

(2002) 08 DEL CK 0239

In the Delhi High Court

Case No : Civil Writ Petition No. 6425 and CM. 11004 of 2001 in CW. No. 3100 of 2001

Super Restaurant P. Ltd. and Shri Kailash Gahlot

APPELLANT

Vs

Delhi Development Authority

RESPONDENT

Date of Decision : 05-08-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10
Constitution of India, 1950 — Article 226

Citation : (2002) 08 DEL CK 0239

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Division Bench

Advocate : Valmiki Mehta, Devashish Mishra, in CWP. No. 6425 of 2001 and Pawan Upadhyay, in CWP No. 3100 of 200, for the Appellant; Gita Mittal and Ajay Verma for DDA., Anil Grover, for MCD and S.P. Upadhyay, for R-5 in CWP No. 6425 of 2001 and Gita Mittal and Ajay Verma for DDA., Anil Grover, for MCD in CWP No. 3100 of 2001, for the Respondent

Judgement

A.K. Sikri, J.—One Mr. Kailash Gahlot, a resident of Vasant Kunj filed Petition under Article 226 of the Constitution of India in this Court being CWP No. 3100 of 2001 which was treated as Public Interest litigation. In this Petition Mr. Gahlot stated that in Vasant Kunj a commercial complex which was situated adjacent to the residential block being Pocket C-6 and C-7 was under construction. The complex and the residential block shared a common boundary wall as per the sanctioned lay out/development Plan prepared/passed by the Delhi Development Authority (hereinafter referred to as DDA, for short). But contrary to the Development Plan the main boundary wall supporting the residential block and commercial complex i.e. the local shopping centre, had been illegally demolished/broken by the builder/promoter of the commercial complex. As a result of this, it was further alleged, that it had created a security risk to the residents of the residential colony. After issuing notice to Municipal Corporation of Delhi (hereinafter referred to as MCD, for short) and Delhi Development Authority

(hereinafter referred to as DDA, for short) who were arrayed as respondents and after hearing the parties this Writ Petitions was disposed of by Order dated 10th July, 2001 by a Division Bench of this court directing as under:-

"Counsel for respondent No. 1 submits that according to her instructions, the boundary wall in question has already been repaired. This assertion is, however, denied by the petitioner. According to the petitioner, the boundary wall has not been repaired.

We direct that the boundary wall in question be repaired properly, if not already repaired, within two weeks.

This petition is disposed of with these observations.

A copy of this Order be given dusty to counsel for respondent No. 1 to ensure compliance."

2. However, the matter has not rested here. This Order itself has given rise to further litigation which is prompted by Super Restaurant Pvt. Ltd. (petitioner in CWP No. 6425/2001) who had purchased a plot in auction at local shopping centre. The Super Restaurant has filed on CM. 11004/2001 in CWP No. 3100/2001 seeking recalling of afore-mentioned Order dated 10th July, 201 under Order 1 Rule 10 of the CPC for impleadment, if necessary, as a party to the Writ Petition.

3. M/s. Super Restaurant has also filed a substantive Writ Petition being 6425 of 2001.

4. Factual background narrated by M/s. Super Restaurant in the Writ Petition runs thus: It had purchased in auction a plot at the local shopping centre, Section C-6 and 7, Vasant Kunj in December 1996 at a cost of RS. 3,85,50,000/-. The purpose was to construct a Guest House, for which the DDA has specifically auctioned the plot in question. The possession of this plot was handed over to M/s. Super Restaurant by the DDA on September 1, 2000 and on September 4, 2000 a purported Lease Deed was also executed in its favor by the DDA.

5. In February 2001 M/s. Super Restaurant noticed that the Residents Welfare Association (hereinafter referred to as RWA, for short) started constructing illegal structure on the western side of the local shopping centre purported to be a Guard Room in contravention of the sanctioned lay out Plan of the local shopping centre. When various representations made by M/s. Super Restaurant did not yield any result, it filed a Suit for permanent and mandatory injunction in the Court of Civil Judge on 4th April, 2001. In fact two days before i.e. on 2nd April, 2001 the RWA had converted the said Guard room into a temple. On 9th April, 2001 Ms. Madhu Jain, Civil Judge passed an injunction Order restraining RWA from raising any further illegal construction. At this juncture when the said Suit was pending, Mr. Kailash Gahlot filed CWP No. 3100 of 2001, the purpose of which was to scuttle the proceedings before the Civil Judge in the case pending

between M/s. Super Restaurant and RWA. In view of the order dated 10th July, 2001 passed in CWP No. 3100 of 2001 since the Suit of M/s. Super Restaurant was rendered infructuous it withdrew the Suit on 28th September, 2001 with liberty to file such appropriate proceedings as necessary and in these circumstances M/s. Super Restaurant filed Review Application being CM.11004/2001 in CWP No. 3100 of 2001 as well as CWP No. 6425 of 2001.

6. Stated in brief the case of M/s. Super Restaurant is that as per the lay out Plan of the local shopping centre as well as residential complex there is no wall which has been constructed. According to it, the DDA had represented that the said boundary wall towards the eastern side of the local shopping centre was a temporary structure which was constructed at the time when the flats of the residential complex were under construction and assured M/s. Super Restaurant, at the time of auction, that the said boundary wall would be removed. It is on this representation of the DDA that M/s. Super Restaurant participated in auction and bid for the plot in question at a hefty price. In these circumstances, the prayer made in the Writ Petition reads as follows:-

1. The order dated 10.7.2001 be recalled and be set aside and respondents be directed to restore the status quo ante as existing before passing of the order dt. 10.7.2001 passed by this Hon"ble Court.

2. The order dated 10.7.2001 in the alternative be held not binding on the applicant nor the respondent No. 1 for implementing by the respondent 1 and/or 2 of the lay out plan of the Local Shopping Centre of Pocket 6 & 7, Sector-C, Vasant Kunj, New Delhi.

3. The applicant be made a party to the present writ petition for the purposes of the reliefs claimed in the present application and also for prayer of the applicant for dismissal of the writ petition.

4. The present writ be dismissed with heavy costs being a gross abuse of the process of the court.

5. Ex-parte and pendente lite orders in terms of prayers 1 and 2 be also granted.

7. At the time of arguments, Mr. Valmiki Mehta, learned senior counsel appearing for M/s. Super Restaurant submitted that Order dated 10th July, 2001 passed in CWP No. 3100 of 2001 needed to be recalled as it was obtained without impleading M/s. Super Restaurant as a party and by suppressing the material facts. Thus, according to the learned counsel, it clearly tantamounted to obtaining the Order by fraud and Therefore was to be treated as nullity. In support of this submission, the learned counsel pressed into service the judgment of the Supreme Court in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, submitting that it was categorically held therein:-

"Fraud avoid all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of

law that a judgment or decree obtaining by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decreed - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

8. Learned counsel also referred to another judgment of the Supreme court in the case of Budhia Swain and Ors. v. Gopinath Deb and Ors. reported in (1994) 4 SCC 396 in support of his submission that a Court had the power to recall an Order earlier made by it if:-

(i) The proceedings culminating in the order suffer from inherent lack of jurisdiction which is patent.

(ii) Fraud or collusion have been used to obtain the judgment;

(iii) There has been a mistake by the court prejudicing a party; or

(iv) a judgment has been rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.

9. His submissions was that since fraud or collusion had been practiced to obtain the Order dated 10th July, 2001 in the instant case inasmuch as even DDA did not come forward with correct factual position, the Order warranted to be recalled.

10. On Merits, submission of Mr. Valmiki Mehta, was that since there was no such wall shown in the lay out on Zonal Plan the prayer made by Mr. Kailash Gahlot in CWP No. 3100 of 2001 for restoration of the said wall which was a temporary structure and was rightly removed by the DDA, was totally misconceived. His submission was that the entire purpose for which M/s Super Restaurant had purchased the plot i.e. for Guest House would be defeated as the space left between the said wall and the structure of the M/s. Super Restaurant was not sufficient for cars to come in the Guest House of M/s. Super Restaurant as there was no scope for maneuverability of the vehicles coming into the Guest House. His submission was that even if for ensuring safety of the residents of the residential block the existence of boundary wall was necessary, it could be shifted by a few yards which would serve the interest of both, namely, shopping complex as well as residential blocks. For this purpose he referred to the judgment of this Court in the case of Vasant Kunj Residents Welfare Assoc. and Another Vs. The Lt.Governor of Delhi and Others, where the solution to the problem was found by the Court in the following manner:-

"Pleading have been completed. Learned counsel for the respondent/DDA relying on the additional affidavit submitted that the opening that had been left are strictly in accordance with the lay out plan of Vasant Kunj and as per the requirement of the master plan. it is further submitted that at the time of allotment of various shops the existence of these approaches to the shopping complex was made known to the licensees and the allottees. Therefore, if any attempt was now made to close or shut down the openings, it would adversely

affect the interest of the allottees and licensees having shops and establishments in the shopping complex. It would also be a breach of the understanding and conditions given to the allottees at the time of auction of the shopping complex.

I have perused the lay out plan, as filed. The openings are shown there. Hence there is considerable merit in the submission of the respondent/DDA, as noted above. The petitioner, accordingly, would not be entitled to a mandamus requiring the respondent/DDA to construct a boundary wall and close the openings. However, one of the possible solutions which commends to the Court feasibility of which may be considered and examined is the installation of gates in some of the main openings. Petitioner, if so advised, may approach the authorities with the proposal of installation of gates, provided the same are property manned, round the clock, and do not block ingress and egress through the said gates. This would, of course, entail expenses being met by residents and agreement/understanding being reached on this account between the petitioners, residents, shopkeepers/allottees and the concerned authorities.

11. The contention of Mr. Kailash Gahlot and RWA on the other hand, was that existence of boundary wall was necessary to ensure the security of the residents of Section C-6 and C-7, Vasant Kunj, New Delhi. The submission was that boundary wall was in existence for long, which was constructed by DDA itself and there was no reason to remove the same. Such boundary wall were in existence in every such locality throughout Delhi and it was not peculiar to this residential colony. In support of this submission Ghaziabad Development Authority and State of U.P. Vs. Delhi Auto and General Finance Pvt. Ltd. and Maha Maya General Finance Co. Ltd. and another, .

12. Further submission was that even in the case of Vasant Kunj Residential Welfare Association (supra) necessity for existence of such a boundary wall was recognised. They highlighted the problem of law and order in Delhi and submitted that security risks like robbery, burglary, kidnapping, extortion, etc. being rampant, it was in public interest that boundary wall in question remained. The learned counsel also referred to the site plan and the lay out plan of the area and submitted that the boundary wall was shown therein. It was also submitted that M/s. Super Restaurant had legal right to have the boundary wall shifted. Thus, according to Mr. Gahlot, there was no need to recall order dated 10th July, 2001 passed in CWP No. 3100 of 2001 and rather the Writ Petition filed by M/s. Super Restaurant warranted dismissal.

13. In order to determine the respective rights of these two parties and appreciate the controversy it would be appropriate to know the stand of the DDA. For, it has brought to fore the factual and legal nuances of the case and cleared the gloss created by both the private parties aiming to advance their own personal interests Mr. Ajay Verma and Ms. Gita Mittal appeared on behalf of the DDA and clarified, with reference to the lay out plan of the area, that there was no provision for boundary wall in question as regards the Local Shopping Centre as well as housing Sector C-6 and C-7, Vasant Kunj, New Delhi. However, it was

emphasised that before taking up the construction of the Local Shopping Centre in Sector C-6 and 7, a stone masonry wall had been constructed in order to protect the area from encroachment. After the construction of Local Shopping Centre, the matter was reconsidered and it was felt necessary to have the boundary wall segregating the Local Shopping Centre from the residential complex for security of both and particularly residents of the residential complex. It was further submitted that in so far as M/s. Super Restaurant is concerned, no such assurance was given for removal of this boundary wall. It was also clarified that as per the lay out plan in the Local Shopping Centre, a particular area was specifically earmarked for parking. This was the practice in all such Local Shopping Centres and visitors to the Local Shopping centre were expected to park their vehicles in the said parking area. M/s. Super Restaurant had no right to claim more parking area and particularly when one side of its structure faces residential complex.

14. On the other hand, it was contended that even the RWA had no legal right to claim the existence of a wall at a particular place inasmuch as there was no such boundary wall shown in the lay out plan of the residential complex and in any case the area in question where the boundary wall at present exists did not form part of the residential complex and it was DDA land of course, because of the security, it was decided by the DDA to retain the boundary wall but it was the prerogative of DDA to consider whether this wall should exist. It was also submitted that in so far as the so called "guard room" converted into a temple as constructed by RWA is concerned the same was illegal.

15. Position as explained by the DDA clarifies the ground realities sufficiently, rounds off the edges and provides the solution which balances the competing interest of the parties. It is clear that in so far as M/s. Super Restaurant is concerned it has no such right to claim that the boundary wall be removed or shifted from the place where it exists at present. In fact necessity of having such a wall for security reasons was not seriously disputed before us. The prayers 1 and 2 made by it in CWP No. 6425 of 2001 are Therefore not maintainable when there is no such provisions in the lay out plan as claimed by it.

16. On the other hand, even the RWA or Mr. Kailash Gahlot have no right to claim the retention of the wall at a particular place. The area in question does not belong to the RWA. CWP No. 3100 of 2001 was filed by Mr. Kailash Gahlot on the premise that the boundary wall was being demolished illegally which was necessary for the security of the residents. Since it was a Public Interest Litigation and since the boundary wall for security was required, the Court passed an Order dated 10th July, 2001. However, at that time the question of retention of the boundary wall at the existing place alone was not gone into at all. Order sheet in CWP No. 3100 of 2001 reveals that when the notice was issued and the learned counsel for DDA appeared she informed the Court that the matter was under consideration and a decision was likely to be taken soon for retaining the boundary wall. In these circumstances the Order dated 10th

July, 2001 was passed for repairing the boundary wall. The likely dispute between the Local Shopping Centre and the RWA did not crop up or was visualised. The matter was also not considered with reference to lay out plans and the right of the RWA to have the boundary wall at a particular place. Therefore, we are of the opinion that Order dated 10th July, 2001 which was passed in the aforesaid circumstances needs to be recalled. We Order accordingly. CM.110004 stands disposed of.

17. While doing so we put the matter back to DDA for appropriate decision. We may notice that during the pendency of these cases attempt was made to resolve the dispute amicably and parties were directed to consider this aspect. For this purpose it was directed that Vice Chairman, DDA should hold a meeting with the parties. However, we were told that since RWA was not willing for shifting of the boundary wall, the matter could not be amicably resolved.

18. In these circumstances, the two Writ Petitions are disposed of with the following directions to the DDA:-

1. To consider the matter afresh and take a decision as to whether boundary wall is to be retained at the existing place or there is a need to shift the same to other place.

2. Till the time such a decision is taken the boundary wall shall be maintained as it is. However, in case the decision is taken to shift the boundary wall, the present boundary wall shall be demolished only after the construction of the new boundary wall.

3. The Vice Chairman, DDA shall also take appropriate decision about the retention/removal of the guard room/temple and if it is found to be illegal, it would be permissible for the DDA to remove the same.

19. The Vice-Chairman, DDA would take a decision of the aforesaid aspects within two months from the date of receipt of copy of the Order. Before taking a decision, the Vice Chairman, DDA shall give due regard to the respective stands of both the parties in these two Writ Petitions.