

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

% **Reserved on: 9th July, 2021**

Pronounced on: 4th August, 2021

+ **CM (M) 409/2021**

DAVINDRA MAHEY

..... Petitioner

Through: Mr. Anil K Aggarwal, Prof. Madan
Mohan and Mr. Rohan Mehra,
Advocates

versus

COMMISSIONER, SOUTH DELHI MUNICIPAL
CORPORATION

.....Respondent

Through: Mr. Siddhant Nath, ASC

CORAM:

HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

[VIA VIDEO CONFERENCING]

CM (M) 409/2021 and CM APPLs. 19086/2021 (by the petitioner u/S 151 CPC for stay), 19087/2021 (by the petitioner u/S 151 CPC for exemption from filing complete Trial Court record)

1. This petition has been filed under Article 227 of the Constitution of India for setting aside and quashing the order dated 8th January, 2021 passed by the learned ACJ in Suit No. CS SCJ 33/2021 and order dated 24th March, 2021 passed by the learned ADJ-02 in MCA DJ No.04/2021. The petitioner is the plaintiff before the learned Trial Court and the appellant before the learned ADJ.

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2. The facts relevant for the disposal of the present petition briefly stated are, that the petitioner is the owner in possession of Flat No.2206 in Pocket 2, Sector C, Vasant Kunj, New Delhi, which was purchased by his father. The property has since been converted into a free hold flat which was originally built by the Delhi Development Authority (“**DDA**”, for short). The petitioner claims that he was carrying out some internal and external repairs of this flat when, out of sheer jealousy and with ulterior motives, in order to harass and intimidate the petitioner, his neighbour Shri Dasrath Singh Tanwar filed a false and frivolous complaint with the Sub-Divisional Magistrate alleging unauthorised construction was being carried out by the petitioner in the suit property. The said Shri Dasrath Singh Tanwar has also filed a Civil Suit No.1366/2019 presently pending before the Patiala House Courts, wherein he has sought, among other reliefs, direction to the Commissioner, South Delhi Municipal Corporation (“**SDMC**”, for short) to remove or demolish the alleged construction carried out by the petitioner. The petitioner claims to have filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (“**CPC**”, for short) in that Suit, which is also pending adjudication.

3. The grievance of the petitioner, which led to the filing of a Suit by him, was the issuance of two Show-Cause Notices under the Delhi Municipal Corporation Act, 1957, (“**DMC Act**”, for short) on 14th December, 2019 and 17th January, 2020 alleging deviations and excess coverage from the “Standard Plan of the DDA”. The request of the petitioner for supply of the said Standard Plan of DDA was not accepted and as a result, he was unable to file proper replies to the said Notices. It

is his further case that another Show-Cause Notice under Sections 343/344 of the DMC Act was issued to him on 30th September, 2020, during the Covid-19 pandemic to which the petitioner submitted a reply. However, the respondent/SDMC passed the impugned order dated 15th December, 2020 directing the demolition of alleged unauthorized construction.

4. In his suit, the petitioner had sought ex parte injunction against the respondent/SDMC to restrain them from carrying out the demolition at the suit premises as ordered by it. The learned Trial Court vide the impugned order dated 8th January, 2021 found no *prima facie* case in favour of the petitioner and dismissed the application refusing to restrain the respondent/SDMC from demolishing the construction carried out by the petitioner at the suit premises. Aggrieved, the petitioner then approached the Appellate Court, which too dismissed his appeal vide the impugned judgement dated 24th March, 2021.

5. Mr. Anil K. Aggarwal, learned counsel for the petitioner, submitted that both the courts below have overlooked the Supreme Court's decisions in *M.C. Mehta vs. UOI & Ors.* (2005) 2 SCC 186 and in *Shiv Kumar Chadha vs. MCD & Ors.* (1993) 3 SSC 161 and had therefore, committed grave errors. Before this Court, it was submitted that a Civil Suit was maintainable against demolition notices, when there was a jurisdictional error. This had occurred, according to the learned counsel, as the Commissioner had exercised power which was in contravention of the Constitution of India particularly, after Part IX-A had been inserted. According to the learned counsel, any action against unauthorized construction had to be taken by the Municipal Corporation, that is the

elected body. No power could be exercised by the Commissioner on behalf of the Central Government or the Government of NCT of Delhi. However, in the present case, the Commissioner has issued the Notices on behalf of Government of NCT of Delhi. Therefore, there was jurisdictional error in the issuance of the impugned Notices and order and the learned Civil Court had had the jurisdiction to issue the injunction that was sought by the petitioner. It was further submitted that the learned Appellate Court had also misdirected itself by not considering the question of jurisdiction in the correct perspective.

6. Learned counsel argued that in fact Section 330A of the DMC Act was in contravention of the Constitution of India and the exercise of powers thereunder by the Commissioner on behalf of the Government of NCT of Delhi and not on behalf of the SDMC, was illegal. He further submitted that the provisions under Section 330A of the DMC Act was in direct conflict with Article 243W of the Constitution of India and so, could not be given effect to.

7. It was further submitted by the learned counsel for the petitioner that there was no adherence to the principles of natural justice in the issuance of the impugned order 15th December, 2020 by the respondent/SDMC, which was again overlooked by both the courts below. The learned counsel submitted that despite repeated requests for supply of the same, no Standard Plan of the DDA had ever been supplied to the petitioner, which prevented him from submitting a complete reply against the Show-Cause Notices. According to the learned counsel, construction in Delhi under the DMC Act can be carried out only in accordance with Sanctioned Plans and the DDA could not have

constructed the flats in the absence of such Sanctioned Plans. Therefore, either of two consequences would follow; either the Chapter governing Building Bye-laws was not applicable to the DDA or the entire building constructed by the DDA was illegal.

8. The learned counsel submitted that his contention was that the Chapter governing Building Bye-laws was not applicable to the DDA flats. Therefore also, the entire action of the Commissioner was outside his jurisdiction. Thus, the Commissioner could not have issued the Show-Cause Notices and nor could he have directed demolition. Since there was no plan and only a sketch of the flat would be available, there being no earmarked and defined authorised construction, nothing now existing in the flat could be described as an unauthorised construction or in excess coverage or deviations from the Sanctioned Plan.

9. It was further submitted that the flats had been constructed in 1992, and, therefore, the respondent/SDMC could not make reference to the policy of 2003 to penalize the petitioner for not having applied for regularization of the alleged excess/unauthorized construction, as the DMC Act did not provide for such regularization. According to him, Section 345 of the DMC Act only refers to the “alteration” in the Sanctioned Plan, but since the DDA has no such Sanctioned Plan, there was no way the petitioner could have sought its alteration.

10. Finally, it was argued that the petitioner alone has been singled out in Vasant Kunj. Furthermore, the question arises why no action was taken at the initial stage in case there was some unauthorised construction going on. In these circumstances, the learned counsel argued that extraneous considerations had led to the issuance of the Show-Cause Notices and the

Demolition Notice, which were liable to be set aside on grounds of malice.

11. Mr.Siddarth Nath, learned Additional Standing Counsel for the respondent/SDMC, submitted that the impugned orders suffered from no error and the petition itself was liable to be dismissed. It was further submitted that the petitioner was required to approach the Appellate Tribunal under Section 343(2) of the DMC Act and not the Civil Court which had no jurisdiction as Section 343(4) and Section 347E of the DMC Act prohibited the Civil Court from entertaining suits or other proceedings to restrain the Commissioner from taking action against unauthorised construction and implementing demolition orders. It was further submitted that the Supreme Court has not held either in *M.C. Mehta (supra)* or in *Shiv Kumar Chaddha (supra)* that the Commissioner had no powers under Section 343 of the DMC Act to deal with unauthorised construction and demolition thereof. Moreover, the Appellate Court had rightly distinguished those cases from the facts of the present case. Learned counsel further pointed out that despite the amendment, provisions dealing with powers of the Commissioner were not disturbed though several other provisions were either repealed or modified. Rather, Section 330A was introduced in the Chapter XVI-Building Regulations, authorizing the Commissioner to exercise his powers in respect of erection of buildings on behalf of the Government.

12. The learned counsel for the respondent/SDMC also submitted that the principles of natural justice have been duly followed inasmuch as the petitioner had been granted a personal hearing also. However, he did not choose to come for the hearing.

13. As regards the Standard Plan, nothing prevented the petitioner from filing an RTI application and obtaining the plan, instead of trying to raise the bogie of non-supply of Standard Plan alleging that such non-supply had caused him prejudice.

14. Finally, it was submitted by the learned counsel for the respondent/SDMC that no jurisdictional error had occurred in the issuance of the Show-Cause Notices or the demolition order and therefore, the learned Civil Judge had no jurisdiction to entertain this suit and had rightly declined interim relief against demolition action. Since there was no error or perversity in the orders of the learned Civil Judge or the learned ADJ, the present petition was liable to be dismissed.

15. The records have been perused and the arguments heard extensively. The arguments raised that in the absence of a Standard Plan, the petitioner was unable to give a proper response to the Show-Cause Notices and the demolition notice, is fallacious. The petitioner would know as to what structure had been allotted to his father and of which he has been in possession for so long. In the Show-Cause Notices, there is reference to the construction of room/structure on the terrace. Without the Standard Plan, the petitioner must know that the terrace is meant for all allottees of the DDA flats and is common space where he cannot construct anything. He also knows what internal and external construction he has carried out, which differs from the original structure. He had only to explain what he has done. But, it appears he has been hedging and not submitting replies to the Show-Cause Notices or attending to the personal hearing granted to him to avoid the demolition order. There is no case

disclosed of violation of principles of natural justice and neither the Show-Cause Notices nor the demolition order are vitiated on this ground.

16. As rightly observed by the courts below, in any case, during the entire year, from the issuance of the first Show-Cause Notice on 14th December, 2019, till the demolition order of 15th December, 2019, no effort was made by the petitioner to obtain the Standard Plan through RTI. This reflects the clear intent of the petitioner to drag on the matter so that no demolition takes place. It is also to be noticed that the present petition has been filed on receipt of an order of vacation dated 15th June, 2021 issued under Section 349 of the DMC Act. He seems to have taken no action on the dismissal of his appeal on 24th March, 2021, till the filing of this petition, on receipt of the said Notice of Vacation. It would, therefore, appear that the petitioner is trying all methods, including approaching the wrong forum, to drag on the case and avoid any demolition action by the respondent/SDMC, pursuant to the Show-Cause Notices issued.

17. If the grievance of the petitioner is that the provisions of Article 330A of the DMC Act was *ultra vires* the Constitution of India, clearly this Court cannot decide that issue. However, it may be noticed that neither the judgment in *M. C. Mehta (supra)* nor the judgment in *Shiv Kumar Chadha (supra)* circumscribes the powers of the SDMC or the Commissioner in dealing with the unauthorized construction. Rather, in both these cases, the Supreme Court had held that the matters relating to unauthorized building, excess coverage, unauthorized land use, etc., have to be dealt with by the Municipal Corporation and action taken can be challenged only before the forum provided under the Act, namely, the

Appellate Tribunal, MCD and the Civil Court would have no jurisdiction. Unless it was shown that there was unlawful exercise of power or there was jurisdictional error in the issuance of orders by the Commissioner, such as, when the property in question was situated beyond the municipal boundaries, the Civil Court cannot entertain suits against Show-Cause Notices or demolition or sealing action. No such case has been pleaded or disclosed in the present matter, that the flat is not located within the municipal boundaries of the respondent/SDMC.

18. The learned counsel has struggled hard to put up a contrived argument that the Building Bye-laws are not applicable to DDA flats. They have to be and are rejected outright.

19. The arguments of learned counsel that the learned ADJ had not appreciated the constitutional provisions correctly are without foundation. The judgment of the learned ADJ has dealt with the XIIth Schedule to Article 243W, Section 59 of the DMC Act, Section 330A of the DMC Act and concluded that the Legislature has drawn a distinction between the functions and powers of the elected body comprising of Councilors and the executive powers exercised through the Commissioner. Apart from the grievance that the observations of the Appellate Court would prejudice the petitioner as the Civil Court has fixed the case for arguments on maintainability of the suit of the petitioner, no error or perversity has been pointed out, which calls for interference by this Court. The petitioner would require to convince the learned Civil Judge that it has jurisdiction in this matter in the light of the various provisions of the DMC Act. If the petitioner seeks to challenge the vires of Section 330A of the DMC Act, he has to initiate appropriate proceedings. This

Court is, therefore, not inclined to discuss the constitutional validity of the said provisions in these proceedings. No doubt, the observations made by the learned Appellate Court would not come in the way of the learned Civil Judge deciding independently the question of maintainability of the suit filed by the petitioner.

20. As has been observed by the Supreme Court in *State of Odisha v. Anup Kumar Senapati*, (2019) 19 SCC 626, there can be no negative equality. Merely because the respondent/SDMC has not initiated action against other residents in Vasant Kunj in respect of unauthorized construction and excess coverage, the petitioner can claim no protection from action initiated against him.

21. The learned Civil Judge has used its discretion to decline relief for reasons given and the learned ADJ in appeal has upheld the same, relying on the judgment of *Shree Priya Ballabh vs. Manoj Kumar*, 1988 (2) CCC 1040, has held that when the court had no jurisdiction to try the case, ad-interim injunction cannot be granted. Two courts have thus applied their minds to decline interim relief. This Court finds no ground to interfere with the exercise of discretion by the courts below.

22. The petition being devoid of merits is dismissed along with the pending applications.

23. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

AUGUST 04,2021
ak/s

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