

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA No. 50 of 2001

% Reserved on: October 24, 2008
Pronounced on : April 02, 2009

Municipal Corporation of Delhi & Anr. Petitioners

through : Mr. Sanjeev Sabharwal with
Mr. Alok Singh, Advocates

VERSUS

B.D. Sharma Respondent

through : Mr. Rajesh Yadav with
Ms. Suchira V. Arora, Advocates

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI

THE HON'BLE MR. JUSTICE MANMOHAN SINGH

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| 1. | Whether Reporters of Local newspapers may be allowed to see the Judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the Judgment should be reported in the Digest? | Yes |

MANMOHAN SINGH, J.

1. This is the first appeal preferred by the Municipal Corporation of Delhi (for short, 'MCD') under Section 96 of the Code of Civil Procedure, 1908 read with Order XLI thereof. Assailed is the judgment and decree dated 16.9.2000 passed by the learned Additional District Judge (ADJ) in a suit preferred by the respondent in this appeal (hereinafter referred to as the 'plaintiff') seeking possession of land bearing property No. 34 measuring 180 sq.yds. comprised in *Khasra* No. 34/4 situate in Triloki Colony in the revenue estate of village Kotla Mubarakpur, New Delhi. By reason

of the said judgment an decree, the learned ADJ has decreed the suit in favour of the plaintiff directing the MCD to handover the possession of the suit property to the plaintiff after removing the structure and *malba* from site. Damages @ Rs.500/- p.m. from the date of filing till the recovery of possession are also granted in favour of the plaintiff.

2. The case of the plaintiff was that M/s. Lila Ram & Sons, c/o. 4/5-B, Asaf Ali Road, New Delhi were the owners of the suit property and the plaintiff purchased the said property from it vide agreement dated 11.5.1978 for a consideration of Rs.7,000/-. The proper sale deed dated 17.4.1981 was also executed in this behalf, which was registered as document No. 1886 in Book No. I, Volume No. 4460 at pages 160-164 in the Office of the Sub-Registrar, New Delhi on 20.4.1981. The mutation was also sanctioned in favour of the plaintiff by the revenue authorities vide No. 2567. The MCD was in possession of the said property at that time as a licensor under M/s. LMG Colonizers and under M/s. Lila Ram & Sons. Thus, after the purchase of the property by the plaintiff, MCD became licensee of the plaintiff by operation of law. The plaintiff sent notice on 8.5.1989 terminating the license. As per the plaintiff, in June 1981, the MCD even removed the tents from the suit property and also handed over the actual possession of the same to the plaintiff. However, in October 1986, the plaintiff found that MCD had illegally encroached upon the suit property and even constructed a room over there. The plaintiff could not come to know of this

earlier as he was in the service of the Indian Air Force and was residing mostly out of Delhi. He took retirement from their w.e.f. 1.4.1986 and when he visited the property in October 1986, he found illegal possession of the MCD over the property in the manner stated above. He came to know that the MCD had in fact encroached upon the property sometime in the year 1983. In February 1987, when he visited again, he found that MCD had illegally raised a boundary wall of about 5 feet around the land in dispute. In fact, the MCD was running a school from there. According to the plaintiff, the MCD was ranked a trespasser in the property and was liable to handover vacant and peaceful possession of the suit property. After serving legal notice dated 2.4.1987 to the MCD under Section 478 of the Delhi Municipal Corporation Act, calling upon the MCD to handover the peaceful and vacant possession of the said property and also to pay damages, the plaintiff filed the suit in question as the MCD did not accede to his request. MCD filed written statement raising various preliminary objections. On merits also allegations were denied. It was the case of MCD that a school had been functioning in the premises since 1957 and no license fee had ever been paid to either M/s. LMG Colonizers and M/s. Lila Ram & Sons and no license/agreement had ever been executed between the parties. Claim of the MCD was that suit property had been gifted to it for purpose of running a school in public interest and, thus, it belonged to the MCD. It was also claimed that later on this property became a part of layout plan for

school. Service of notice was also denied. The plaintiff filed replication thereto refuting the allegations. On the basis of pleadings, following issues were framed by the trial court :-

- “(i) Whether the pltf. is the owner of the suit property and is entitled to recover possession from the defdts.? OPP
- (ii) Whether the pltf. is entitled to recover damages from the defdts.? If so at what rate and for what period? OPP
- (iii) Whether the suit of the pltf. is barred u/s. 477 and 478 of the DMC Act? OPD
- (iv) Whether the suit has not been properly valued for the purpose of court fees and jurisdiction and this court has no perculier jurisdiction to try the present suit? OPD
- (v) Whether the suit property belongs to the defdts. and the colonizers gave the property to the defdts. for public utility? OPP
- (vi) Whether the defdt. Has become the owner by adverse possession? OPD
- (viii) Relief.”

3. The plaintiff examined himself as PW1 and Sh. Prem Raj as PW2 when leading evidence in rebuttal. The defdts. examined Smt. Gur Pyari as DW1 being a teacher of the MCD school. It also examined Smt. Kamlesh Mudgal, teacher as DW2. It examined Sh. B.S. Tomar, Assistant Education Officer as DW3, Sh. Jal Singh, Land and Estate Dept. Head Clerk as DW4, Mrs. Kusum Kapoor, Assistant Education Officer as DW5, Sh. Kailash Chand Meena, Assistant Engineer, Town Planning as DW6.

4. The learned ADJ after hearing the arguments held issue No. 1 in favour of the plaintiff holding that he was the owner of the property on the basis of sale deed executed in his favour. Following discussion

in this behalf, entered into by the trial court, may be extracted, as in this appeal not much quarrel is made about the same :-

“Issue No.1

The plaintiff has placed on record the certified copy of the sale deed executed in his favour as Ex.D1 and PW2 Sh. Prem Raj executants of the said document has affirmed that the property had been sold to the plaintiff. Though during arguments it was submitted that neither LMG colonizers nor Lila Ram and Sons had any title to the property transferred to the plaintiff, it is apparent from the pleadings as also the evidence on record that the MCD itself recognizes that M/s. LMG Colonizers were the owners of the suit property in as much as the MCD itself refers to the sanctioned plan obtained by LMG Colonizers for development of their colony. Moreover it was claimed that the colonizers had approached the MCD in 1957 for regularization of its colony and at that time portions were earmarked for parks, roads and community services by the colonizers. Thus apart from the documentary evidence even from the pleadings it appears as an admitted fact that the suit property was owned by LMG Colonizers and thereafter by M/s. Lila Ram and Sons of whom the PW 2 was one of the partners and attorney on the basis of which the property was transferred to the plaintiff. It was submitted on behalf of the MCD that PW2 was the uncle of the plntf. But this fact would not lead to conclusion that there was no sale or transfer of the property by the uncle to the nephew as claimed by the plaintiff. On the basis of this evidence therefore the plaintiff is held to be the owner of the suit property and is therefore entitled to recover possession from the defendants.

This issue is answered in favour of the plaintiff.”

5. Since the plaintiff was held to be the owner of the property and entitled to take possession from the MCD, possession with the MCD was treated as unauthorized and while answering the issue No.2, damages @ Rs.500/- p.m. were granted from the date of filing of the suit. While dealing with the issue No.5, the learned trial court observed that though MCD claimed that property in question had been gifted to it, no document of gift was produced by the MCD. Even the colonizers had stated on oath that the suit property was never gifted to the MCD.

6. The Trial Court held, and rightly so, that there cannot be an oral gift of immovable property. The argument of the MCD that the colonizers had given the suit property for public utility purposes and under Section 313 of the Delhi Municipal Corporation Act, it had become owner of the suit property, has also been turned down by the learned ADJ. It is remarked, in this behalf, that there is no dispute that M/s. LMG Colonizers had applied for sanctioned plan copies (Ex. DW-6/1 and DW-6/3) which would show that it never gave property to the MCD. The contention of the MCD that as per the layout plan the property is earmarked for school purposes, which is being run and, therefore, it becomes a property of the MCD is repelled in the following terms :-

“Section 313 refers to lay out plans. It makes it obligatory upon the owner who is applying with a lay out plan to show among other things the reservation of allotment of any site for any street, open space, park, recreation ground, school, market or any other public purpose. However, nothing in the Act shows that the mere earmarking of land by the colonizer/applicant entailed the vesting of rights of ownership in respect of these facilities in the MCD. The situation is otherwise. Under Section 313 DMC Act though reservations have to be made for streets in the lay out plans, under Section 316 it is the discretion of the owners to require the streets to be declared public and for such declaration a requisition of the majority of the owners has to be made to the Commissioner who may declare such a street public street and it is only thereupon that the street vests in the Corporation. This clearly shows that the mere reservation of sites for street does not have the effect of vesting that street in the Corporation.

No such provision has been made in respect of schools. However, under Section 197 of the DMC Act the Corporation has the power to acquire and hold movable and immovable property or any interest therein. Under Section 198, the Corporation can acquire any immovable property for the purposes of the Act by acquisition of the property by the Commissioner on behalf of the Corporation by agreement on such terms and at such price as may be appraised by the Standing Committee. Under Section 199 of the DMC Act

whenever the Commissioner is unable to acquire any immovable property under Section 198 by agreement the Commissioner is to request the Central Government to acquire the land under the provisions of the Land Acquisition Act 1894 and on payment of compensation awarded under that Act by the Corporation and the charges incurred during acquisition, the land would vest in the Corporation.

In these circumstances it is clear that if the Corporation had acquired the suit property for purposes of the school it should have done so under Section 198 or under Section 199 of the DMC Act. The defendant has failed to show any document of agreement or acquisition whereby the suit property was acquired by the defendants.

With regard to the claim that the property had been given by the colonizer for public utility the evidence does not support the defendant. PW2 has stated that the school was found to be on the site of service lane and therefore he had written letters to the Education Officer DMC. The reference made in this correspondence Ex.PW-2/1 and Ex.PW2/17 is that a particular site had been marked for school purposes and the MCD was required to vacate the suit premises and shift to the other site. It was argued by the Id. counsel for the MCD that these communications were fabricated and manipulated and that in any case the Assistant Education Officer Mr. A.P. Kapila had no authority to communicate with the PW2 in respect of the site for the school. There is no force in these contentions. The correspondence has been produced by a witness from the MCD office itself. DW3 Sh. B.S. Tomar Assistant Education Officer has admitted knowing Sh. A.P. Kapila Assistant Education Officer therefore Sh. A.P. Kapila is not a fictitious person. There is no fact disclosed on the record by the defendant which discloses fraud and manipulation in respect of the correspondence, to show that Sh. Kapila had reason to conspire with the plaintiff to prepare documents relating to the early 1960s i.e. 1961-1963. Whether or not Sh. Kapila had the authority to enter into correspondence with PW2 Sh. Prem Raj is not a matter that would have been known to Sh. Prem Raj. It was for the defendant to show that Sh. Kapila lacked the required authority.

The defendants have sought to establish that their school had been running since 1957. According to PW2 some tents had been pitched for running a school on the land of the colony and when LMG Colonizers started development of the colony it was found that the school tents fell on the site of service lane and thereupon he wrote a letter on 5.7.61 to the Education Officer MCD to shift the tents. Since the MCD claims that the school was in existence since 1957 the possibility of Prem Raj entering into the correspondence with the Education Officer of the MCD in 1961 is not such an improbable event to lead to the conclusion that the correspondence produced by the MCD officials during the

testimony of the PW2 are fabricated and manipulated letters. The plea of the defendants in this regard is therefore to be repelled.

From the evidence on the record it is also not possible to accept the contention of the defendants that it was the suit property alone that was earmarked as a school site. The defendants through DW6 has placed on record Ex. DW6/1 and Ex.DW6/3 which are the lay out plans and the revised lay out plans submitted by LMG Colonisers in respect of Triloki Colony at Kotla Mubarakpur. These plans show that an area of 7,000 sq.yards had been earmarked as school area. In the correspondence between Sh. Prem Raj and the Education Officer/Assistant Education Officer MCD which are EX.PW2/3 reference is made to an offer to the MCD for shifting from the present site to the school site of 7000 sq. yards for which the MCD was to pay Rs. 1 per month as licence fee and about which there was also an interest of the MCD for purchase. Sh. Prem Raj was also requested to disclose the price at which he was prepared to sell the school site of 7,000 sq. yards to the MCD. It is therefore clear that what was the school site was a different and much larger plot and was not the same as the property which is only 180 sq. yards. The defendants therefore cannot claim that the suit property had been given to him for public utility. What was to be taken over as public utility was a completely different piece of land.

The Id. counsel for the MCD argued that the fact that in Ex.PW2/7 Sh. Prem Raj asked for Rs.40 per square yard for the school site in 1963 was not believable since the suit property is claimed to be transferred to the plaintiff in 1981 for Rs.7000 which would be about Rs.38 per square yard. I do not find this submission sufficient to discount the fact that the school site was measuring 7000 sq. yards and was clearly earmarked in the original lay out Ex.DW6/1 as also the revised lay out plan Ex.DW6/3. The vendors may have claimed commercial rates from the MCD while transferring at a concession the property to his own nephew. Besides the defendant has placed on record Ex.DW4/1 being the register of immovable property of the MCD wherein it is written that the Nigam School in tents at Bapu Park, Kotla Mubarakpur was valued at Rs. 1,39,433/- on 12.11.69. Ex.DW4/1 and its site plan Ex.DW4/2 do not correspond to the suit premises. Rather the site plan Ex.DW4/2 would relate to the portion earmarked for school of 7000 sq. yards in the lay out plan. Ex.DW6/3 and DW 6/1 as it is open on all sides. DW 4/1 also refers to the area being 1,388.33 sq.yards/1160.64 sq.meters. In these circumstances there is nothing to show that the suit premises had been given to the MCD for public utility.”

7. Learned counsel for the MCD/appellant could not advance any arguments to rebut the aforesaid findings arrived at by the learned

ADJ on the basis of evidence placed on record. In fact, adjournments were taken from time to time by the MCD's counsel on the ground that MCD was trying to search some important document, which may have bearing in this case. In this behalf, oral submission was made that giving of the property by the colonizer to the MCD was taken note in the meeting of the Standing Committee and resolution was passed to this effect. However, even after number of adjournments, no satisfactory evidence could be produced in support of such a submission. CM No. 11034/2008 is filed in which plea was raised that the impugned judgment of the trial court is challenged on the principle of adverse possession. In support of this plea, the appellant/MCD annexed copy of Resolution No. 110 dated 30.4.1965 passed by the Standing Committee, which reads as under :-

“Resolved that in view of the fact that the area of Kotla Mubarakpur is to be redeveloped, the area marked as A B C D E F G of Triloki Colony be retained as already approved by the Standing Committee and the rest of the area of Triloki Colony be utilized for the future development of Kotla Mubarakpur Area. The area so carved out be utilized for Community facilities.

The School site already existing in the approved Triloki Colony shall be transferred to Municipal Corporation of Delhi free of charge from the colonizer.”

8. It is alleged that at the time of filing of the appeal, MCD was not aware of the aforesaid resolution and, therefore, this fact could not be brought to the notice of the Court. However, this would not advance the case of the MCD. Firstly, it has to be borne in mind that we are sitting in appeal against the judgment and decree of the trial

court. If any document is to be produced at the appellate stage, appropriate permission under Order XLI Rule 27 of the CPC is to be filed justifying the case for adducing additional evidence at the appellate stage. No such attempt is made. Secondly, original of the said purported resolution had not been filed. Only a photocopy, as true copy, is filed. Even after taking various adjournments, the MCD could not produce the original and stated that records are not traceable. Thirdly, and that is most important, the plea of adverse possession was never taken before the trial court and no issues framed thereupon. It would not be permissible for the MCD to take such a plea in the appeal for the first time. Therefore, case of adverse possession is neither made out by the appellant nor can it be permitted to do so.

9. It has already been established on record that the plaintiff is the owner of the property in question. MCD is a statutory body. It has to show, on the basis of valid documents, the right over the suit property, which it has failed to. We are conscious of the fact that a school is being run on this property for number of years. However, a statutory body cannot claim public interest by encroaching upon or usurping the property of a citizen. If the property in question is needed for public purpose, appropriate course is to acquire the same after following the due procedure as laid down in the Land Acquisition Act, 1894 so that proper compensation is paid to the land owner. Without doing the same, on the ground of purported public interest, the MCD cannot continue to occupy the suit property

illegally, which belongs to other person. Agreeing with the findings of the learned trial court and as there is no merit in this appeal, the same is dismissed along with CM No. 10034/2008 with costs.

10. **CM No. 10029/2008**

This application is preferred by the plaintiff seeking enhancement of the mesne profits. The market rate of the rent for fixing the mesne profits is to be determined by the trial court. Such an enquiry has to be under Order XX Rule 12 of the CPC. Since we are dismissing the appeal for the purpose of determining the mesne profits for the period from the date of filing of the appeal till the vacation of the premises by the appellant/MCD, the matter is relegated to the learned trial court. Parties will be at liberty to adduce evidence on this aspect.

This application is disposed of in these terms.

(MANMOHAN SINGH)
JUDGE

(A.K. SIKRI)
JUDGE

April 02, 2009
nsk