

(2004) 09 DEL CK 0181
In the Delhi High Court
Case No : WP (C) No. 462 of 1977

Kashmiri Lal and Others

APPELLANT

Vs

NDMC and Another

RESPONDENT

Date of Decision : 28-09-2004

Acts Referred:

Punjab Municipal Act, 1911 — Section 171, 171(4), 174(1), 3(13), 81

Citation : AIR 2005 Delhi 236 : (2005) 1 RCR(Civil) 609

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : Anil Nauriya and Sumita Hazarika, for the Appellant; Arvind Sah, for the Respondent

Judgement

Pradeep Nandrajog, J.—Petitioners are holding a perpetual lease in their names executed by the L&DO for shops in Bhagat Singh Market, New Delhi. Bhagat Singh Market was earlier in an area under the control of New Delhi Municipal Committee, now, under the jurisdiction of New Delhi Municipal Council.

2. The lease deeds being identical, the one in favor of petitioner in WP(C) No.427/1977 Sh.K.S. Bhati was referred to during arguments.

3. The lease deed so referred to was agreed by the counsel for the parties as being representative of all other lease deeds executed in favor of other petitioners as well.

4. The lease deed is dated 31.12.1969. Shop no.24 has been demised in favor of K.S. Bhati for a period of 99 years. The perpetual lease deed records that the government has constructed double storied building in Bhagat Singh Market consisting of 160 shops on the ground floor and flats on the upper floor. While conveying shop No.24 to K.S. Bhati, it is stated that the shop admeasures 387 Sq.Yds. In the schedule to the lease deed, being schedule B, it is stated that land under the structure measures about 387 Sq.Yds. A site plan has been enclosed. The site plan gives the dimensions of the shop demised. Towards the front of the

shop, while delineating the shop 2 parallel lines are shown.

5. Relevant terms of the lease deed on which the parties predicated their stand at the hearing may be noted. The same are Clause 2 of the recital and Clause 4 of the covenants.

6. Clause 2 of the recitals reads as under:-

"2. AND WHEREAS the Government has built a double storeyed building consisting of 162/82 shops/flats (162 shops on the ground floor and flats on the upper floor) with a joint/independent passage and staircase for going to the upper floor as shown in the plan annexed to these presents on plot No.Mkt situated in Bhagat Singh Market Colony, New Delhi."

7. Clause 4 of the covenants reads as under:-

"4. The said allottee shall not use the said shop No.24 for any purpose other than the purpose of business and the said allottee shall not use the said staircase for any purpose other than the purpose of the staircase without previous consent in writing of the Government and shall not do anything which shall cause annoyance or inconvenience to the owners and/or occupants of adjoining shop/flat together with the use in common with the owner of the adjoining first floor/flat being No._____ the staircase and a passage and the open space in front leading to the staircase and also land under the staircase (shown hatched in _____ colour on the plan annexed hereto)."

8. Before nothing the factual backdrop of the dispute, a relevant fact pertaining to the clauses of the conveyance deed be noted.

9. NDMC was directed by this court to measure the shop and report to the court the measurements and area thereof.

10. By and under affidavit sworn on 9.5.2001 by the Chief Architect of NDMC, it has been disclosed as under:-

"3. That as per the directions of this Hon"ble Court the measurements of the site was carried out on 24th day of April 2001. The details of the measurements carried out under my supervision by my field staff of shop No.24, Bhagat Singh Market, New Delhi are as follows:

Area of the shop 297 sq. feet.

The public veranda in front of the shop 110 sq. feet. (13"-6" x 8"-3" approximately)."

11. Aforesaid information was required to be submitted to this court in as much as it was not clear from the conveyance deed executed in favor of petitioner K.S. Bhati whether the area of the shop stated in the conveyance deed included only the area within the four walls of the shop or included area of the veranda in front, abutting the public street.

15. On 12.2.1976, NDMC issued a public notice u/s 171(4) of the Punjab Municipal Act, 1911. The public notice reads as under:-

"PUBLIC NOTICE

(Notice u/s 171(4) Punjab Municipal Act.1911)

Whereas the Chief Commissioner, Delhi under notification No.F.3(5)/56-LSG dated 30.6.58 extended section 171 of the P.M. Act to the New Delhi Municipal Committee.

Whereas under Reso.No.2 of Special meeting held on 6.2.76 the Committee has decided to give intimation of its intention to declare verandah in front of shops at Bhagat Singh Market, New Delhi as a public street.

Notice is hereby given that if any owner of property fronting, adjoining or abutting on the verandah of the Bhagat Singh Market, New Delhi has got any objection, the same may be lodged within one month from the date of publication of this notice. Such objections should be sent in writing under Registered A.D. Cover with the undersigned at Town Hall, New Delhi during the office hours."

16. Objections were filed by various shop owners. In the objections, inter alia, following was objected to:

"1. That there exists no Veranda or street whether private or otherwise of the property in question.

2. That there is no thoroughfare and the property in question is an independent unit transferred to the individual owner by the Rehabilitation Department.

3. That the Municipal Committee did not carry out any work of improvement levelling, paying, mettaling, or cleaning etc., on any portion of the property covered by notice in question at any time and, Therefore, the provisions of Section 171 of any sub-clause there of does not apply.

4. That the action u/s 171(IV) of Punjab Municipal Act is not valid.

5. That the property in question is private property and provision u/s 171(IV) do not apply there to.

6. That under the colour of declaration sought to be made u/s 171(IV) of Punjab Municipal Act, the owner's property sought to be acquired without payment of compensation.

7. That no notification by the Government under the provisions of land acquisition Act has been issued.

8. That the property in question was originally constructed by the Ministry of Rehabilitation and the shop together with the front portion which forms one unit, was transferred to the undersigned Objection vide Sale deed.

9. That the owners, the public has no right to use there of and, Therefore the property thus a private property cannot be declared as a street.

10. That the provision of Section 171(IV) of Punjab Municipal Act are unconstitutional in as much as the right of the private ownership of the property is sought to be taken away without due process of law and without any compensation.

11. That there exists independent thoroughfare about 32 feet wide Public Street in front of the property and about 12 feet in the back in question and the property in front which is meant and is being used for thoroughfare by the public for the purposes of marketing by the public at large.

In view of existence of public street, the declaration sought to be made, is without any authority and justification.

12. That there has been no legal and valid meeting and resolution of the Committee as contemplated by law and on the score also the proposed action is not justified.

13. That market consisting of about 150 shops, is of the main Road which is composed of more than seventy per cent shops being used as Godowns and Offices and rest hardly have public dealing shops. As such there is no congestion in the Market also.

14. It may also be noted that the walls of the flats are also raised on the walls covering the front portion of the shops which you propose to demolish. If these walls are demolished, the entire structure standing on then including bursitis may fall on the earth causing other structural damages and personal injuries as well."

17. Objections were considered by the committee. It was resolved that objections be rejected and that the verandas in front of the shops at Bhagat Singh Market be declared as public street.

18. Resolution of the committee being Resolution No.8 in the meeting held on 19.3.1976, after considering the 14 objections aforementioned as laid for consideration by the shop owners records the following:-

"The Committee considered all these objections in detail. The Committee does not find any force in these objections. In the original sanctioned plan of Bhagat Singh Market, the covered passage in front of each shop has been shown so as the serve as a continuous verandahs in front of all the shops from time to time the shopkeepers on their own had closed the verandah in front of their shops by putting up walls, fixtures and show cases etc. This fact has been admitted to by most of the objections that the front portions of the shops were completed by the allottees. This clearly indicates that when they were allotted these shops, these were open spaces meant to be utilised by the general public for their convenience. This action on their part has resulted in a great inconvenience to

the public at large who visit the market for shopping purposes. It is only to remove general inconvenience of the public using these shops that the Committee has proposed to declare the street in front of shops in Bhagat Singh Market, as public street.

The Committee is fully authorised under the provisions of section 171 of the Punjab Municipal Act, 1911 to declare a place which was originally meant to be used as an open space and as a thoroughfare within its jurisdiction and already maintainable by it as public street by affixing up one months notice inviting objections which course has properly been followed. Constitutionality of this provision still subsists and that is why it is a part and parcel of the valid law. The said section of the Punjab Municipal Act, 1911 stands extended to the limits of New Delhi Municipal Committee by a notification No.F.3(5)/56-LSG dated 3.6.58. It is not the contention of the committee to acquire the rights of ownership of the said verandahs of Bhagat Singh Market, but to keep the same neat and clean and away from any sort of encroachment for general public. The Committee in declaring the verandahs as public street will not be acquiring any proprietary rights in respect of these verandahs but only the managerial rights in the larger public good. The committee is attempting to reasonably regulate the right of ingress and egress of the users of this verandah. The Committee shall also undertake the maintenance of the said verandahs i.e. cleaning, paving, levelling metalling etc. by declaring the said verandahs as public street.

As regards objection at (4) above, the meeting has been validly held under the provision of the Punjab Municipal Act, 1911.

The contention of the objections at (6) above is also incorrect. The road is generally flooded with the vehicles and the customers using the shops are put to a considerable inconvenience. There is also no protection to the customers against the rain and sun. In order to get over this difficulty, it is proposed to declare the verandahs in Bhagat Singh Market as public street.

As regard the objection 7 is concerned it has been technically examined & found that this objection is totally unfounded.

The intermediary partition walls were added later on and their removal is not going to effect the structure on top.

Therefore all their apprehensions, which have been expressed in their objections are grounded on flimsy considerations and as such are turned down by the Committee.

Further resolved that the verandahs in front of shops of Bhagat Singh Market be declared as public street."

19. Decision of the committee dated 19.3.1976 was notified on 24th March, 1976.

20. Present petitions were filed when the committee issued notices to the petitioners to remove brick masonry walls in the veranda in front of their shops

as also to shift the shutters which were enclosing the veranda. It was stated in the notices issued to the petitioners that the brick masonry walls and shutters were encroaching upon public streets.

21. Prayer made in the petition is to quash the Resolution dated 19.3.1976 and the notices issued in June, 1977 to the shop owners requiring them to remove the brick masonry walls and the shutters.

22. Section 171 of the Punjab Municipal Act, 1971 be noted. It reads as under:-

"171. Power to require repairs of streets and to declare such streets public.-

(1)(a) When the municipal committee consider that in any street other than a public street, or in any part of such street within the municipality, it is necessary, for the public health, convenience or safety, that any work should be done for the levelling, paving, metalling, flagging, channelling, draining, lighting or cleaning thereof, the municipal committee may by written notice require the owner or owners of such street or part thereof to carry out such work in a manner and within a time to be specified in such notice; and

(b) Should the owner refuse or should he fail to carry out the work within the time specified, the committee may, by written notice, require the owners of the land or buildings, fronting adjoining or building upon such street or part thereof to carry out the work in such manner and within such time as may be specified in the notice.

(2) If compliance with the terms of the notice issued under clause (b) of sub-section (1) is not effected within the time specified, the committee may, if it thinks fit itself execute the work and may recover under the provisions of section 81 the expenses incurred in doing so in such proportions as it may deem equitable from the owner of the street and the persons served with a notice under clause (b) of sub-section (1).

(3) After such work has been carried out by the person served with a notice under clause (b) of sub-section (1) or as provided in sub-section (2) by the committee at the expense of such persons and the owner of the street or part thereof, in which such work has been done, may, and on the requisition of the owner or owners of the major portion of the said street for part thereof, or on the requisition of a majority of the persons served with a notice under clause (b) of sub-section (1), it shall be declared by a public notice to be put up therein by the committee to be a public street and shall vest in the committee.

(4) A committee may at any time, by notice fixed up in any street or part thereof not maintainable by the committee give intimation of their intention to declare the same a public street, and unless within one month next after such notice has been so put up, the owner or any one of several owners of such street or such part of a street lodge objection thereto at the Municipal office, the Municipal Committee may, by notice in writing, put in such street, or such part, declare the same to be a public street vested in the committee.

(5) This section shall not take effect in any municipality until it has been specially extended thereto by the State Government, of its own motion or at the request of the committee."

23. Section 3(13) of the Punjab Municipal Act, 1911 defines a street as under:-

"(13) (a) "street", shall mean any road, footway, square, court, alley, or passage, accessible, whether permanently or temporarily to the public, and whether a thoroughfare or not; and shall include every vacant space, notwithstanding that it may be private property and partly or wholly obstructed by any gate; post, chain or other barrier, if houses, shops or other buildings abut thereon, and if it is used by any person as a means of access to or from any public place or thoroughfare, whether such persons be occupiers of such buildings or not, but shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid:

and shall include also the drains or gutters therein, or on either side, and the land, whether covered or not by any pavement, verandah or other erection, up to the boundary of any abutting property not accessible to the public.

(b) "public street" shall mean any street-

(i) heretofore leveled, paved, metalled, channelled, sewered, or repaired out of municipal or other public funds, unless before such work was carried out there was an agreement with the proprietor that the street should not thereby become a public street, or unless such work was done without the implied or express consent of the proprietor; or

(ii) which under the provisions of section 171, is declared by the committee to be, or under any other provision of this Act becomes, a public street,"

24. Respondent/NDMC has acted in purported exercise of power under sub-section 4 of Section 171 of the Punjab Municipal Act, 1911.

25. A perusal of the definition of the word "street" in Section 3(13) of the Punjab Municipal Act, 1911 would reveal that accessibility, whether permanent or temporary, to the public is the sine qua non for a passage or a strip of land to be called a street.

26. Interpreting Section 3(13) and Section 174(1) of the Punjab Municipal Act, 1911 their Lordships of the Supreme Court in the judgment M/s. Gobind Pershad Jagdish Pershad Vs. New Delhi Municipal Committee, :-

"7. We agree with the learned counsel for the appellant that before a space can be held to be a "street" under the Act, there must be a dedication by the owner to the public. It is contended that there is no evidence on the record to prove animus dedicandi."

27. Upholding a notification under sub-Section 4 of Section 171 of the Punjab Municipal Act, 1911 declaring verandas in Connaught Circus as a public street,

vested in the committee, their Lordships in para 10 of the judgment held as under:-

"We see no ground to differ with the concurrent findings of the courts below and hold that the appellant has dedicated the verandah in dispute to the public use. It is being used for passing and repassing by the public at large and as such is a "street" in terms of Section 3(13)(a) of the Act. The appellant has, thus, surrendered his rights in the property for the benefit of the public. The user of the property is and always shall be with the public. Any space, passage, verandah, alley, road or footway dedicated to public by the owner for passing and repassing, partakes the character of a "street" and no longer remains under the control of the owner. The owner has no right at all times to prevent the public from using the same. When the owner of the property has, by his own volition permitted his property to be converted into a "street", then he has no right to claim any compensation when the same property is made a "public street" u/s 171 (4) of the Act. The "streets" are meant for public use. It is necessary that the "streets" which are being used by the public are frequently repaired and are also saved from public abuse. It is common knowledge that in the absence of any regulatory control, the hawkers and squatters are likely to occupy the "streets" thereby creating nuisance for the public. In a situation like this it is necessary for the Committee to step in and exercise its powers u/s 171(4) of the Act. The Committee exercises regulatory control and is responsible for the repair and upkeep of the "public streets". The verandah in dispute is a "street". It has been declared as a "public street" for the better enjoyment of the public-right in the said street. We hold that when a "street" is declared as "public street" the owner, of the property comprising the said "street", has no right to claim compensation."

28. Controversy between the parties commenced with the issuance of the public notice on 12.2.1976 whereunder NDMC invited objections from owner of property adjoining or abutting on the veranda of Bhagat Singh Market, to declare the veranda in front of the shops a public street. Petitioners filed their objections. 14 points were raised as noted above. Inter alia, it was stated that the space of the veranda was a private property. The shop together with the veranda in front forms one unit. There exists no streets. Veranda space was never used by the public as thoroughfare. Public was accessing the market through a thoroughfare in front of the verandas.

29. Cause for NDMC, as stated at the Bar, by Mr.Arvind Sah, Advocate was that the shopkeepers had erected brick masonry walls and had affixed shutters, thereby amalgamating the veranda within the 4 walls of the shop.

30. Objections, as noted above were considered. They were rejected by the committee. Relevant extracts of the minutes of the decision of the committee taken on 19.3.1976 have been noted in para 18 above.

31. A perusal of the reasons recorded by the committee would reveal that following has weighed with the committee in rejecting the objections:-

- a) Covered passage in front of each shop has been shown as a continuous veranda in front of all the shops.
- b) From time to time the shopkeepers on their own had closed the veranda by putting up walls, fixtures and show causes.
- c) Veranda space was meant to be utilized by the general public for their convenience.
- d) Declaration of the verandas as public streets will not be acquiring proprietary rights in respect of the veranda space but only the managerial rights in the larger public good.

32. A perusal of the 4 reasons given by the committee aforesaid ex-facie reveal that the committee was of the opinion that there was no proprietary right of the petitioners in the veranda space.

33. Learned counsel for NDMC stated that indeed petitioners did not have any proprietary interest in the veranda space.

34. Counsel relied upon Clause 2 of the recital of the Conveyance Deed executed in favor of Sh.K.S. Bhati and covenant 4 of the covenants. Mr.Arvind Sah highlighted that the conveyance was for shop No.24 as per covenant No.4 with use in common of the staircase and a passage and the open space in front.

35. Counsel urged that recital 2 clarified, in as much as it was recorded therein that 162 shops in Bhagat Singh Market were constructed on the ground floor. Flats were constructed on the upper floor. The shops and the flats had a joint passage and staircase for going to the upper floor.

36. Counsel for the petitioners urged that a closer look at covenant 4 would reveal that the use in common was of the staircase and a passage and the open space in front leading to the staircase. Counsel urged that it was only the open space from the 32 feet common pathway leading up to the passage of the staircase which was to be used in common.

37. As noted above, 4 reasons have weighed with the committee to reject the objections of the petitioners.

38. It has weighed with the committee that no proprietary right was acquired. It has further weighed with the committee that the open space of the veranda was meant to be utilized by the general public as a convenience. It has weighed with the committee that veranda space was contiguous and that petitioners had enclosed the veranda.

39. Conveyance deed pertaining to shop No.24 clearly records that the area of the shop is 387 sq.ft. A plan of the shop, delineating its boundaries is enclosed. As noted above, towards the front 2 parallel lines are shown in the site plan. It was not in dispute that these parallel lines indicate the space of the veranda.

40. To clear the doubt and controversy as to what was the area of the shop

demised, as noted above, NDMC was directed to carry out site inspection and report. Report pursuant to site inspection is as noted in para 10 above. Report states that area of the shop minus the veranda space is 297 sq.ft. Area of the veranda is 110 sq.ft.

41. It is, Therefore, obvious that as per the perpetual lease deed 31.12.1969 whereby the shops have been demised to various persons, area of the veranda is included as a part of the conveyance. Reason of NDMC that no proprietary right is being acquired is patently contrary to the terms of the perpetual lease deed in favor of the shop owners.

42. The reason of the committee as recorded that the space of the veranda was meant to be utilized by the general public flows from the fact that the veranda in front of the shops, as per the plans show a continuous covered space. Would it be permissible in law to infer that merely because the verandas were continuous, they were intended to be utilized by the general public for their convenience?

43. If L&DO had intended that the verandas would be by way of public convenience, I find no reason why L&DO would have demised the veranda space to the shop owners. By demising the area of the veranda to the shop owners, intention of L&DO was to convey property interest to the shop owners. The reasoning of the committee is nothing but ipse dixit.

44. The most vital and important issue to my mind which required consideration by the committee was whether there was a dedication by the shop owners in favor of the general public by permitting the general public to use the veranda space as a thoroughfare.

45. There is not even a whisper in the minutes of the committee, far less a finding, that there was a dedication by the shopkeepers in favor of the general public to allow the veranda space to be used as a thoroughfare.

46. On the contrary, facts would reveal that the shopkeepers had erected boundary walls by way of extension of the existing boundary walls to amalgamate the veranda space within the four corners of the shops. The existing shutters were affixed at the front of the verandas. This shows that the shopkeepers had not allowed the veranda space to be used as a public thoroughfare.

47. Decision of the Supreme Court in M/s. Gobind Pershad Jagdish Pershad's case is to the effect that before a space can be held to be a street under the Punjab Municipal Act, 1911, it must be shown that there is dedication by the owner to the public.

48. Learned counsel for the respondent stated that whether or not a space has been dedicated by the owner to the public is a question of fact. Petitioners ought to have filed a civil suit. Counsel contended that Gobind Pershad Jagdish Pershad & Ors., appellants before the Supreme Court had filed Civil Suits. Decision of the Supreme Court would reveal that conclusions were arrived at on the basis of

evidence which was led.

49. Contention of counsel for NDMC would have merited some consideration if NDMC had held that there was a dedication by the shopkeepers in favor of the public by permitting use of veranda space as a public thoroughfare and the petitioners would have urged otherwise.

50. In the instant case, I do not find that NDMC while passing the Resolution has held that there is a dedication in favor of the general public by the shopkeepers. On the contrary, reasoning of NDMC as emerges from the Resolution is that the veranda space was always meant to be used as a convenience by the public. This is contrary to the conveyance deeds.

51. Thus, in view of the stand of NDMC and in particular the reasons contained in its Resolution dated 19.3.1976, no disputed question of facts arises.

52. Learned counsel for NDMC stated that what was actually found objectionable, as indeed, is to be culled out from the reasoning of the NDMC in its Resolution is the fact that the shopkeepers erected brick masonry walls as extensions of the existing walls of the shops. They fixed shutters on the front of the veranda and thereby amalgamated the veranda space within their shops.

53. Solution to this act of the shopkeepers was simple. Under the Punjab Municipal Act, 1911 and under the New Delhi Municipal Council Act, 1994, no person can effect any construction which includes re-erection or further construction to an existing premises without the prior sanction of the committee. Admittedly, under the conveyance deed, petitioners have been granted perpetual lease hold rights in respect of a shop and an open veranda in front. None of the shopkeepers obtained any sanction from the committee to erect boundary walls or extend the existing boundary walls. None of the shopkeepers obtained a permission to shift the shutters from the place where they existed when the shops were allotted by the L&DO to the veranda line at the front. Admittedly, these constructions are unauthorized constructions. NDMC could have simply booked the unauthorized constructions. Notices should have been issued to the shopkeepers. Demolition orders passed and offending constructions demolished.

54. NDMC has sought to achieve the object of keeping the veranda space as an open veranda and contiguous but unfortunately has chosen the wrong route.

55. For the reasons stated above, Resolution No.8 of NDMC passed in the meeting held on 19.3.1976 is quashed. The public notice dated 24.3.1976 is quashed. Impugned notices to the petitioners to remove the brick masonry walls alleging the same to be encroachments on public streets is quashed. However, it would be open to the respondents to take action for any unauthorized construction effected by the shopkeepers in light of the observations made in the present judgment.

56. No costs.