

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 9th July, 2018*

+ **W.P.(C) 6557/2018**

DESTINATION CAFE PRIVATE LIMITED Petitioner

Through: **Mr. Parmod K. Sharma, Mr. Prashant
Bajaj and Ms. Ankita Vashishth, Advs.**

versus

NEW DELHI MUNICIPAL COUNCIL & ANR Respondents

Through: **Mr. Tarunveer Singh Khehar, Standing
Counsel with Mr. Arjun Malik, ASC
with Mr. Vivek Garg, Assistant
Architect.
Mr. Vinnie Sharma, Counsel for
Monitoring Committee.**

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. Present petition has been filed by the petitioner with the following
prayers:

*"It is most respectfully and humbly prayed that this Hon'ble
Court may graciously be pleased to:*

*(a) Issue Writ of mandamus, order or direction setting-
aside/annulling/quashing the sealing Order No.D-
149/CA/NA/AA(M)/26 dated 04.05.2018 passed by respondent
No.2 in respect of premises No.E-13/29, Ground Floor, Harsha
Bhawan Middle Circle, Connaught Place, New Delhi
Restaurant Zabardast; AND*

(b) Direct respondents to de-seal the premises No. E-13/29, Ground Floor, Harsha Bhawan Middle Circle, Connaught Place, New Delhi Restaurant Zabardast more particularly shown in red colour in the site plan annexed hereto as ANNEXURE A-17 and allow the petitioner to use the said premises as Restaurant-cum-Bar in terms of Licenses granted by respondents and other Government Departments; AND

(c) Pass such other or further order(s) as may be deemed fit and proper in the facts and circumstances of the case in favour of petitioner and against the respondents.”

2. It is the case of the petitioner that an area ad-measuring 1049 Sq. Ft. of super built area; an area ad-measuring 1091 Sq. Ft. of super built area and an area ad-measuring 1010 Sq. Ft. of super built area at ground floor of property no. E-13/29, E-Block, Harsha Bhawan, Middle Circle, Connaught Place, New Delhi owned by M/s. Lunia Automobiles Pvt. Ltd.; M/s. Aswathi Shipping Services Pvt. Ltd. and M/s. Hakoba Plastic Pvt. Ltd. was leased out to the petitioner company for carrying out Restaurant / Bar business vide three separate registered lease deeds registered on May 18, 2016. It is the case of the petitioner that after taking the physical possession of the premises from the landlords, the petitioner company invested huge money on furniture, fixtures, fittings, air conditioners, kitchen, kitchen appliances, decoration etc. The petitioner company applied for various licenses/registrations like health license; certificate of registration of a eating house; L-17 and L-17F licenses from the Excise Department; permission from Delhi Fire Service

for carrying on the business of Restaurant and Bar from the premises in question. It is averred that respondent no.2, Chief Architect of the NDMC has in response to the letter dated September 1, 2016 of the Medical Officer of the Health Department gave a “No Objection Certificate” vide letter dated October 27, 2016 by stating that the premises is on the ground floor and situated in the Connaught Place and as per the development plan, the land use is commercial and restaurant is permitted in the commercial zone as per the Master Plan of Delhi – 2021. It is averred that after obtaining all requisite licenses from the concerned departments the petitioner started the business of Restaurant / Bar from the premises in question in the name and style of “Zabardast Indian Kitchen” and employed around 70 employees. That on May 10, 2018, surprisingly, respondent no.2, who himself had granted the “No Objection Certificate” dated October 27, 2016, served upon the petitioner company his order dated May 4, 2018, being an order of sealing under Section 250 of the NDMC Act, 1994 and sealed the premises in question at around 6.50 PM when the restaurant / bar was functioning and they by abruptly stopping the business of the petitioner company without issuing a show cause notice to the petitioner.

3. Mr. P.K. Sharma, learned counsel appearing for the petitioner submitted that the sealing of the premises is arbitrary, without any basis, more particularly after an NOC was granted by the Chief Architect of the NDMC with total application of mind. He stated that the petitioner has come to know that a similar notice in respect of the premises in question was also issued by the respondent in the year 1990 to the then user who was at that time using the premises in question for commercial purposes. At that time also, the matter was filed before the ATMCD, against whose order, the NDMC has filed a petition before the Lt. Governor of NCT of Delhi which petition was dismissed and since then and even prior to that the premises in question is being continuously used for commercial purposes. He would also refer to one order passed by this Court in ***Crl. M.C. no. 1838/2003 titled as A.K. Ramalingam v. NDMC*** dated April 6, 2004, wherein this Court had quashed the complaint filed by the respondent under Section 252 / 369 (1) of the NDMC Act, 1994 against the petitioner therein for using the premises for commercial purposes. According to him, this court has held that once the respondent has permitted the user of the premises for commercial purpose and has made such a submission before the writ court, it could not have prosecuted the petitioner for having violated the building plans and using the same as commercial. Mr. Sharma has also drawn my attention to certain note

sheets maintained in the files of the NDMC wherein the Chief Legal Adviser vide his note dated May 21, 2018 has concluded that as the NOC dated October 27, 2016 has been granted by the competent authority for use of premises for commercial purposes, the premises could not have been sealed for the reasons cited by the department that the stilt floor is meant for parking only. Mr. Sharma has also referred to a note sheet dated May 24, 2018 of AA (Misuse) wherein the following has been stated:

“a) The building was constructed in the eighties on basis of Comprehensive Redevelopment Plan of Connaught Place prepared by the DDA.

b) The building plan was sanctioned vide resolution no. 84(28) dated 04/08/1978 and Completion Certificate & Completion Plan was approved vide resolution No: 84(28) dated 04/08/1978 and Completion Certificate & Completion Plan was approved vide resolution no: 02 dated 27/12/1982 comprising of Basement, Stilt/Ground Floor + 3 upper floors. The basement was for Part-Parking / Part- storage, Ground Floor for Part – Commercial / Part-Parking (Stilt) and upper floors were for commercial use.”

4. Mr. Sharma contended that the building plan for the Ground floor was sanctioned for part commercial / part parking (stilt) and upper floors for commercial use. According to him, since it is for part commercial, the petitioner was within its right to use the premises for commercial activity. He also stated that even though the impugned communication dated May 4, 2018 referred to a direction of the Monitoring Committee, a copy of the direction

had never been given to the petitioner. That apart it is his submission that had the respondent issued a show-cause notice to the petitioner, the petitioner would have highlighted the aforesaid facts which surely would not have resulted in the impugned action of sealing. He also referred to the stand taken by respondent no.1 in their counter-affidavit that the remedy for the petitioner is to approach the Monitoring Committee appointed by Supreme Court in view of the order of the Supreme Court dated December 15, 2017 in ***I.A. No. 2768/2016 in W.P.(C) 4677/1985 in M.C. Mehta v. Union of India and Ors.*** by drawing my attention to the Judgment of the Division Bench of this Court in the case of ***North Delhi Municipal Corporation v. DCM Limited and Anr., LPA 487/2017***, to contend that the Division Bench of this Court has clearly held that the order of the Supreme Court is in relation to misuser / non-confirming user of the residential premises for industrial or commercial purposes, which is not the case herein. He also stated that the Division Bench has also held sealing could not be affected without any prior notice or hearing.

5. On the other hand, Mr. Tarunveer Singh Khehar, learned Standing Counsel appearing for the respondent no.1 submitted that the impugned action of sealing has been taken in terms of the directions of the Supreme Court dated May 15, 2017. According to him, order directed any challenge to the decision of the Monitoring Committee would lie in the Supreme Court only. According to him, since the action is on the basis of the direction of the

Monitoring Committee, appropriate shall be for the petitioner to approach the Supreme Court. That apart on merit, he stated that the premises is situated at E-13/29, middle circle, Connaught Place, New Delhi and at the time of construction, the ground floor where it is situated is to be used for parking only. He has drawn my attention to the plans dated August 4, 1978 approved by the Chief Architect in the New Delhi Municipal Council in that regard. According to him, a perusal of the approved drawings would show that initially the construction was carried out as a four storey building. Thereafter, the construction was again carried out for additional block with basement and ground floor for parking. According to him, the NDMC has no role in letting out the premises. But the same has been let out by the landlords which they could not have done for the purpose other than for what it has been approved, i.e., parking. In substance, it is his submission that the ground floor being meant for parking should be used for parking and not for any commercial purposes, like bank, restaurant, music shop or for any other purposes. According to Mr. Khehar, similar sealing action has been carried out with regard to other premises in the middle circle of the Connaught Place by the respondent no.1 in consonance with the directions of the Monitoring Committee. On the “No Objection Certificate” Mr. Khehar states, the same has been obtained by suppressing and misrepresenting the facts. Even otherwise, the NOC which has been issued cannot be allowed to continue in

perpetuity as the same is contrary to the approved building plans. During the course of his submissions, he conceded to the fact that no show-cause notice was issued to the petitioner before taking the impugned action. He also conceded that there is no sealing order. He stated, the action is primarily under Section 250 of the NDMC Act, 1994 which stipulates action for unauthorized construction. According to him, as the said unauthorized construction has resulted in running of a restaurant which is impermissible, the impugned action is justified.

6. Having heard the learned counsel for the parties, the first and foremost issue that needs to be decided whether the petitioner should approach the Monitoring Committee in terms of the judgment of the Supreme Court dated December 15, 2017 in the case *M.C. Mehta (supra)*. Suffice to state, a similar issue arose before the Division Bench of this Court in the case of *North Delhi Municipal Corporation v. DCM Limited and Anr.(supra)*, wherein the Court had clearly held that the same shall be applicable where the residential property is being put to use for industrial purposes / commercial purposes, which is not the case herein. Hence, the remedy for the petitioner shall not lie before the Monitoring Committee and the said plea is rejected.

7. On merits, it is noted there is no dispute that the petitioner started running the restaurant on the basis of “No Objection Certificate” granted by

respondent no.2 and has been operating since then without any hindrance. The impugned action, as conceded by Mr. Khehar during his submissions, was taken on May 10, 2018 at 6.50 PM abruptly without even seeking a response and passing a sealing order. The petitioner through Mr. Sharma is justified in airing its grievance that the action is most arbitrary. Mr. Sharma is also justified in stating that had a show cause notice been issued to the petitioner, the petitioner would have represented the facts as narrated in the petition including the fact that the petitioner had taken requisite permissions from all authorities and invested huge amount of money and the construction on the ground floor has been approved in the past litigation before the Lt. Governor when the appeal filed by the NDMC against the order of the ATMCD was dismissed, and also the views expressed by the officers of the NDMC in their notes as referred above.

8. The case of the respondent is that action has been taken on the directions of the Monitoring Committee appointed by the Supreme Court. Further, it is the stand that the construction of additional block where the premises is situated, more particularly, the ground floor can be used only for parking and no commercial activity contrary to the building plans is permissible.

9. The stand of the respondent that they have taken the action on the direction of the Monitoring Committee, surely suggest non-application of mind. There is nothing to suggest the respondent NDMC has considered, the material / the past litigation referred to by the petitioner, before taking the action of sealing. It is a case of flagrant violation of principles of natural justice. The action cannot be justified. The Division Bench in ***North Delhi Municipal Corporation v. DCM Ltd. and Anr. (supra)*** has clearly held that, an order of sealing could not have been passed without giving a hearing. The relevant para is reproduced as under:

“Thus, the MC, in our view, was not justified in springing into action and issuing the order/communication dated 08.01.2018 directing the NDMC to seal the FFC of DCM, and that too, without any prior notice or hearing. In our view, by issuing the communication dated 08.01.2018 the MC overreached this Court, and arguably overstepped its authority vested by the Supreme Court, since the MC directed sealing of the FFC- which is not a residential premises. Since the MC is a creation of the orders passed by the Supreme Court, it derives its authority only from its orders. It has no independent statutory existence or powers.”

10. The above conclusion, must normally result in the de-sealing of the property in question. Having said that, this court is of the view, in the facts of this case, more particularly in view of the stand taken by the parties to balance the equities, appropriate should be for the respondent to issue a show-cause notice to the petitioner within three days from today detailing therein the

reasons for which they intend to take action of sealing against the petitioner's premises enclosing therewith the communication received by it from the Monitoring Committee and seek a reply on the same from the petitioner within four days thereafter and pass a reasoned and speaking order, on all the pleas urged / taken by the petitioner in its reply within one week thereafter. If the respondent no.1 agrees with the pleas taken by the petitioner, then the follow-up action shall be taken. If in the eventuality, the petitioner is aggrieved with the order to be passed by respondent no.1, liberty is with the petitioner to approach this Court in accordance with law.

11. The petition is disposed of but with cost of Rs.10,000/- to be paid to the petitioner, along with the order to be communicated to the petitioner, in terms of above.

CM No. 25032/2018 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

JULY 09, 2018/jg