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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P.(C) 651/2011 & CM No.1381/2011 (for interim directions)

M/S UNIQUE INNOVATION PVT. LTD. Petitioner
Through: Mr. Harish Malhotra, Sr. Adv. with
Mr. Neeraj Malhotra, Adv.

Versus

MCD Respondent
Through: Mr. Ajay Arora & Mr. Kapil Dutta,
Advocates.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

03.02.2011

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1. This order is in continuation of yesterday's order i.e. of 2nd February, 2011. In reply to the queries posed yesterday, the counsel for the respondent MCD states that neither any second inspection was carried out nor any order of sealing passed or served on the petitioner. He however states that the action of sealing against the petitioner was in pursuance to the inspection of 14th December, 2010 by the Members of the Monitoring Committee appointed by the Supreme Court. He has in Court handed over a copy of the file noting recording that the basement of the motel of the

petitioner was found being used in contravention of MPD-2021/Building Bye-Laws, 1983 and in view thereof notice under Section 345-A of the DMC Act was approved to be issued to the petitioner. It is however admitted that in the evening of 27th December, 2010 an unattested affidavit, as appearing at pages 36 & 37 of the paper book was submitted by the petitioner to the MCD.

2. It is further informed that since in the said affidavit the petitioner had undertaken to use the basement for storage purposes only and which storage purpose is also not permitted, the action of sealing as already scheduled for 28th December, 2010 was carried out. In this regard a copy of the Notification dated 16th June, 1995 of the DDA is handed over prescribing the use of basement sanctioned free from FAR, for purposes only of airconditioning plant, filtration plant, electric sub-station, parking and other essential services. On the basis thereof it is contended that the use to which the petitioner undertook to put the basement i.e. of storage was also not permitted use and hence no need was felt to carry out any other inspection or pass an order and the basement was sealed.

3. The counsel for the respondent MCD has also contended that the sealing action being in accordance with the directions of the Monitoring

Committee appointed by the Supreme Court, this Court in accordance with the judgment dated 11th October, 2007 of Division Bench of this Court in W.P.(C) No.7109/2007 titled *T.S.I. Displays P. Ltd. Vs. MCD* ought to refrain itself from entertaining this writ petition and the remedy of the petitioner is either before the Monitoring Committee or before the Supreme Court.

4. Though Section 345-A of the DMC Act does not prescribe issuance of show cause notice but the Division Bench of this Court in *Ahuja Property Developers (P) Ltd. Vs. MCD* 42 (1990) DLT 474 (DB) followed also in *Shrimati Shamim Bano Vs. MCD* 2007 VIII AD (Delhi) 304 held that Rules of natural justice have to be followed and a notice to show cause required to be given before the sealing action under Section 345-A. The notice dated 24th December, 2010 in the present case was given in compliance of the said judgment. The relevant part of the said notice for convenience is reproduced below:-

“WHEREAS, during the course of inspection along with Members, Monitoring Committee (Apex Court) it has been found that basement of motel known as Lutyens situated at M.G. Road, Sultanpur, New Delhi is being used in total violation of permission/sanctioned use of the said property and also against the Master Plan-2021/Zonal Plan/Sanctioned Plan/Modified Plan approved by DUAC & accepted by MCD which amounts to misuse of premises.

Now, therefore, I S.K. Midha, Deputy Commissioner, Municipal Corporation of Delhi, South Zone, Green Park, New Delhi in exercise of the power vested in me under Section 345-A, of the Delhi Municipal Corporation Act, read with Section 491 of the Act and rules made thereunder, after considering the reports placed before, me, hereby direct you to stop the misuse and bring the premises within permitted use as per Master Plan-2021 within 48 hours and also file an affidavit in the prescribed format, failing which the premises under reference will be sealed without further notice.”

5. In response thereto the petitioner submitted a reply dated 27th December, 2010 stating *inter alia* as under:-

“We have not built any extra construction in the basement we have Storage & Services, however, we are given to understand that a small portion of basement usage is not as per the sanctioned which we have stopped with immediate effect also to mention that we have adequate parking space which exceed more than 350 cars and area approximate 1.5 acres.

We request your good self to condone our basement sealing since we are submitting this affidavit as required and stand committed to operate as per MCD Guide Lines.

I will abide by all the rules and regulation given by the Hon’ble Supreme Court of India.

I will use the said premises only for permitted/sanctioned use as storage purpose only.”

6. The petitioner also submitted an affidavit, the relevant extracts whereof are as under:-

- “3. That pursuance to the said Notice. The deponent has stopped/vacated the misuse of a small portion in the aforesaid basement of the aforesaid property within the 48 Hrs. and the deponent hereby undertake to use the said basement as per sanctioned/permited or in accordance with the provision of Master Plan for Delhi-2021.
4. That the deponent undertakes to use the said premises only to permitted/sanctioned use as storage purpose only.
5. That the deponent undertakes to abide by all orders given by Hon’ble Supreme Court of India.
6. That the deponent also undertakes that he will above by all the guidelines norms issued time to time regarding above mentioned property/areas.”

7. A perusal of the aforesaid shows that in the show cause notice, it was not specified that to what use the basement was being put and which was found objectionable or to what use it should be put. No date also of carrying out sealing on 28th December, 2010 as now argued, was intimated or could be intimated inasmuch as the date of sealing could not possibly be fixed while issuing a show cause notice inasmuch as that would defeat the purpose of giving show cause notice and show a pre-determination on the part of the respondent MCD to seal the basement.

8. As far as the argument of the counsel for the respondent MCD of the petitioner having shown defiance by undertaking to use the basement for

storage purposes and which is not permitted, is concerned, the reply and the affidavit submitted by the petitioner have to be read in entirety. The petitioner had clearly undertaken to bring the use of the basement in conformity with the Master Plan and permitted user. Merely because the petitioner while stating so also stated that the sanctioned use was storage, did not entitle the respondent MCD to pick up that line only and on the basis thereof seal the basement. Even if the respondent MCD was of the view that the storage was not permitted, opportunity ought to have been given. The petitioner ought to have been intimated of the same and if the petitioner had failed to comply with the direction, then the respondent MCD would have been entitled to seal the basement.

9. I am also unable to understand as to how the sealing action could have been taken without passing an order. The law has provided for the remedy of an appeal against the order of sealing. The said appeal has to be filed against the order to be passed by the respondent MCD. The office noting sheet handed over as aforesaid by the counsel for the respondent MCD shows a noting of 28th December, 2010 to the effect that no reply had been received from any of the motel owners. The said noting itself is incorrect inasmuch as admittedly reply/affidavit had been received from the petitioner. On the basis that no reply had been received, sealing action was

approved. No order is shown to have been passed. The file notings cannot take place of the order required to be made.

10. The aforesaid shows a total non application of mind on the part of the respondent MCD in taking the sealing action. Once the Division Bench of this Court has held that the Rules of natural justice apply and a hearing has to be given, the respondent MCD could not without considering the reply or passing any order thereon have sealed the basement of the petitioner.

11. It is also the contention of the petitioner in the present writ petition that though at the time of sanction of construction, basement was not taken into consideration for the purposes of FAR but under the revised norms, the FAR has been increased and the basement is permitted to be used for all purposes as allowed in a hotel and the basement is within the enhanced FAR norms. The counsel for the respondent MCD of course controverts the said plea. However the fact remains that the respondent MCD is not shown to have applied its mind to the aforesaid matter, having not passed an order and having sealed the basement merely on the premise that reply has not been received.

12. Insofar as the argument of the counsel for the respondent MCD of the remedy of the petitioner being before Monitoring Committee or the

Supreme Court is concerned, the controversy in *T.S.I. Displays* (supra) is also the subject matter of a Full Bench of this Court and which is still pending. Even otherwise, the petitioner having been deprived of the hearing which it is entitled to in law, I am of the opinion that the procedure preceding sealing having not been followed, this Court is entitled to exercise its power of judicial review under Article 226 of the Constitution of India. The office noting sheet handed over does not show that the matter was put up before or considered by the Monitoring Committee after the issuance of the show cause notice.

13. The counsel for the respondent MCD has further contended that the MCD is powerless in this regard and the pleas of the petitioner have to be considered either by the Monitoring Committee or by the Supreme Court. It is up to the MCD to place the representation and the matter before appropriate authorities.

14. In the circumstances, the writ petition is disposed of with the following directions:-

- (i) The respondent MCD to immediately within 24 hours de-seal the basement of the petitioner.

(ii) The petitioner is however bound with its reply and the affidavit and directed to use basement till the decision below mentioned for permitted purposes only and to not use the same for any other purposes.

(iii) The petitioner is also restrained from till then, parting with possession or encumbering the said basement in any manner whatsoever.

(iv) The MCD to treat the present writ petition also as part of the reply of the petitioner to the show cause notice and to hear the petitioner on 22nd February, 2011 at 1100 hours and on such further dates as may be necessary and to pass a reasoned order thereon.

(v) In the event of the MCD after hearing the petitioner, finding a case for sealing to have been made out, the petitioner shall be served with a copy of the said order and unless there is stay from any Fora in remedy if any availed by the petitioner thereagainst, the petitioner shall not obstruct the sealing carried out after seven days of the service of the said order on the petitioner.

No order as to costs.

Copy of this order be given *Dasti* under the signature of the Court
Master.

RAJIV SAHAI ENDLAW, J

FEBRUARY 03, 2011/bs