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

\+ W.P.(C) 9409/2017 and CM. APPL.38314/2017

VIJAY KUMAR ..... Petitioner

Through: Ms. Shobhana Takiar and Mr. Kuljeet Singh, Advs.

versus

NEW DELHI MUNICIPAL COUNCIL ..... Respondent

Through: Mr. Yoginder Handoo, Mr. Ashwin Kataria and Ms. Medha Gaur, Advs.

**CORAM:**
**HON'BLE MR. JUSTICE SACHIN DATTA**

**O R D E R**

% **09.01.2024**

1. The present writ petition has been filed seeking the following prayers:

> "*(a) issue a writ of mandamus directing the Respondent to transfer and renew the licence of the Kiosk no. 15 at Gandhi Sadan, Mandir Marg, New Delhi, as per the policy/circular dated 16th August 2016 in favour of the petitioner;*
> *(b) issue a writ of mandamus directing the respondent to allow change of trade in respect of the kiosk of the Petitioner as per the circular dated 16th August 2016.*"

2. The above prayers have been sought in the backdrop of a speaking order dated 01.08.2017, whereby the petitioner's request for transfer of Kiosk No.15, Gandhi Sadan, Mandir Marg, New Delhi, was not accepted by the competent authority. The said speaking order reads as under:

> "
> *1. Kiosk No.15, Gandhi Sadan was initially allotted to Shri Praveen Kumar who later on entered into partnership with Shri Vijay Kumar vide Partnership Deed dated 23.05.1989 and Dissolution Deed dated 24.07.1989.*
> *2. On receipt of complaint of Shri Vijay Kumar the case was*

*processed and the premises in question was inspected on 19.10.2016 at around 0.05 by the officials of Estate-I Deptt.*

*3. During inspection, neither Shri Praveen Kumar nor Shri Vijay Kumar was found present at the Kiosk. One Shri Naresh Was found present and was occupying the Kiosk unauthorisidely as a trespasser without any authority.*

*4. In the meantime, Shri Vijay Kumar approached the Hon'ble High Court of Delhi against NDMC seeking transfer of Kiosk in his name and change of trade as per the policy circulated vide circular dated 16.8.2016. The Hon'ble Court was pleased to dispose of the writ petition on 23.02.2017 with following directions as under:*

> *"As and when the petitioner receives the aforesaid notice from the respondent / NDMC, he shall be entitled to submit a reply, which shall be considered and decided by the respondent / NDMC in accordance with law, within six weeks from the date of receipt of reply, under written intimation to him. If the petitioner is aggrieved by the decision that may be taken by the respondent / NDMC, he shall be entitled to seek his remedies in accordance with law."*

*5. In compliance of the aforesaid direction of the Hon'ble High Court, a show cause notice dated 23.3.2017 was served to Shri Praveen& Shri Vijay Kumar directing them to show cause as to why the possession of Kiosk No.15, Gandhi Sadan, Mandir Marg, may not be taken by the NDMC on account of unauthorized occupancy and trespassing the public premises without any authority.*

*6. No reply to show case notice dated 23.3.2017from Shri Praveen Kumar was received. However, Shri Vijay Kumar replied, which was tenable as he has entered into partnership with the allottee. Shri Praveen Kumar in unauthorized manner without prior permission of the Dept. as well as he has further parted possession with unauthorized person, Shri Naresh Kumar who is merely a trespasser. Thus, it is misused of a Govt. premises.*

*7. In view of above, it is informed that your request dated 30.03.2017 for transfer of Kiosk No.15, Gandhi Sadan, Mandir Marg, New Delhi has been examined and not accepted by the Competent Authority.*"

3. Learned counsel for the petitioner submits that the kiosk in question was initially allotted to one Mr. Praveen Kumar who entered into a partnership with the present petitioner as far back as on 23.05.1989. It is

submitted that the existence of partnership between the said Praveen Kumar and the present petitioner is evident from a perusal of the show cause notice dated 11.10.1994. Since the concerned partnership has been dissolved, various requests came to be made by the petitioner for transfer of the allotment of the kiosk in favour of the present petitioner, however, the said representations remain undecided.Instead, pursuant to an inspection stated to have been conducted by the respondent, the aforesaid speaking order dated 01.08.2017 came to be passed. The basis of passing of the aforesaid speaking order and non-consideration of the request of the petitioner was that the kiosk in question had been "under unauthorized occupancy and trespassing".

4. Learned counsel for the petitioner has strenuously contended that the allegations regarding unauthorized occupancy are misconceived. In fact, the property had been sought to be encroached upon/occupied by one of the persons engaged by the petitioner to assist him in running the kiosk. The said person i.e. Mr. Naresh Kumar also filed a civil suit being CS (OS) 312/2012 against certain persons, including the petitioner herein, seeking the permanent injunction against the present petitioner. The said suit was filed on the false assertion that the plaintiff therein i.e. Mr. Naresh Kumar is the original allottee of the concerned kiosk. The said suit came to be dismissed vide judgment dated 18.12.2013. The suit was contested by the present petitioner and as such, it is completely misconceived to contend that it is the petitioner who inducted Mr. Naresh Kumar into the property.

5. Learned counsel for the petitioner submits that apart from the unfounded apprehension of the respondent regarding the kiosk being under "unauthorized occupation", there is no impediment to the petitioner's case

being considered for regularization under the extant policy of the respondent. The said policy *interalia* contains the following provisions:

> "*6. <u>Transfer of licence on Partnership basis:</u>*
> *(i) All cases before the date of issuing this circular i.e. 16.8.2016 shall be governed as per the Council's resolutions application as on that date.*
> *(ii) For prospective cases of transfer: Prior permission of the NDMC is made mandatory in terms Of the modified clause no. 9 of the standard Licence Deed before entering into partnership or to allow any person to use the shop in any manner during the valid term of licence subject to enhancement of the existing licence, fee by 50%. In default of such prior permission, the licensee/occupant shall be liable for eviction and ejectment being unauthorized occupant besides forfeiture of the security deposit and damage charges.*
> *(iii) For pending cases of transfer: Partnership entered before the date of issuing this circular i.e. 16.8,2016, NDMC will entertain such cases, irrespective of whether the same was done during the valid term of licence or after expiry of the licence, as an exceptional case. If the occupant now seeks the permission of the NDMC at this belated stage, such transfer cases shall be regularized after forfeiting the earlier security deposit by the licensee and subject to enhancement of the licence fee by such percentage as per the respective Council's resolutions applicable as on that date for each such transfer and completion of other required formalities like deposit of fresh security deposit, etc.*
> *(iv) In cases, wherein the licence holder has died and has nominated any other person or organization for using whole of such premises only for purposes such as literature, science, art and social service, without any commercial usage, in such cases the application for transfer of licence, alongwith an undertaking by the applicant to not use such premises for any commercial purpose, may be considered on case to case basis, subject to enhancement of the licence fee by 50%. In case of date of such transfer is before the date of issuing this circular i.e. 16.8.2016, enhancement of the licence fee will be by such percentage as per the respective Council's resolutions applicable as on that date for each such transfer. If at any time, it is found that such premises is used for commercial usage, then licence of such premises will stand terminated after giving a notice of 21 days to such licence holder by Director (Estate).*
> *(v) Transfers are freely allowed (except in case of premises granted*

*under special considerations such as SC/ST/OBC/Physically challenged etc.) in the above manner Only,*

*(vi) In case of date of entry of partnership on or after issuing of this circular i.e. 16.8.2016, there will be 30% enhancement in the licence fee. In case of date of entry of partnership before 16th August, 2016 enhancement of the licence fee will be by such percentage as per the respective Council's resolutions applicable as on that date for each such partnership.*

*(vii) If the status of the Individual licensee is converted into the Private Limited Companies, the same shall be permissible subject to enhancement in the existing licence fee by 50%. The existing/proposed private limited companies/companies seeking transfer shall have to submit annual declaration indicating change in equity holding pattern, if any. Whenever, there is change in equity holding pattern of more than 25%, the licence fee of such company shall be enhanced by 50% w.e.f. the date of change of such equity holding pattern.*

*(viii) Any issue/point not covered under the above policy shall be decided by the Chairman on merits, while keeping the overall spirit of this policy.*

*(ix) Deletion of name of partner is allowed without any cost with prior approval of NDMC, subject to NOC from all other holders of that licence.*

*(x) Cases involving multiple transfer are to be dealt in accordance with the above proposals.*"

6. Learned counsel for the petitioner strenuously relies upon the aforesaid policy which contemplates that where a partnership has been entered before 16.08.2016, the case would be regularized for allotment by the respondent in favour of the concerned partner i.e. the petitioner herein.

7. Learned counsel for the petitioner also relies upon a judgment of a Coordinate Bench of this court in ***Himanshu Bhatia &Anr. Vs. New Delhi Municipal Council & Ors***. in W.P.(C)2236/2021. In that case, after noticing the very same policy, it has been held by this court as under:

"*28. Sub-clause (v) of Clause 6 of the Policy shows that the licence is freely transferable except in cases where the premises is granted under special considerations such as SC/ST/OBC/Physically challenged etc..*

*The transfer on partnership basis is subject to enhancement of licence fee at the rates stipulated for different categories.*

*29. Apart from differential in licence fee for different categories and except where premises are allotted under special considerations, transfer of licence is freely permissible.*

*30. Even in the case of the Petitioners, Petitioner No. 1 was originally allotted the shop by Licence Deed dated 24.06.2016 and thereafter petitioner No. 2 was permitted to be inducted as a partner on 25.05.2017. Petitioner No. 1 wanted to retire and accordingly a dissolution deed has been executed on. The sole reason for rejection of the same is that prior permission of NDMC has not been taken.*

*31. Deletion of the name of the partner is permissible by sub-clause (x) of the Policy which stipulates that deletion of name of partner is allowed, without any cost, with prior approval of NDMC, subject to NOC from all other holders of that licence.*

*32. In the instant case there are only two partners i.e. the petitioners. Petitioner No. 1 consents to deletion of his name. As per the Policy, in case of deletion of a name there is no change in the terms and conditions of the licence or licence fee or any formalities required to be completed except obtaining prior permission of the NDMC. The Policy also does not stipulate any conditions under which deletion of the name is to be permitted except NOC from all other holders of the Licence.*

*33. The only objection of NDMC is that prior permission was not taken of NDMC before the execution of the deed of dissolution. On the one hand, NDMC contends that prior permission was not taken before dissolving the partnership and as such the same cannot be accepted and on the other hand, it contends that the affidavit withdrawing the deed of dissolution cannot be accepted.*

*34. Be that as it may, the question that arises for consideration is as to whether the condition of obtaining prior NOC from NDMC for deletion of the name of a partner is mandatory or directory.*

*35. As noticed above, as per the policy, there are no additional conditions to be fulfilled for deletion of the name of a partner. Condition stipulating prior permission of NDMC for addition of a partner, is understandable and reasonable as addition of a partner amounts to transfer of rights in favour of a third party. However, where the name of a partner is to be deleted, the effect of deletion of a partner would be that the share of such partner is transferred to an existing partner and no third party right is created. In such a situation to hold that the condition of obtaining prior permission from NDMC, prior to deletion of the name of a partner, is mandatory and breach of the same* *would be a material breach and would entail penal consequences, would militate against the scheme of the policy which permits free transfer of licence, especially when there are no additional conditions to be satisfied.*

*36. Accordingly, it is held that the condition of obtaining prior NOC from NDMC for deletion of the name of a partner is directory and not mandatory. The condition would be satisfied, if the NDMC is duly informed of the deletion of the name of the partner.*

*37. Thus, the dissolution of the partnership by the Petitioners, without prior permission of NDMC, would not amount to a material breach of any condition of the Licence or the Policy, accordingly, the Respondent could not have rejected the application for change of trade merely on the said ground.*

*38. For the reasons hereinabove, both the orders of the Respondent NDMC dated 25.09.2020 and 20.07.2021 are not sustainable and are quashed.*

*39. In view of the above, the application of the Petitioners seeking change of trade i.e. from non-licence trade of surgical only to licence trade of surgical cum chemist is allowed subject to petitioners obtaining the requisite NOCs, if not already obtained and complying with other requirements, if any. Further, the application seeking deletion of the name of Petitioner No. 1, as having retired from the partnership is also accepted and the licence shall continue in the sole name of Petitioner No. 2.*"

8. Prima facie, there is merit in the aforesaid contentions of the petitioner. There is no basis to conclude that the petitioner is responsible for any "unauthorized occupancy or trespassing" into the kiosk. Also, prima facie, the petitioner is eligible for regularization in his favor, in terms of the aforesaid policy of the respondent.

9. In the circumstances, the present petition is disposed of with a direction to the respondent to consider the case of the petitioner for regularization under the aforesaid policy dated 16.08.2016. Let a reasoned order be passed by the respondent, after affording an opportunity to the petitioner, within a period of 08 weeks from today.

10. The present petition, alongwith pending applications, accordingly, stand disposed of.

**SACHIN DATTA, J**

**JANUARY 9, 2024/**cl