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

+ W.P.(C) 2283/2019 & CMs 23335/19, 22400/19, 10665/19, 22432/19

PHOOLO DEV @ PHOOLWARI Petitioner

Through: Mr. Ramesh Kumar Mishra,
Advocate

versus

NEW DELHI MUNICIPAL COUNCIL & ORS Respondents

Through: Ms. Kriti Sinha, Advocate for Mr. Sri
Harsha Peechara, ASC for respondent
No.1-NDMC
Mr. Madhav Nanda, Advocate for
respondent No.2
Mr. Anand V. Khatri, Advocate for
respondent No.3 with SI Rakesh

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ORDER

% **16.07.2019**

1. The present petition has been filed by the petitioner praying
inter alia for the following reliefs: -

- “a. Issue any appropriate writ, order or direction directing the Respondent no. 1 and 3 not to dispossess the Petition from her vending site at Janpath Lane, Telephone Box near Gupta Pan Bhandar, Behind Bank of Baroda building, Janpath, New Delhi, on the premise of the order dated 17.08.2017 passed by this Hon'ble Court in W.P.(C) 11519/2016 or any other order passed by this Hon'ble Court for implementation of order dated 17.08.2017 and/or*
b. Issue a writ of mandamus or any other appropriate writ,

order or direction directing the respondent not to interfere with the vending activities of the petitioner from the aforesaid vending place till the newly constituted town vending committee completes the process of survey/identification and registration process of street vendors under section 3 and 4 of the street vendors' act, 2014);

c. Recall order dated 17.08.2017 passed by this Hon'ble Court in W.P. (C) 11513/2016.

d. Pass any other order(s)/direction(s) as this Hon'ble Court may deem fit and appropriate in the facts and circumstances of the present case."

2. In the affidavit filed by the respondent No.1/NDMC, a preliminary objection has been taken with regard to the maintainability of the present petition on the ground that the same is barred by the principles of *res judicata* since the petitioner had filed a writ petition last year, registered as W.P.(C) No.614/2018 seeking the very same relief, which was withdrawn by her on 8th August, 2018, without reserving her right to file a fresh petition based on the same cause of action.

3. No doubt, this is the second round of litigation initiated by the petitioner. Prior hereto in January, 2018, she had filed the captioned petition that was disposed of on 08.08.2018, with the following order :-

"The present writ petition has been filed by the petitioner under Articles 226 and 19 (1) (g) of the Constitution of India. The petitioner claims to be a regular street vendor and squatting at the Backside of Bank of Baroda, in front of Telephone Junction Box, Janpath Market, Janpath Lane, New Delhi in the NDMC area since 1980 and selling readymade items. Prayers made in the writ petition are as under:

A. To allow the petitioner to operate her trade at her squatting site i.e. Backside of Bank of Baroda, in front of Telephone Junction Box, Janpath Market, Janpath Lane, New Delhi till the certificate of vending has been issued to petitioner as per the provisions of the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014.

B. To direct the respondents not to dispossess or obstruct or disturb the petitioner in carrying on her trade from her vending site i.e. Backside of Bank of Baroda, in front of Telephone Junction Box, Janpath Market, Janpath Lane, New Delhi in terms of Article 19 (1) (g) of the Constitution of India as well as in terms of the provisions of the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 and the orders passed by this Court from time to time; and

C. To direct the respondents to collect the CCTV footage of all the CCTV cameras installed nearby to the squatting site i.e. Backside of Bank of Baroda, in front of Telephone Junction Box, Janpath Market, Janpath Lane, New Delhi of the petitioner, in order to clarify the real and true facts about the long term squatting activity of the petitioner herein.

Counsel for the petitioner submits that he has instructions to withdraw this writ petition in view of the stand taken by the NDMC in para 8 of the counter affidavit.

Accordingly, the writ petition and C.M.2692/2018 are dismissed as not pressed.”

4. Mr. Mishra, learned counsel for the petitioner disputes the stand taken by the counsel for respondent no.1/NDMC and asserts that the

prayer made in the earlier writ petition was entirely different from the one that has been made in this petition, which is for recalling the order dated 17.08.2017, passed in W.P.(C) 11513/2016 filed by one Mohan Kumar, impleaded as respondent No.2 herein.

5. We have asked learned counsel to first address us on the maintainability of a fresh petition by his client in less than one year from the date she had withdrawn an earlier petition filed in January, 2018, when she had all the opportunity at that time to lay a challenge to the order dated 17.08.2017 on the ground that the respondent no. 2/Mohan Kumar had misled the court in passing the said order. The contention of the learned counsel for the petitioner that no specific prayer was made in the previous writ petition to the effect that a fraud had been played on the Court by the respondent no.2/ Mohan Kumar, is found to be meritless in the light of the specific averments made by the petitioner in paras 20 & 21 of the earlier writ petition [W.P.(C) No.614/2018] which were to the following effect: -

*“20. That on 12.1.18 the officials of NDMC/Respondent No.1 and Respondent No.2 again came to the squatting site of the Petitioner and started creating obstruction in the peaceful working of the petitioner. **However the officials of the Respondent No.1/NDMC came to be said site of the Petitioner with police force and illegally removed the Petitioner on the pretext that said site belongs to one Sh. Mohan Kumar and said Mohan Kumar is having some order from this Hon’ble Court, despite the fact that said Mohan Kumar neither ever vend at the Janpath Market, Janpath Lane, Delhi nor at the squatting site of the Petitioner. The similar squatters who are squatting adjacent to the site of the Petitioner again tried to intervene or apprised the Respondents about the true and***

correct facts that said Mohan Kumar never ever vend in the Janpath Market or at the site of the Petitioner.....”

21. The said Sh. Mohan Kumar has taken favourable orders from this Hon’ble Court while misleading and concealing the true facts from this Hon’ble Court as well as NDMC. It is imperative to mention here that previously on 08.02.2016 at around 48 squatters who are squatting at the Janpath Market, Janpath Lane, Delhi including Petitioner gave a joint written communication to the NDMC and Respondent no. 2 authenticating the factum of the said Mohan Kumar, Shamshudin and Ashok Anand that they never vend in the Mini Market Janpath Lane, Delhi while appending their respective signatures and the said letter has been duly received in the office of the Respondent no. 1/NDMC. The copies of letter dated 08.02.2016 addressed to Respondent No. 1 and letter addressed to Respondent No. 2 are annexed herewith as Annexure F (Colly).”

(emphasis added)

6. In our view, merely because the petitioner herein did not specifically state in the prayer clause of the earlier petition filed by her that a fraud was played on the Court by the respondents herein, would not be of any consequence, when relevant averments were made by her in the body of the petition to lay the foundation of a prayer for restraining the respondents from dispossessing her from the site in question. The Court must examine the substance of the averments made in the petition to consider the relief prayed for and not be swayed just by the language used while wording the relief. Quite clearly, the petitioner had sought to lay the foundation of the relief sought by her in the earlier petition by asserting that it was the respondent no.2 herein who had deliberately tried to mislead the Court due to which

“favourable orders were granted to him”. In other words, essentially her stand was that the Court had been misled by the respondent no.2 in passing the order dated 17.08.2017 in W.P.(C) No.11519/2016. Therefore, not much would turn on non-mentioning of the said order specifically in the prayer clause of W.P.(C) No.614/2018.

7. Learned counsel for the petitioner further states that though the petitioner had given instructions to her previous counsel to withdraw the earlier writ petition in view of the stand taken by the respondent No.1/NDMC in para 8 of the counter-affidavit filed in the said petition, at the same time she had also instructed her counsel to submit to the Court that officials of the respondent No.1/NDMC had unofficially permitted her to continue squatting at the site in question.

8. We have pointedly asked learned counsel for the petitioner that if such an instruction was given by the petitioner to her previous counsel, then, was the same brought to the notice of the Court before the order dated 08.04.2018 came to be passed, either orally or by filing an affidavit. His response is that no such affidavit was filed by the petitioner though she had been unofficially permitted to continue vending at the site in question for a period of 2-3 months after the writ petition was filed, i.e., upto the month of March, 2018. On our recording the above submission, learned counsel for the petitioner takes strong exception and continues to interrupt us during the dictation of this order and asserts that he had not stated so. We decline to delete his statement as recorded above, as it has been so stated before us during the course of arguments.

9. As noted above, the petitioner had unqualifiedly withdrawn the

earlier writ petition filed by her for permission to operate from the site in question. If it is her stand that the order dated 17.08.2018 passed in W.P.(C) 11519/2016 filed by the respondent No.2 herein came to be passed due to some misrepresentations made by him and it ought to be recalled, then instead of withdrawing the petition, she should have pursued the same with vigour, more so when she had made specific averments on this aspect in paras 20 and 21 of the said petition. But for reasons best known to her, the petitioner elected to withdraw the said petition without reserving her right to re-agitate the same issue, as raised therein, in a subsequent petition. Interestingly, though the petitioner has a grievance that the respondent No.2 had failed to implead her in his petition, it transpires that she did the same at the time of filing the earlier petition. Respondent no.2 herein was not arrayed as a respondent in the said petition.

10. The prayer made by the petitioner in W.P.(C) No.614/2018 may have been differently worded vis-a-vis the prayers made in the present petition, but the turn of phrases is not enough when the consequential relief sought in both the petitions is one and the same. Moreover, the grounds pleaded in this petition were also taken in the earlier petition. Having unilaterally withdrawn the earlier petition, the petitioner cannot be permitted to press the present petition. In our view, the judgment in the case of *A.V.Papayya Sastry & Ors. V Government of A.P. & Ors.* reported as (2007) 4 SCC 221, relied on by learned counsel for the petitioner would not have any application to the facts of the instant case.

11. For the aforesaid reasons, we decline to entertain the present

petition that is based on the same cause of action subject matter of the earlier petition. The present petition is accordingly dismissed as not maintainable alongwith the pending applications.

HIMA KOHLI, J

ASHA MENON, J

JULY 16, 2019

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