

\$~73(Appellate)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 1015/2022 & CM APPL. 42075/2022, CM APPL.
42076/2022

SHER MOHAMMAD Petitioner
Through: Mr. Prashant Katara, Adv.

versus

MUNICIPAL CORPORATION OF DELHI (SDMC)
..... Respondent
Through: Mr. Tushar Sannu, Standing
Counsel for MCD

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

% **09.11.2022**

1. This petition, under Article 227 of the Constitution of India, assails judgment dated 14th September 2022, passed by the learned Principal District & Sessions Judge (the learned Pr. DSJ), on an appeal preferred by the petitioner against the order dated 9th August 2021 passed by the learned Appellate Tribunal, Municipal Corporation of Delhi (the learned AT MCD).

2. A brief conspectus of facts is necessary at the outset.

3. On 26th September 2011, the Municipal Corporation of Delhi (MCD) issued a show cause notice under Section 344(1) read with Section 343 of the DMC Act, 1957 alleging that unauthorized constructions had taken place at T-72, Village Hauz Khas, New Delhi and calling on the owners/builders of the said property to show cause

as to why the construction be not demolished. This was followed by a demolition order dated 7th October 2011. The petitioner challenged the said show cause as well as the demolition order before this Court by way of WP(C) 773/2013 (*Sher Mohammad v. MCD*).

4. The said writ petition was disposed of by a learned Single Judge of this Court, by the following order, passed on 8th February 2013:

“1. Present writ petition has been filed by petitioner under Articles 226 and 227 of the Constitution of India seeking to quash the notices and orders dated 26.9.2011 and 7.10.2011 issued by the respondent qua the property of the petitioner. The petitioner also seeks a direction to the respondent to de-seal the property of the petitioner bearing no. T-72 Part, Hauz Khas Village, New Delhi.

2. Learned counsel for the petitioner submits that one of the main grievances of the petitioner is that the show cause notice dated 26.9.2011 received by the petitioner is not addressed to any person nor the description of the property in question is correct.

3. To overcome this technical objection raised by the petitioner and to avoid multiplicity of proceeding, this matter was passed over once to enable counsel for the MCD to issue a fresh show cause notice in Court to the petitioner at the particulars so produced by him.

4. At the second call, learned counsel for the petitioner submits that the correct particulars of the owner/occupant are “Mr.Sher Mohammad, s/o late Sh. Alimuddin, r/o T-72 Part, Hauz Khas Village, New Delhi”. Learned counsel for the MCD submits that the word “Part” in the above address should not be used as it implies that the MCD has recognised the divisibility of the property in question. It is made clear that the word “Part” has only been added with a view to avoid any technical objection, which has been raised by the respondent, that the property in question has not been described properly. It is made clear that no further objection of the petitioner will be entertained on this account.

5. Counsel for the petitioner accepts the above show cause notice. It is agreed by counsel for the parties that the notice accepted by the counsel for the petitioner shall be treated as a notice issued to the petitioner. Accordingly, the order dated 7.10.2011 qua the property of the petitioner in question is set aside. Let reply to this notice be submitted by the petitioner to the respondent within seven days from today and thereafter the respondent will pass an appropriate order in accordance with law

and a copy of the order shall be served on the petitioner at the address mentioned in the writ petition.

6. Writ petition and application stand disposed of.”

5. The following aspects of the dispute become clear from the aforesaid order dated 8th February 2013:

(i) The petitioner had sought to challenge the show cause notice dated 26th September 2011 and the demolition order dated 7th October 2011 on the ground that the suit property had been wrongly described in the show cause notice and in the order.

(ii) The correct description of the suit property was T-72, Hauz Khas Village, New Delhi. The property could not be regarded as divisible.

(iii) No further objections, from the petitioner, to the effect that the said address did not describe the suit property actually was to be entertained. The petitioner, in fact, accepted the show cause notice as having been validly issued to the petitioner and was directed, therefore, to file a reply to the show cause notice whereafter an appropriate order was to be passed by the MCD.

6. It appears that no order came to be passed on the said show cause notice, which was served on the petitioner during the course of proceedings before this Court on 8th February 2013.

7. The suit property was again booked for demolition *vide* notice dated 9th December 2020, again purportedly in pursuance of the notice dated 26th September 2011, alleging further unauthorized construction

on the suit property.

8. This order was challenged by the petitioner by way of Appeal no. 51/2021 before the learned AT MCD, contending that there was no valid service of show cause notice on the petitioner, as the notice had been served on Soin Khan, who was not concerned with the suit property.

9. The learned AT MCD, observing that, prior to passing of the order dated 9th December 2020, the petitioner ought to have been heard, remanded the matter to the MCD for *de-novo* consideration.

10. The matter was taken up by the Assistant Engineer (Buildings) on 5th July 2021. The impugned order dated 14th September 2022, passed by the learned ADJ, notes the fact that, in the said hearing, the petitioner was represented by his son Soin Khan who, the petitioner had alleged in the earlier proceedings, was not authorized to represent him.

11. Soin Khan sought to contend, on behalf of the petitioner, before the AE (Building) that the suit property stood constructed up to third floor since 2011 and relied, in this regard, on the following status report, dated 16th September 2015, filed by the MCD before this Court in WP(C) 4193/2015:

“... iii) **Property No. T-72, Village Hauz Khas, New Delhi**

The owner/ builder of the subject property had raised unauthorized construction in the shape of rear portion of Second floor (rest of building is old and occupied) without having any prior permission/ sanction from the competent authority i.e., SDMC, however, action against the same has been initiated and the said unauthorized construction has been booked vide file No.

115/UC/B-1/SZ/20 11 dated **26/09/2011** under section 343/344 of the DMC Act, 1957. Sealing action under section 345-A of the DMC Act, was also initiated vide file No. 800/Seal/B-1/SZ/11 dated **21/11/2011** and after complying with the mandatory provisions as contained under the relevant Act, demolition/sealing orders were passed. However, in order to execute the said demolition/ sealing orders the demolition/ sealing programme was fixed for **21/11/2011 and during the course of action demolished Third floor roof, slab punctured and also balcony of Third floor roof cut by gas cutter**. After that staircase entry sealed at Second floor (main entry) at one point on 22/11/2011. However, during the routine inspection on 31/07/2013 by the area JE, it was found that the seal affixed by the department/ SDMC have tempered with by the owner/ occupier, therefore, the same resealed on 07/08/2013, at **Second floor** main which was also booked vide file No. 2/UC/B-1/SZ/14 dated 02/01/2014 under section 343/344 of the DMC Act. It is further submitted that as per the Delhi Special Provision Act, (special Law) the construction prior to 1 June-2014 are protected and no punitive action could be taken against the same till 31/12/2017.....”

12. Rejecting the contentions advanced on behalf of the petitioner, the AE (Building) once again passed a demolition order on 23rd July 2021.

13. The petitioner appealed against the said demolition order to the learned AT MCD. The learned AT MCD held, on the basis of the inspections conducted on 9th December 2020 and 27th July 2021, that the petitioner had raised fresh constructions after 1st June 2014, being the cut-off date in respect of which constructions made upto the said date were protected by Section 3(2)(ii)¹ of the National Capital Territory of Delhi Laws (Special Provisions) Act, 2011.

¹ **3. Enforcement to be kept in abeyance.—**

(2) Subject to the provisions contained in sub-section (1) and notwithstanding any judgment, decree or order of any court, status quo— (i) as on the 1st day of January, 2006 in respect of encroachment or unauthorised development; and (ii) in respect of unauthorised colonies, village abadi area (including urban villages) and its extension, which existed on the 31st day of March, 2002 and where construction took place even beyond that date and up to the 8th day of February, 2007, mentioned in sub-section (1), shall be maintained.

14. Accordingly, the learned AT MCD upheld the direction to demolish the construction raised on the third floor of the suit property.

15. Aggrieved by the aforesaid order dated 9th August 2021, passed by the learned AT MCD, the petitioner appealed to the learned ADJ under Section 347D of the DMC Act.

16. It was sought to be contended, before the learned Pr. DSJ, that the property which forms subject matter of the order dated 8th February 2013 was different from the property which forms subject matter of the dispute before the learned AT MCD. The petitioner sought to submit that the property at T-72 had several units and that it was not possible to identify the suit property precisely. It was further sought to be contended that construction upto the third floor of the aforesaid property existed prior to 2011 and, in any case, much prior to the cut-off date of 1st June 2014.

17. By the impugned order dated 14th September 2022, the learned Pr.DSJ has dismissed the petitioner's appeal.

18. The learned Pr. DSJ opined that, with the passing of the order by this Court on 8th February 2013, the right of the petitioner to assail the proposed demolition again on the ground that the property was not properly identified was no longer available to it. The impugned order further holds that there was nothing to indicate that the third floor of the suit property had been constructed after 1st June 2014. The contention, of the petitioner, that the third floor of the suit property was in existence in 2011 was rejected by the learned Pr. DSJ. In rejecting the said contention, the learned Pr. DSJ has referred to the

status report of the MCD as filed before this Court along with its affidavit dated 16th September 2015 in WP (C) 4193/2015. It was noted that the said order referred to the demolition of the second floor of the suit property which had been carried out on 21st January 2011 and the demolition of the third floor slab by puncturing it.

19. In view of the provisions of the National Capital Territory of Delhi Laws (Special Provisions) Act, 2011, the learned AT MCD held that the petitioner could not have carried out any construction beyond the demolished second floor of the suit property.

20. The inspection reports of the years 2020-2021 indicated that the petitioner was carrying out construction on the third floor/terrace of the suit property. Thus, according to the learned Pr. DSJ, the petitioner was continuing to carry out, with impunity, further unauthorized constructions even after the cut-off date of 1st June 2014.

21. In that view of the matter, the learned Pr. DSJ did not deem it appropriate to interfere with the impugned order dated 9th August 2021 passed by the AT MCD.

22. The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India assailing the aforesaid order dated 14th September 2022 of the learned Pr. DSJ.

23. Mr. Tushar Sannu, learned Standing Counsel for the MCD, has advanced a preliminary objection regarding the maintainability of the present appeal. Mr. Sannu submits that the present petition would not lie in view of Section 347D (3) of the DMC Act. Section 347D (3) of

the DMC Act reads thus:

“347D. Appeal against orders of Appellate Tribunal.—

(1) An appeal shall lie to the Administrator against an order of the Appellate Tribunal, made in an appeal under section 343 or section 347B, confirming, modifying or annulling an order made or notice issued under this Act.

(2) The provisions of sub-sections (2) and (3) of section 347B and section 347C and the rules made thereunder, shall, so far as may be, apply to the filing and disposal of an appeal under this section as they apply to the filing and disposal of an appeal under those sections.

(3) An order of the Administrator on an appeal under this section, and subject only to such order, an order of the Appellate Tribunal under section 347B, and subject to such orders of the Administrator or an Appellate Tribunal, an order or notice referred to in sub-section (1) of that section, shall be final.”

24. Mr. Sannu submits that as Section 347D makes orders passed by the learned District Judge, on an appeal against the order passed by the learned AT MCD, final, a writ petition against such an order would appropriately lie under Article 226 of the Constitution of India and not under Article 227 of the Constitution of India.

25. The availability of a remedy under Article 226 of the Constitution of India does not unquestionably foreclose a remedy under Article 227. The scope and ambit of the two provisions are markedly different. Article 227 of the Constitution of India only confers superintending – or, more appropriately, supervisory - jurisdiction on the High Court. The High Court does not, under Article 227, judicially review the order passed by the hierarchically lower authority. Nor does it examine the correctness or otherwise, of the said order. It is only where the manner in which the lower judicial authority has acted calls for supervisory correction that the High Court

would step in under Article 227 of the Constitution of India. It is for this reason that the order of the lower authority is classically regarded as final both on facts as well as in law, insofar as the writ jurisdiction vested in the court under Article 227 the Constitution of India is concerned.

26. Errors which are manifestly perverse or which result in serious and irreparable prejudice to the parties alone are amenable to challenge under Article 227. The Supreme Court, in the following passages from *Ibrat Faizan v Omaxe Buildhome*², has sounded a note of caution where a party seeks to avail under Article 227 of the Constitution of India even when other remedies may be available:

“28. The scope and ambit of jurisdiction of Article 227 of the Constitution has been explained by this Court in the case of *Estralla Rubber v. Dass Estate (P) Ltd*³, which has been consistently followed by this Court (see the recent decision of this Court in the case of *Garment Craft v. Prakash Chand Goel*⁴). Therefore, while exercising the powers under Article 227 of the Constitution, the High Court has to act within the parameters to exercise the powers under Article 227 of the Constitution. It goes without saying that even while considering the grant of interim stay/relief in a writ petition under Article 227 of the Constitution of India, the High Court has to bear in mind the limited jurisdiction of superintendence under Article 227 of the Constitution. Therefore, while granting any interim stay/relief in a writ petition under Article 227 of the Constitution against an order passed by the National Commission, the same shall always be subject to the rigour of the powers to be exercised under Article 227 of the Constitution of India.”

27. One may also refer to the following passage from *Sadhana Lodh v. National Insurance Co. Ltd.*⁵ in this regard:

“7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or tribunal has proceeded within its

² 2022 SCC Online SC 620

³ (2001) 8 SCC 97

⁴ 2022 SCC OnLine SC 29

⁵ (2003) 3 SSC 524

parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision.”

28. Within the parameters of the limited jurisdiction vested in this Court by Article 227 of the Constitution of India, I do not see any case for interfering with the impugned order dated 14th September 2022, passed by the learned ADJ in MCD Appeal 01/2021. It is now nearly ten years since the order dated 8th February 2013 was passed by this Court in WP(C) 773/2013. It is time that a quietus was arrived at and the dispute set at rest. Unauthorized constructions are a bane to orderly development of the city, which is already bursting at its seams, and cannot be allowed to continue to stand in perpetuity.

29. Accordingly, the present petition is dismissed *in limine*, with no order as to costs.

NOVEMBER 9, 2022

dsn

C. HARI SHANKAR, J.