

BEFORE THE HON'BLE LOKAYUKTA
Justice Manmohan Sarin
Complaint No. C-485/Lok/2010

Lokayukta on its own motion in Re:

Ms. Preeti Behn, Original Informant

And

Mr. Amrish Singh Gautam, MLA and Dy. Speaker.

Ms. Praveena Gautam with Mr. Anirudh Mayee, Advocates for the Respondent.

Mr. Viraj R. Datar, Advocate, Amicus Curiae with Mr. Chetan Lokur, Advocate.

ORDER

1. By this order the application dated 7th March, 2011, moved by the Respondent for dropping the inquiry proceedings on the ground of lack of jurisdiction to take cognizance of any complaint against Speaker or Dy. Speaker of the Legislative Assembly, is being decided.
2. A notice, bearing No. C-485/Lok/2010/7900 dated 6.12.10, under section 7 read with 2(b) of the Delhi Lokayukta and Upalokayukta Act, 1995, hereinafter referred to as the 'Act' was issued to the Respondent for an inquiry regarding unauthorized construction in the Respondent's Property bearing No. 10/160-161, Khichripur, Delhi, which is a resettlement colony. It was based on a report given by the MCD that there was unauthorized construction of 109.74 sq.mtrs without any sanctioned building plan, out of which 73.16 sq. mtrs was compoundable, but had not been regularized, and 36.58 sq. mtrs i.e. structure on the second floor was non compoundable. It was required to be demolished but had not been

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demolished. The notice proceeded on the basis that by the aforesaid violation, the Respondent-MLA had, prima-facie, failed to act in accordance with norms of conduct which ought to be followed by the Public Functionaries or the class to which he belongs. The said notice was duly served and Respondent filed reply.

3. The Respondent in the reply raised preliminary objections, questioning the allegations as being the result of opposition wanting to bring down the prestige of the MLA of ruling party and to defame his image belatedly after 21 years. The Respondent claims that there were two properties bearing No. 160 and 161 each admeasuring 22.5 sq. yards, totalling 45.00 sq. yards, which had been purchased in July, 1989. Respondent carried out only alteration and renovation work after the purchase. Respondent had sought permission from the DDA and MCD from time to time about renovation and alteration but there was no legal provision in the Master Plan for any sanction or approval for the resettlement colonies.

4. Another application was moved for directions for making available policy applicable for regularization in resettlement colonies. Even though the Respondent as a purchaser of premises in the resettlement colony could have obtained the allotment letter and the Standard Plan from the seller, but to put the controversy to an end, the Standard Plan applicable to the resettlement colony was made available, under the directions of this Forum.

5. At this stage, it was emphasized to the learned Counsel for the Respondent that the substantive issue is of adherence to norms of integrity and conduct, which would be of a higher decree for a Dy. Speaker than others. It was put to the learned Counsel for Respondent

to ascertain if the Respondent would be willing to furnish an undertaking for demolition of unauthorized portion in case the development norms pursuant to the Master Plan -2021 do not permit the said construction. However, the Respondent moved an application for dropping the proceedings and questioned jurisdiction of this forum on the ground that jurisdiction was excluded under section 2(m)(iii) of the Act.

6. Counsel for the Respondent- Applicant was heard in support of jurisdictional objections on 11th March, 2011, when the matter was adjourned to 31st March, 2011. Both the Amicus Curiae and Respondent were heard on 31st March, 2011, when the Counsel for Respondent sought some time to do further research and give list of authorities. The matter was taken up on 7th April, 2011 when the respondent's Counsel relied on (1997) 9 SCC 42, Institution of A.P. Lokayukta/Upalokayukta, A.P. & Others Vs. T. Rama Subba Reddy & others. She also sought time to seek further instructions on whether the Respondent would be willing to furnish an undertaking for demolition of unauthorized portion in case the development norms pursuant to Mater Plan 2021 do not permit it. The matter was again adjourned at request of the Respondent to 28th April, 2011 when the Counsel for the Respondents informed that the Respondent was unable to give an undertaking and preliminary objections raised on lack of jurisdiction may be decided.

7. Mr. Viraj R. Datar, Advocate Amicus Curiae was heard on 9th May, 2011 and order reserved.

8. Having noticed the factual matrix of the case and the circumstances in which objection as to the jurisdiction has been

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raised, let us consider the objection. The case of the Respondent in short is that being an MLA he was elected as Dy. Speaker on 23rd December, 2008 and Notification regarding the same is duly on record. Having become the Dy. Speaker and the Presiding Officer, Respondent does not perform any of the functions of a Legislator, namely, voting, or participating in the proceedings. It is urged that the Respondent was entitled to be excluded from the class of 'Public Functionary' by virtue of Section 2(m) (iii) of the Act. Section 2(m) (i)(ii) (iii) of the Act is reproduced for facility of reference:

"Section 2(m) 'Public functionary' means a person who is or has been at any time-

- (i) The Chief Minister or a Minister;*
- (ii) A Member of Legislative Assembly;*
- (iii) A person having the rank of Minister but shall not include Speaker and Deputy Speaker of the Legislative Assembly ;"*

Mr. Mayee on behalf of the Respondent urged that an analogy could be drawn with the case of a lawyer, who is elevated to the Bench. His license to practice remains suspended during his tenure as a Judge. He submitted that similarly, when a Legislator gets elected as Dy. Speaker or Speaker, he does not perform any function as a Legislator and discharges the functions only of the Speaker or Dy. Speaker. He urged that section 2(m)(iii) excluded from the definition of "Public Functionary" a person holding the rank of a Minister who was a Speaker or Dy. Speaker from the jurisdiction of the Lokayukta. It is urged that the notice had been issued on 6th December, 2010 and was served on 20th December, 2010, when the Respondent had already become Dy. Speaker, having been elected on 23.12.2008. Inquiry

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proceedings initiated against the Respondent Dy. Speaker were non est, without jurisdiction and per incurium. Accordingly he prays for the proceeding to be dropped.

9. Rebutting the above submissions Mr. Viraj R. Datar, Amicus Curiae and Mr. Chetan Lokur, Advocate submit that in the instant case the cause of action within the meaning of section 2(b), arose upon unauthorized construction being carried out in the property in question. It was a cause of action which continued with the beneficial enjoyment of unauthorized construction by the Respondent during his tenures as an MLA hither to before. It is not disputed that the Respondent continued as MLA after being elected in 1993 to 1998 in the first term, 1998 to 2003 in the second term and 2003 to 2008 in the third term and also in the 4th term when he got elected as Dy. Speaker. Allegations of breach of norms of integrity and conduct relates to the period when he was an MLA. In terms of section 8 (b) of the Act, it is only if cognizance is taken after the expiry of period of 5 years of the act complained that the inquiry is barred. In the instant case, cognizance has been taken in 2010, within a period of 5 years of the continuous beneficial enjoyment as MLA. In support of the argument that it is not only the person who is "Public Functionary" against whom inquiry can be conducted, but same can be conducted against a person who has been a "public functionary" subject to provision of section 8(b). Learned Amicus Curiae referred to section 2(m) which provides as under:

"public functionary" means "a person who is or has been at any time....."

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Learned Amicus Curiae next submitted that the exclusion under section 2(m) (iii) was only of persons having a rank of Minister who happens to be a Speaker or Dy. Speaker. This exclusion was confined to a person having a rank of a Minister.

The other public functionaries are provided for in section 2(m)(i) and 2(m)(ii), namely, the Chief Minister or Minister under 2(m)(i) and Member of Legislative Assembly under 2(m)(ii). He submitted that there was no exclusion, as was provided under sub clause (iii) of (m), in respect of sub clause (i) and (ii) which pertain to Chief Minister or Minister and Member of Legislative Assembly. In other words, he submitted that the Respondent even as Dy. Speaker continued to be a Member of Legislative Assembly. Lastly, reference was made to Article 178 and 212 of the Constitution of India. Article 178 makes the provision for Speaker and Dy. Speaker of the State Legislative Assembly. Article 212 prohibits the Courts from inquiring into proceedings of the Legislature, while sub clause (2) of Article 212 bars jurisdiction of the Courts against officers regulating procedure and conducting business of Legislation and in respect of exercise by him of those powers.

Reference was also made to section 18 (3) of the Government of NCT of Delhi Act, 1991 which provides for Delhi Legislature to have the same powers, privileges and immunity as of State Legislative Assembly. He therefore urged that under the Constitutional scheme even the protection which was available to the Speaker or Dy. Speaker was in respect of the powers and duties concerning regulation of the Assembly or the house. It was not extendable to the private or other acts of the Speaker. In short, the submission being that the immunity

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provided to the Speaker and Dy. Speaker of Delhi Legislative Assembly could not be higher than that of the State Assemblies and House of People under the Constitution.

He submitted that therefore, Respondent- Dy. Speaker could not enjoy immunity in respect of his acts in relation to the unauthorized construction, when the same are per-se in violation of norms of conduct expected of class to which he belongs.

10. Having heard the learned Counsel and noted the submissions made in detail, I find considerable merit, firstly in the submission that the notice of inquiry relates to acts and omissions of the Respondent while he was a Member of the Legislative Assembly. There is no dispute with regard to the fact that the properties were purchased by the Respondent in 1989, as stated by him and thereafter renovation and alterations were carried out as an MLA. The Respondent had continued with the beneficial enjoyment of the unauthorized construction and it is a continuous cause of action with the unauthorized construction and beneficial enjoyment from day to day. The cognizance for purpose of inquiry was taken by issuance of notice on 6th December, 2010. Cognizance could be taken in respect of any act or omission in the preceding 5 years which becomes apparent from the provision of section 8(b) read with section 2(m)(i) of the Act. The specific words used are:-

“Public Functionary means a person who is or **has been** at any time.....”

For example if a Legislator, who has committed actionable acts or omissions, but does not get re-elected and he ceases to be Legislator, cognizance can still be taken in respect of the acts done

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while he was a legislator subject to the limitation of five years. Applying the above rationale, there is no doubt that cause of action for the present inquiry arose when the Respondent was a Legislator and was not holding post of Dy. Speaker. Considering the view that has been taken, it was not necessary to refer to the other submissions made by the Amicus Curiae. However, there is also merit in the submission that there was no exclusion provided under either section m(i) or m(ii). The exclusion that has been provided is confined to the category of persons in m (iii). It may also be noticed that under the scheme of the Act, there is specific provision under section 17 for excluding from the jurisdiction of the Lokayukta Members of the judicial services and civil services and those in the civil service and holding civil posts. Considering the scheme of the Act, as noticed above, and the Constitutional scheme as manifested in Article 178 and 212, read with section 18(3) of the Government of NCT of Delhi Act, 1991, it would follow, firstly that the exclusion under the Act has to be confined to clause m(iii) alone and would not exclude the MLA. Secondly, the ambit of the immunity under the Constitutional Scheme is in respect of exercise of power and acts in relation to the proceeding of the Legislature. Under the constitutional scheme, no immunity or protection is provided to the Speaker or Dy. Speaker in respect of private acts. It would, therefore, follow that when such protection is not available even to the Head of the State or the Governor and the Speaker and Dy. Speaker of the Parliament and Legislative Assemblies of the States, such immunity cannot be sought in respect of private acts of the Speaker or Dy. Speaker of Legislative Assembly of NCT of Delhi.

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11. Ld. Counsel for respondent while relying upon judgment of the Hon'ble Supreme Court in (1997) SCC 42, Institution of A. P. Lokayukta/UPA-Lokayukta, AP and others Vs. T. Rama Subba Reddy and another has argued that since the respondent in his capacity as Deputy Speaker is not working in connection with the affairs of Govt. of NCT, he would not be covered within the ambit of the definition of 'public functionary'. In the above case the question was whether an officer working in Andhra Pradesh State Road Transport Corporation or in Cooperative Societies would be a public servant as defined under Andhra Pradesh Lokayukta Act 1983 or not? Section 2 (K) of the said Act which defines public servant includes an officer as referred to in Clause (i) of Section 2. Clause (i) of Section 2 of the said Act provides that officer means a person appointed to a public service or post in connection with the affairs of the State of Andhra Pradesh. In view of the above provisions, the Hon'ble Supreme Court held that before a person can be said to a public servant because he is an officer, it must be shown, that he was appointed to public service or post in connection with the affairs of the State of Andhra Pradesh. It was further held that writ petitioner in the said case could not be said to be person appointed to public service or post in connection with the affairs of the State Andhra Pradesh. Hence Petitioners were not full fledged government servants who would be entitled to enjoy the protection of Article 311 of the Constitution of India.

It may be seen that the provisions of Andhra Pradesh Lokayukta Act 1983 are different from Delhi Lokayukta and Upalokayukta Act, 1995. The ambit and scope of the term "Public Functionary" in the present case has to be seen in the light of Section 2

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(m) of Delhi Lokayukta and Upalokayukta Act, 1995. The conduct of respondent under enquiry also pertains to the period when he was MLA only before his appointment as Deputy Speaker. There is no allegation with regard to his action as Deputy Speaker in connection with the affairs of the State. Arguments advanced by Ld. Counsel for Respondent rather support the contention of Ld. Amicus Curiae that immunity is available to respondent only while performing the duty as Deputy Speaker and not for his other acts.

The judgment cited by Ld. Respondent's Counsel does not advance the case of the Respondent in any manner.

12. It would be seen that section 2 (m) (iii) of the Act merely excludes Speaker or Dy. Speaker from the definition of 'public functionary' while they function as Speaker or Dy. Speaker. There is no blanket immunity or protection, provided under section 2 (m) (iii) of the Act, to the Speaker or Dy. Speaker from inquiry under the Act during the term of their office. In this connection, reference may be made to Article 361 (2) and (3) of the Constitution of India providing absolute protection to President, Governors and Raj Pramukhs of States. The said clauses are as under :-

"Article 361: Protection of President and Governors and Rajpramukhs

(1)

(2) No criminal proceedings whatsoever shall be instituted or continued against the President or the Governor of a State, in any court **during his term of office.**

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(3) No process for the arrest or imprisonment of the President or the Governor of a State, shall issue from any Court **during his term of office.**

(4).....” (Emphasis supplied)

The above provides blanket protection or immunity to the President, Governor and Raj Pramukh against criminal proceedings and arrest or imprisonment during their terms office, while it is not the case under section 2 (m) (iii) of the Act for Speaker or Dy. Speaker to illustrate, a Member of Legislative Assembly on his appointment as Speaker or Dy. Speaker of Legislative Assembly would have the protection from inquiry, for his acts as Speaker or Dy. Speaker since in that capacity he ceases to be a ‘public functionary’.

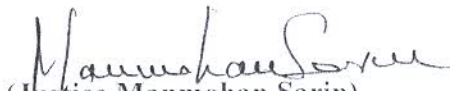
However, the Speaker or Dy. Speaker would have no such protection or exclusion in respect of acts or omissions before his appointment as Speaker or Dy. Speaker. The position would be similar for an MLA who loses an election and ceases to be a public functionary since he is not absolved or provided immunity for the acts or omissions committed by him while he was an MLA. This statutory position is duly manifested by clause 2 (m) (ii) of the Act being independent of clause 2 (m) (iii).

13. Lastly, the provision of this enactment which is for eradication of the evil of corruption and maladministration has to be construed liberally so as to advance the remedy as has been held by the Division Bench of the Hon’ble High Court in 160 (2009) DLT, Office of Lokayukta Vs. Govt. of NCT of Delhi and another.

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In the instant case, the inquiry is in respect of menace of unauthorized constructions widely prevalent in the metropolis of Delhi where action sought to be taken is in respect of construction owned by the public functionaries. Needless to mention that the Public Functionaries, by making informed choice voluntarily to abide by municipal bye-laws, can give a lead in containing the spate of unauthorized constructions as they are the torch bearers. It was with this intention that this forum had also inquired from the Respondent whether he was willing to give undertaking that he would get regularizable portion regularized as may be permissible under the development controls to be finalized under the Master Plan 2021 and to have the non-compoundable portions demolished. Unfortunately, the Respondent has opted for the contrary and contested it on the ground of lack of jurisdiction.

14. In view of the forgoing discussion, the preliminary objections have no merit and the application is dismissed.


(Justice Manmohan Sarin)
Lokayukta

Dated : 30th May, 2011
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