

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

+ **CM(M) 924/2008 & CM A.No.11278/2008 (for direction)**

% **Date of decision: 8th January, 2010**

VIVEK KUMAR GUPTA & ORS.Petitioners.

Through: Mr. Sanjeev Sindhawani & Ms. Ekta B. Sikri,
Advocates.

Versus

HARISH CHANDER MALIK & ANR. ... Respondents.

Through: Mr. Nalin Tripathi, Advocate for R-2/MCD.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. This petition under Article 227 of the Constitution of India has been preferred by the defendants in a suit filed by the respondent No.1 plaintiff. The suit was filed for permanent and mandatory injunction averring that the petitioners/defendants being in occupation of shop No.12, Esplanade Road, Chandni Chowk, Delhi – 110006 were making additions and alterations and raising construction therein and encroaching on public land around the shop; a decree for permanent injunction for restraining the petitioners/defendants in this regard and a decree for mandatory injunction for directing the respondent No.2 MCD also impleaded as a defendant in the suit, to demolish the unauthorized construction was claimed. The suit was accompanied with an application for interim relief.

2. The petitioners/defendants contested the suit. The trial court after completion of the pleadings, on 13th December, 2007 finding that the respondent No.2 MCD in its written statement had pleaded that there was temporary encroachment at the suit site but *pucca* encroachment could not be established, directed the MCD to file status report regarding *pucca* encroachment and action taken report with respect to temporary encroachment. It is the contention of the petitioners/defendants that pursuant to the said order the MCD carried out demolition action qua the shop of the petitioners/defendants and demolished the construction which was not even an encroachment. The petitioners/defendants filed an application before the trial court for allowing them to get their premises restored/repared so as to bring the shop in line with the other shops and for direction that the petitioners/defendants shall be entitled to recover costs of such restoration from the respondent No.1/plaintiff as well as the respondent No.2 MCD. The petitioners/defendants also filed another application before the trial court for taking similar demolition action against other shops in the market, stated to have carried out similar encroachments/constructions as by the petitioners/defendants and which had been demolished.

3. The respondent No.1/plaintiff however on 25th July, 2008 sought to withdraw the suit. The petitioners/defendants opposed such withdrawal contending that since the MCD had been directed to file the status report with regard to the respondent No.1/plaintiff's property that is why the respondent No.1/plaintiff was withdrawing the suit. The trial court nevertheless allowed the respondent No.1/plaintiff to withdraw the suit, however without prejudice to the rights, if any, of the petitioners/defendants.

4. Aggrieved therefrom, the present petition has been filed. This court while issuing notice of the petition observed that the petitioners/defendants should not have been discriminated and action should have been taken by the respondent MCD qua other encroachment in the area. MCD was thus directed to report. The deputy Commissioner of MCD appeared before this court on 20th November, 2008 and informed that action is being taken against temporary structures and the same shall be removed by 1st December, 2008. With respect to the *pucca* structures, it was informed that survey was being

conducted by the MCD. Thereafter on 13th July, 2009 it was informed that all temporary encroachments on Esplanade Road, Chandni Chowk, Delhi – 110006 had been removed. This court directed the MCD to ensure prevention of recurrence of such encroachment.

5. The counsel for the petitioners/defendants has at the outset contended that the MCD had not complied with the orders in this petition and the encroachments continue to exist. However, this court is of the opinion that in this private lis, directions with respect to properties of others, not before this court cannot be issued. If the petitioners/defendants have a complaint of any unauthorized construction in properties in their neighbourhood, they have their remedies in law and the directions with respect thereto cannot be made in this petition.

6. As far as the present petition is concerned, the contention of the counsel for the petitioners/defendants is that the relief sought by the petitioners/defendants from the trial court of permission to restore their own property to the same position as it was prior to the demolition action pursuant to interim orders in the suit, was in the nature of restitution. It is urged that since the respondent No.1/plaintiff did not take the suit to its logical conclusion, the trial court, notwithstanding the withdrawal of suit by the respondent No.1/plaintiff ought to have allowed the application of the petitioners/defendants.

7. The provision of restitution applies when a order is reversed. No order has been reversed in the present case. All that has happened is that on the application of the respondent No.1/plaintiff for interim relief, this court merely directed the respondent No.2 MCD to perform its statutory duty. This court did not make any enquiry as adjudication as to whether the construction was unauthorized or not; whether there was any encroachment or not. It is the MCD which informed this court that there was unauthorized temporary construction and this court merely directed the MCD to perform its statutory duty. If it was the case of the petitioners/defendants that the construction which the respondent No.2 MCD was alleging to be unauthorized, was in fact authorized/sanctioned and/or that the MCD had no right to take any action with respect thereto, it was open to the petitioners/defendants to approach the Appellate Tribunal *CM(M) 924/2008 & CM A.No.11278/2008 (for direction)*

MCD qua such order of the respondent No.2 MCD. The petitioners/defendants however in spite of the orders of this court and the report by the MCD thereon, did not take any such action. Had the petitioners/defendants taken any such action/proceeding, in that the Tribunal constituted, specially for the said purpose would have decided whether the construction is legal / permitted and authorized or not. In the absence thereof, the trial court could not be expected to adjudicate the application aforesaid of the petitioners/defendants, notwithstanding withdrawal of the suit.

8. It is to be presumed that the action of demolition taken by the respondent No.2 MCD, even if pursuant to the orders in the suit, qua the shop of the petitioners/defendants was in accordance with law. If the same is not in accordance with law and/or if the respondent No.2 MCD has exceeded its authority, again the petitioners/defendants have remedies available to them in law. The petitioners/defendants however cannot be permitted by an order of the trial court and/or of this court to install shutter or to restore the premises to the same condition in which it was prior to the demolition action, merely for the reason of withdrawal of the suit. There is no sanction plan before this court for this court to be satisfied as to what is sanctioned construction on the property; only if the sanction plan was available could this court in the exercise of equitable jurisdiction have considered the request of the petitioners/defendants. However, in the absence of the same, allowing the petitioners/defendants to restore the premises or to install shutter would tantamount to this court giving a blanket permission to the petitioners/defendants to carry out any construction/encroachment on the property. No site plan has been filed to satisfy the conscience of this court. Of course, the counsel for the petitioners/defendants states that the petitioners/defendants are tenants in the shop (the landlords are not parties to this petition) and cannot be expected to have the sanction plan. But the same would still not entitle the petitioners/defendants to any directions as claimed. If it is the case of the petitioners/defendants that the respondent No.1/plaintiff has caused any loss to the petitioners/defendants, again the petitioners/defendants have to take remedies available in law to them in this regard and the same could not have been decided by way of the application in the suit which has been withdrawn.

9. This court is also not concerned with the reasons for the respondent No.1/plaintiff to withdraw the suit. Merely because the petitioners/defendants had filed an application for taking similar action as taken with respect to the shop of the petitioners/defendants, also against the shop of the respondent No.1 / plaintiff would not allow the petitioners/defendants to oppose the withdrawal of the suit; if the petitioners/defendants have any grievance in that regard they are always entitled to sue separately for the same.

10. Accordingly, no merits are found in this petition. The same is dismissed. However, it is clarified that the said dismissal shall not come in the way of the petitioners/defendants applying to the appropriate authorities in accordance with law for the repair work/construction work if any required to be done in the said shop and the petitioners/defendants would be entitled to carry out the said work if the said work is sanctioned by the respondent No.2 MCD.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**January 08, 2010
PP**