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

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

+ **W.P.(C) 8176/2016 & CM APPL. 33813/2016**

Between: -

SHRI RAM NARAYAN GUPTA

S/O LATE GAINDA LAI,

R/O: 1, BHAGAT SINGH MARG, (FIRST FLOOR),

GOLE MARKET, NEW DELHI.

NEW DELHI: 110001

.....PETITIONER

(Through: Mr. S.C. Singhal, Mr. Amir Rabbani, Advocates.)

AND

NEW DELHI MUNICIPAL COUNCIL

SERVICE TO BE AFFECTED THROUGH:

ITS SECRETARY / CHAIRMAN

DEPARTMENT OF ARCHITECTURE AND ENVIRONS

NEW DELHI MUNICIPAL

PALIKA KENDRA

NEW DELHI

.....RESPONDENT

(Through: Ms. Kanika Agnihotri, Standing Counsel, NDMC,

Mr. Sachin Sharma, Advocate.

Mr. Ashok Rathi, Advocate for R-2).

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Reserved on: 31.07.2024

Pronounced on: 16.08.2024

J U D G M E N T

The instant petition is directed against the impugned demand

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notice dated 02.08.2016, whereby, the petitioner has been enjoined to

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deposit a sum of ₹2,84,250/- for an alleged misuse of a portion of the first floor of the subject premises, which stands in violation of **paragraph 15.9(v) of the Master Plan of Delhi 2021 (MPD-2021)**.

2. The facts pertinent to the adjudication of the present case elucidate that the petitioner is the lessee of Shop No. 1, situated on the ground floor, as well as the first floor and the '*barsati*' floor of Mpl. No. 1, Bhagat Singh Marg, Gole Market, New Delhi, all under the purview of the Land and Development Office (hereinafter 'L&DO'). The petitioner acquired the premises from L&DO approximately 40 years ago, through M/s Gainda Lal Ram Swarup. The petitioner asserts possession of a trade license for the sale and storage of sweets, cooking utensils and other raw materials among other items.

3. The ground floor of the property is designated for use as a shop, while the first floor and the '*barsati*' floor are intended for residential purposes as per the sanctioned plan. On 27.04.2016, a Show Cause Notice under Section 250 of the **New Delhi Municipal Council Act, 1994 (hereinafter 'NDMC Act')** was issued to the petitioner. In this notice, the petitioner was called upon to show cause as to why penal action, pursuant to **paragraph no. 15.9 of the Master Plan Delhi, 2021**, should not be initiated against him. The notice stated that the permitted use of the premises was residential in nature, whereas, the premises were in actuality being misused for commercial purposes.

4. Thereafter, the petitioner submitted a reply on 10.05.2016. A perusal of the assertions made by the petitioner against the Show Cause Notice would indicate that the petitioner had taken a stand that the notice was issued at the behest of a neighbour, who had filed an eviction petition against the petitioner for his personal vendetta and who himself violates the **MPD-2021**, yet no action was taken against

was vague and failed to provide any source of information regarding the alleged commercial use of the property. In light of these assertions, the petitioner had volunteered to have the premises inspected in his presence to verify the actual use of the property.

5. After considering the reply submitted by the petitioner, it was directed, *via* the impugned demand dated 02.08.2016, that the petitioner was liable for penal action in terms of paragraph no. 15.9(v) of the Master Plan Delhi, 2021, due to the misuse of the said premises. In furtherance, the petitioner was directed to deposit a sum of Rs. 2,84,250/- with an undertaking to not indulge in misuse of the premises in the future. It is this demand notice which is under challenge in the instant writ petition.

6. The respondent-NDMC has filed its counter affidavit and has raised a preliminary objection with respect to the maintainability of the instant writ petition, in view of the efficacious remedy being available to the petitioner under Section 253 of the NDMC Act to approach the appellate Tribunal. Besides preliminary objections, it is stated that the petitioner has been using the first and *barsati* floors of the premises for storage and manufacturing of sweets etc. It is stated that the premises in question was inspected by the officials of the respondent on 13.04.2016 and during the inspection, it was noticed that the petitioner was using the first floor of the premises for commercial purposes and that the grounds taken by the petitioner are not sufficient to invoke the writ jurisdiction of this Court. The allegation that the initial inspection action was initiated upon the complaint of the neighbour has no merit and substance as no such action was actually initiated at the behest of any such neighbour.

7. The respondent further contends that the assertion of action being initiated solely based on a neighbour's complaint lacks merit.

and substance. The respondent submits that the action was taken without any influence from the neighbour and on the basis of an inspection conducted by its officials. Paragraph Nos. 4 and 5 of the counter affidavit filed by the respondents reads as under:-

“4. The contents of paragraph no.7 are wrong and denied. It is submitted that the petitioner has wrongly and falsely averred that the Respondent are taking action against the petitioner on behest of one Mr. Narayan Shamnani. It is submitted that the premises in question was inspected by the officials of Respondent on 13.04.2016. In the course of inspection it was noticed that the Petitioner was using the first floor of the premises for commercial purpose. It was noticed that the Petitioner was using the first floor for sweet storage, storage of raw materials for preparation of sweet items in cooking utensils which were also placed in the premises. It was clear that the premise was being used for storage and manufacture of sweets etc which was not permissible as it amounts to commercial purpose whereas the permitted purpose was residential. Noting the above mentioned violation the Respondent was constrained to issue show cause notice u/s 250 of NDMC Act, 1994 dated 27.04.2016.

5. The contents of paragraph No.8 are wrong and denied. It is submitted that the Petitioner filed a reply to the show cause notice vide letter dated 10.05.2016 in pursuance of which the Respondent inspected the premises again on 14.06.2016 and it was revealed that the misuse as noticed on inspection conducted on 13.04.2016 had been removed and the first floor of the premises was now being used for residential purpose as permitted. It is denied that the notice appears to have been sent at the instant of Mr. Narayan Shamnani."

8. During the course of arguments, learned counsel appearing for the respondents reiterated the objections regarding the maintainability of the instant petition, emphasizing the availability of an efficacious alternative remedy under Section 253 of the NDMC Act.

9. Mr. S.C. Singhal, learned counsel for the petitioner, submits that the impugned demand dated 02.08.2016 lacks legal backing, as it fails to specify the provision of law under which it has been raised. Furthermore, he contends that the Show Cause Notice was issued under Section 250 of the NDMC Act, which only empowers the

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pertain to the alleged misuse of the subject premises, whereas the impugned demand was issued under Section 250 of the NDMC Act, which empowers the respondent to seal unauthorized constructions. He contends that while Section 250 of the NDMC Act pertains to unauthorized construction, the allegations in the notice issued under this Section relate to the misuse of the premises. Thus, the allegations are not relevant to the provision under which the notice was issued.

10. In response to the aforesaid submissions, Ms. Kanika Agnihotri, learned counsel for the respondent contends that the Council is empowered under Section 252 of the NDMC Act to take action against the occupant for the misuse of land premises. She draws the Court's attention to the provisions of Section 252 of the NDMC Act and submits that non-mentioning of the correct provision in the impugned order does not vitiate the action, provided the power to take action against misuse is vested with the Council. Therefore, she submits that the impugned action clearly falls within the ambit of Section 252 of the NDMC Act and any action under this Section is assailable under sub-Section 254(1)(4)(p) of the NDMC Act. To substantiate her contention, she placed reliance on the decision of the Supreme Court in the case of *Municipal Corpn. of the City of Ahmedabad v. Ben Hiraben Manilal*¹ and *Union of India v. Mohit Minerals (P) Ltd.*²

11. I have heard learned counsels appearing on behalf of the parties and have perused the record.

12. The Show Cause Notice undeniably references Section 250 of the NDMC Act, a provision that admittedly pertains to unauthorized construction, rather than misuse. The notice explicitly calls upon the

petitioner to address the alleged misuse of the premises, specifically the deviation from permissible residential use to commercial use. The lack of coherence between the cited provision of law and the substantive allegation in the notice is *prima facie* evident.

13. However, in response to the Show Cause Notice, the petitioner, while unequivocally denying the allegations on merits, failed to contest the authority or jurisdiction of the Council as vested under the Act. This objection of lack of authority or jurisdiction, and the non-application of the correct provision on the head of the Show Cause Notice, has only been raised for the first time in this Court and not in the reply to the Show Cause Notice. Nevertheless, since a legal argument of lack of jurisdiction is advanced, the same can be heard and considered.

14. In response to the Show Cause Notice, the petitioner submitted a reply, wherein, he challenged the said notice on merits. Upon considering this reply, the impugned order determined that the petitioner was in violation of paragraph 15.9(i) of the Master Plan Delhi, 2021. Consequently, the respondent issued the impugned demand. The impugned order dated 02.08.2016 reads as under:-

“Sub:Deposition of misuse charges I penalty amount against commercial use of First Floor (part portion) in R/o Shop at premises No. 1, Bhagat Singh Marg, New Delhi.

Ref: (i) Show Cause Notice dated 23.04.2016
(ii) Your reply dated 10.05.2016

Sir,

This is with reference to above cited subject and in continuation of show cause notice u/s 250 of NDMC Act, 1994 dated 23.04.2016. After considering your submission dated 10.05.2016, it is intimated that you are liable for the penal action in term of Para 15.9 (v) of MPD- 2021 against the misuse noticed at above said premises.

You are therefore, directed to deposit the amount of Rs. 2,84,250/- for misuse of first floor part portion in above said premises (Roo just over shop and extended veranda for area of 18.53 sq. ft.)

1,534/- x 10 times = Rs. 2,84,250/-) within 30 days along with affidavit / undertaking that you will not misuse the same premises in future. Failing which, necessary action shall be initiated.- by NDMC against you as per law.”

15. Notwithstanding the issuance of Show Cause Notice invoking Section 250 of the NDMC Act, the notice does not incorporate any averment of unauthorized construction. Instead, its essence unambiguously pertains to the misuse of the premises. Section 252 of the NDMC Act delineates stringent restrictions on the use of buildings and expressly prohibits any alteration or permission of alteration in the use of land or buildings without obtaining an explicit written authorization of the Chairperson. For the sake of clarity, Section 252 of the NDMC Act is reproduced herein for reference: -

“252. Restrictions on uses of buildings.- No person shall, without the written permission of the Chairperson, or otherwise than in conformity with the conditions, if any, of such permission-

(a) use or permit to be used for human habitation any part of a building not originally erected or authorised to be used for that purpose or not used for that purpose before any alteration has been made therein by any work executed in accordance with the provisions of this Act and the bye-laws made thereunder;

(b) change or allow the change of the use of any land or building;

(c) convert or allow the conversion of one kind of tenement into another kind.”

16. Thus, it is discernible that the pith and substance of the impugned order clearly falls within the ambit of Section 252 of the NDMC Act. The issue whether the absence of a specific provision or presence of a wrong provision in the impugned order would vitiate the same is also not *res integra*. Learned counsel for the respondent-Council has rightly placed reliance on the decision in the cases of ***Municipal Corporation of the City (supra)*** and ***Mohit Minerals Private Limited (supra)***. The Supreme Court has unequivocally held

that mere non-reference to the provision providing for the exercise of

power does not necessarily vitiate its application, provided that the exercise of such power is otherwise vested and justified in the given facts and circumstances of the case. A useful reference may also be made to the decision in the case of *Union of India v. Tulsi Ram Patel*³ to advance this proposition of law.

17. It is, thus, evidently seen that the impugned order cannot be invalidated solely on the ground of omission to make a reference to the specific Section, as it is demonstrated that the respondent-Council held the requisite authority to undertake the action in question in light of the Act. A contrary view on this aspect would not only result into absurd consequences but would also be a case of over-formalization of law. Justice, as a concept, is not meant to maintain order as per the black letter of law, rather, it is meant to ensure that the application of law is just and reasonable.

18. Section 254 of the NDMC Act provides for an appeal against various orders and notices issued under the Act, including under Sections 250 and 252 of the NDMC Act. In addition to a range of appealable orders and notices, an order granting or refusing permission under Section 252 of the NDMC Act is also subject to appeal. Moreover, any other order or notice pertaining to or arising from land and development under the provisions of the NDMC Act, as may be prescribed by the Rules, can similarly be appealed before the appellate authority under Section 254 of the Act.

19. It is seen that Section 254 of the NDMC Act establishes the framework for appeals against various orders and notices issued under

the Act, encompassing within its sweep the orders and notices issued under Sections 250 and 252 of the NDMC Act as well. Beyond the

array of appealable orders and notices, decisions granting or refusing permission under Section 252 of the NDMC Act are also subject to appeal. Furthermore, any other order or notice related to or arising from land and development under the NDMC Act's provisions, as prescribed by the Rules, may likewise be contested before the appellate authority pursuant to Section 254 of the NDMC Act.

20. The Court has determined that the essence of the impugned order falls within the scope of Section 252 of the Act. Consequently, given the availability of an efficacious alternative remedy under Section 254 of the NDMC Act, the order is subject to challenge before the Appellate Tribunal. Section 254(1)(p) grants the Appellate Tribunal the authority to entertain appeals against such orders or notices pertaining to or arising from planning and development under the NDMC Act, as may be stipulated by the Rules.

21. Examining the facts of the instant case, it is evident that the impugned action is predicated solely on an alleged violation of paragraph 15.9 of the Master Plan Delhi, 2021, which pertains to the misuse of the premises. Such misuse must be evaluated in the context of its contravention of the Master Plan and the provisions of the NDMC Act, 1994.

22. The Supreme Court in the case of *Radha Krishan Industries v. State of H.P.*⁴ has observed that when a right is created by a statute that prescribes a specific remedy or procedure for its enforcement, recourse must be had to that particular statutory remedy before seeking relief under Article 226 of the Constitution of India. This

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principle of exhausting statutory remedies is a matter of policy, convenience and discretion, where an alternative remedy is available.

The relevant extract of the said decision is culled out as under:-

"27. The principles of law which emerge are that:

27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

23. Based on a meticulous examination of the NDMC Act and the pertinent facts in the instant case, the Court is of the considered opinion that the petitioner has an efficacious alternative remedy to impugn the order dated 02.08.2016 before the Appellate Tribunal as envisaged under Section 254 of the NDMC Act. In such circumstances, no occasion arises for invoking the discretionary

jurisdiction of this Court under Article 226 of the Constitution of

24. Reserving such liberty, the instant petition is dismissed alongwith the pending application(s), if any. No order as to costs.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

AUGUST 16, 2024

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