(2016) 05 DEL CK 0021

In the Delhi High Court

Case No : W.P. (C) 1930 of 2011

N Block Welfare Association — APPELLANT

Vs

MCD — RESPONDENT

Date of Decision : 10-05-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 158 DRJ 278

Hon'ble Judges : Mr. Badar Durrez Ahmed and Mr. Sanjeev Sachdeva, JJ.

Bench : Division Bench

Advocate : Mr. Ashok Sethi with Mr. Rajeev Kapoor, Advocates, for the Appellant; Mr. Sanjay Poddar, Senior Advocate with Mr. Jagdish Sagar, Mr. Govind Kumar, Advocates, Ms. Pavni Poddar, Advocate,, for the Respondent

Final Decision : Disposed Off

Judgement

Sanjeev Sachdeva, J.—W.P.(C) 1930/2011 & CM Nos.9123/2015 (directions), 9191/2015 (condonation of delay), 28344/2015 (for disposal of petition)

1. The petitioner had filed the present petition in public interest seeking a direction to the respondent/Municipal Corporation of Delhi to demolish in entirety the impugned structure caused by the Municipal Corporation under their Design, Build, Own, Operate, Maintain and Transfer Scheme in the parking area of N. Block, Greater Kailash-I Market, New Delhi.

2. On 14.05.2012, this Court passed the following order:-

"In the public interest litigation, a challenge is laid to the action of the MCD in initially floating a request for proposal in August, 2009 for public private partnership to construct urinals for Commonwealth Games involving a part of the constructed area to be used for commercial purposes. It may be noticed that three persons had filed a writ petition no.4562/2010 being shopkeepers of Greater Kailash-1 market challenging the award of such a tender alleging that it affected their rights. The petition was filed with reference to a representation made by N Block Market Traders Association. The present writ petition purported to be filed on behalf of N Block Welfare Association. The earlier petition was dismissed by the learned Single Judge vide order dated 13.07.2010 as being without merit. It is pointed out to us that though the present petition is supported by an affidavit of Aasha Bhutani, the early hearing application was supported by an affidavit of Mr. Manish Gupta who was petitioner no.1 in the earlier petition.

The subsequent development which is occurred is while the matter was contested both by the MCD and the DDA by filing their counter-affidavits, there appears to have been a revisit of the whole proposal. It is on account of the controversy which arose that the plot is also being used for commercial exploitation to facilitate construction of high end public projects. The MCD thus proposed to take over all the eight toilets constructed under this scheme and obtained an independent evaluation qua cost incurred by the persons who were awarded the said tenders. A proposal was thus forwarded to the Lieutenant Governor on 02.08.2010 to scrap the project. An Expert Committee was appointed and in pursuance to that, a final recommendation is stated to have been made for the approval of the Lieutenant Governor on 09.05.2011. Without getting into further details, it is apparent that the project had been scrapped and a decision is taken to award certain amounts to the bidders on account of monies spent in the project.

There is also an additional affidavit filed by the MCD affirmed on 16.04.2012. Para 3 of that affidavit states that since public money is used for construction of high end projects, it was decided by the competent authority to use the said structure as toilets for the public.

We fail to appreciate how a tender could have been floated without examining the validity of such a tender. A question thus arises as to whether any responsibility has been fixed in this behalf as the MCD cannot be permitted to merely state that they have scrapped the tender.

The second aspect is as to how the persons who bid in the tender and invested their money are to be compensated. The third aspect arises from the proposal to keep the structure as it is and use it for urinals i.e., whether any feasibility study has been done for this purpose and what is the proposed plan. We are not able to decipher any of these aspects from the affidavits filed and we consider appropriate that the matter should be looked into and a proper affidavit filed giving answers to these queries. The affidavit be filed under the signatures of the Commissioner on or before 06.07.2012. We make it clear that the affidavit should enclose the plan for re-utilization of the existing structure as it is the say of both the petitioners and the intervener that the existing structure cannot be utilised for toilets alone.

We may note that the learned counsel for the petitioner states that he does not wish to file any rejoinder to the existing affidavits.

List on 24.07.2012."

3. In continuation of the order dated 14.05.2012, this Court passed another order dated 24.07.2012, which reads as under:-

"We had set out the controversy which gives rise to the present petition and the rival contentions of the parties in the last order dated 14.05 .2012, and thus the present order has been passed in succession to the said order.

After recording the facts and objections of the parties, we had set out three issues which need to be examined:

(i) Whether any responsibility had been fixed in the MCD as to why such a tender was floated which at its nascent stage is sought to be scrapped after completion of construction.

(ii) How the persons who bid in the tender and invested money would be compensated.

(iii) The feasibility of keeping the structure as it is for use as toilets. The Commissioner has filed an affidavit in pursuance of our directions of the last date, calling upon these aspects to be addressed.

Insofar as the first aspect is concerned, in a nutshell, it is pleaded that a conscious decision was taken to build the toilets keeping in mind the needs of the locality, but on account of opposition from the residents in different areas, it has sought to be scrapped. It has thus been pleaded that the intention was genuine and bona fide with anticipated approval of the concerned authorities.

We, however, find this explanation far from satisfactory for the reason that if there had been a proper survey and application of mind, then the project should have been taken to the logical conclusion and not left half way, and thereafter when the construction is almost complete, the project is sought to be scrapped.

It has a major ramification, inasmuch, as, money shall flow out of the coffers of the corporation, as those persons who had invested cannot be left high and dry, and would have to be compensated due to scrapping of the scheme (a fact admitted by the MCD). The mode & manner of such compensation financially or otherwise will have to be decided. It has also been stated in the affidavit that there are audit objections subsequently raised, but then that has been sought to be explained away by emphasising that the monetary component of the project has been highlighted more than public aspect. If public need required the project, then in our view, there was no need to scrap it.

We thus consider it appropriate to direct that an officer be deputed by the CAG to look into the various aspects as to how the project was envisaged, executed and then abandoned and the financial implication thereof, and a report be submitted to this Court by the officer investigating in a sealed cover. The MCD is directed to cooperate in the enquiry in all respects.

A copy of this order would consequently go to the CAG for appointment of such an officer. The same be sent to the CAG without process fee.

We are informed that there are committees and sub committees being constituted qua the issue of the assessment of compensation to be paid to the people who have invested. This matter cannot drag on indefinitely and the committee should take a final view on this issue within a maximum period of three months from today.

Insofar as the third aspect of the feasibility is concerned, it has been stated that once again an independent committee is going into the issue of how the toilets can be run at the site.

We may note that as per the intervenors, the way these toilets have been constructed, they are not capable of being used in any other manner, other than the model under which they were constructed. The details of these aspects have not been dealt with in the affidavit.

Suffice it to say, that this aspect would also have to be addressed by the committee/sub committees formed for the purpose, and a final view be taken within the same period of three months.

We may note that a grievance is made by the learned counsel for the petitioner that as a result of the construction in this block, the parking area has been reduced by 27%. He further states that the needs of the market are being met by an already existing toilet block.

In our view, these are matters of municipal governance which the corporation has to address. These factors would be taken note of by the corporation while taking a final view in the matter as to what has to be done with the structures constructed, specifically at the site in question. A status report, on the decision taken by the Committee/sub-Committees on all the above aspects be filed before the next date.

The writ petition stands disposed of in the aforesaid terms.

List for compliance on 07.12.2012."

(underlining supplied)

4. On 24.07.2012, the writ petition was disposed of holding that the said matters are matters of municipal governance, which the Corporation had to address and the facts noted in the order would be taken note of by the Corporation while taking a final view in the matter as to what has to be done with the structures constructed at the site in question. A status report on the decision taken by the Committee/Sub-Committees on the aspects referred to in the order was directed to be filed.

5. The order of 24.07.2012 contained two directions: first of all an officer was to

be deputed by the Comptroller & Auditor General to look into the various aspects as to how the project was envisaged, executed and then abandoned and the financial implications thereof. The second was with regard to the Corporation taking a final view in the matter as to what has to be done with the structures constructed, especially, at the site in question.

6. In compliance of order dated 24.07.2012, a report on construction of high end public toilets was submitted by the Comptroller & Auditor General. The report gives opinion on various aspects but also mentions about non-production of certain records by the SDMC.

7. With regard to aspect of high end public toilets, it was contended by the respondent Corporation that the said project was envisaged as a pilot project conceiving the project of High End Toilets. The intention of the Corporation was to provide world class facility to the citizens and to the public at large. The Corporation had perceived the project as there was a huge demand for clean, aesthetic, user friendly and hygienic public toilets especially in the market and commercial areas. Keeping the demand of the public at large, the proposal for High End Toilets was conceived. It was evaluated that the Corporation would have to bear the expenses of hundreds of crores for construction of high end toilets and Rupees 12 to 15 crores per annum on maintenance and operations of these high end toilets, which would increase on yearly basis due to escalation in costs, inflation and depreciation besides human resource management problem and accountability. To avoid the expenditure and also due to paucity of funds, it was conceptualized to develop these facilities on Develop, Built, Own, Operate, Maintain and Transfer (DBOOMT) basis. Noticing that heavy investment was required from the Concessionaires in order to achieve the target and the major revenue for the Concessionaire would be through advertisements, it was decided to adopt a new approach, wherein it was proposed to permit commercial space along with high end toilets. The said decision was taken after due deliberations at various levels.

8. It is contended by the respondent Corporation that there was no financial implication on the Corporation as the same was built on DBOOMT basis. It is further contended that the said toilets are not being handed over to a Concessionaire as the project has been scrapped. It is contended that all documents available with the Corporation had been supplied to the Comptroller & Auditor General.

9. On 25.08.2014, this Court directed that since the Comptroller & Auditor General had suggested that the process of tendering was not transparent, it would be appropriate that the Vigilance Department of the SDMC examines this matter thoroughly and submits its report.

The respondent Corporation was also directed to come up with a viable solution with regard to the existing structure constructed.

10. Pursuant to the said order, a vigilance report has been filed. The conclusion

drawn in the vigilance report is as under:-

"Conclusion:-

It is an admitted fact there are certain irregularities in the tender process, as has been observed as non-transparent by the CAG. However the analysis of facts as discussed herein above on the basis of available record reflects that the said process was undertaken on the consensus joint decisions taken by the authorities even up to the level of Hon''ble Mayor to go ahead with the adopted procedure. Further, it is on record that the Deptt. Proposed the scrapping the said project and addressed the entire facts. The Commissioner as per his note dated 31.03.2011, placed the entire facts before the authorities. The then Hon''ble Lt. Governor, after considering the proposal of Commissioner, made no other observations, approved to scrap the project and to compensate the concessioners accordingly.

It has emerged that the project did not take off and stands scrapped. No contract has been awarded in this project. No compensation has been given, so far, for the construction of live models. MCD is likely to take over the structures by paying back the cost as decided after valuation and the models shall be put to public utility so that public asset does not go in ruination and decay. There seems to be no financial loss in the entire exercise. Thus on the basis of available record and given the circumstances, at this stage no further action is proposed.

Above submissions is placed before the Hon''ble High Court for kind perusal please."

(underlining supplied)

11. With regard to the existing structure, a proposal has been approved by the SDMC by resolution No.67 dated 17.07.2015. The relevant portion of the Resolution records as under:-

"On the basis of the information provided by the Chief Town Planner vide his letter No.TP/G/SDMC/2014/5883 dated 11.12.2014, permissibility of public utility in various use zones/premises, as per development code of MPD-2021 are as under:-

1. Water (Treatment Plant etc.)

2. Sewerage (Treatment Plant etc.)

3. Electricity (Power House, Sub-Station etc.

4. Solid Waste (Sanitary land fill etc.

5. Drain

Master Plan also provides that Park, Open Parking, circulation and public utilities are permitted in all use zones. The amenities structure of toilets blocks, control room, electric room, guard room and equipment room are also permitted in areas like green belt, regional park, city park, district park, community park and multipurpose garden. Besides certain facilities like bus terminal, taxi stand, milk/ vegetable booth, religious premises, vending booth, petrol/CNG filling, police post, police station, fire station, post office, telegraph office and telephone exchange, local Govt. maintenance offices and office of utilities/facilities providing agencies also, permitted in all used zones as part of layout plan.

That having regard to the decision taken, at the highest level in the Government of NCT of Delhi and of DDA, that the structures shall be decided by the Corporation at a later stage. No decision regarding the particular site in N-Block, GK-I, that is the subject of this petition could be taken in isolation. There are nine such structures, detailed below, in respect of which decisions need to be taken :

1. Market of Defence Colony

2. Market of Greater Kailash-I, M-Block

3. Market of Greater Kailash-I, N-Block

4. Market of East of Kailash

5. Market of Chittaranjan Park

6. Market of Nehru Place

7. Market of Community Centre, East of Kailash

8. Opp. Mool Chand Hospital

9. Market of F-Block, Model Town (North Delhi Municipal Corporation)

It is further pertinent to say that a very wide variety of usages, all useful to the local community are possible, but subject to adaptation to suit the constraints of the site and the decision of the Corporation. By way of illustration, and without prejudice to the decisions that the Corporation may take through its democratic process, some possible uses might conceivably include kiosks for e-governance (making e-governance facilities accessible to the weaker sections of society who do not have access to personal computers); distributive services like milk booths etc.; railway booking offices; space for ironing of clothes (which otherwise leads to authorised usage of road space); shelter for local watch-and-ward staff engaged by RWAs and local traders'' associations etc. These are only stated as possible examples and it is reiterated that the elected members of the Corporation in their wisdom may consider all options and reach their considered decision for using these toilets, as "Public Utility".

As the intended purpose of the "High End Public Toilet" Scheme was to providing aesthetically pleasing, hygienic, ultra modern public toilets of international standards keeping in mind the huge gap in the provision of public toilets in and around MCD markets as well as other commercial areas particularly to facilitate ladies, kids and physically challenged in different sizes; hence it is recommended to utilise these structures for the purposes of toilets, Public Library, Recreation Centre for Senior Citizens/Gym/Yoga Centre, Community Centre etc.

In view of the above, matter is placed before the Corporation through Standing Committee for taking the decision in respect of using these toilets, as "Public Utility".

(ii) Resolution No.50 of the Standing Committee dated 29.06.2015

Resolved that it be recommended to the Corporation that the proposal of the Commissioner as contained in his letter No.F.33/R.P.Cells/SDMC/102/C&C dated 03.06.2015, regarding Viable Solution for Utilization of Structure of High End Toilets built on different locations in the jurisdiction of South Delhi Municipal Corporation, as detailed in the aforesaid letter, be approved with the addition of Milk Booth, Flower, Vegetable and Fruit Outlet in utilisation of these toilets as Public Utility.

(Members of Opposition dissented)

Resolution No.67 Resolved that as recommended by the Standing Committee vide its Resolution No.50 dated 29.06.2015 the proposal of the Commissioner as contained in his letter No.F.33/R.P.Cell/SDMC/102/C&C dated 03.06.2015, regarding viable solution for utilisation of Structure of High End Toilets built on different locations in the jurisdiction of South Delhi Municipal Corporation, as detailed in the aforesaid letter, be approved with the addition of Milk Booth, Flower, Vegetable and Fruit Outlet in utilisation of these Toilets as Public Utility.

The motion was carried."

(underlining supplied)

12. Perusal of the Resolutions show that the Corporation proposes to maintain the said toilets as public utility and include kiosks for e-Governance services that the Corporation has proposed for usage of sites, illustrations of which have been given as kiosks for e-governance distributive services like milk booths, railway booking offices etc., space for ironing of clothes, shelter for local watch-and-ward, staff engaged by RWAs and local traders'' associations etc. It has been decided to utilise the existing structure for purposes of toilets of Public Library, Recreation Centre for Senior Citizens, Gym, Yoga Centre, Community Centre etc. with the addition of milk booth, flower, vegetables and fruit outlet in utilisation of these toilets as public utility.

13. Since the two issues, for compliance of which the proceedings were kept pending by order dated 24.07.2012, which had disposed of the Writ Petition, have been addressed by the Corporation, we are of the view that no further orders are called for in this petition. The pending applications are also disposed of.

