

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

+ **CM(M)1255/2009**

% **Date of decision: 5th November, 2009**

SHYAM SUNDER Petitioner

Through: Mr.Rajiv Khosla with Mr D.B. Yadav, Advocates

Versus

SHEO PAL & ORS Respondents

Through: Mr. Ajay Verma with Mr Amit Mehra, Advocates
for R-2/DDA.
Mr Rahul Srivastava with Ms Suparana Srivastava,
Advocates for R-3/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 against the order passed by the Trial Court directing the respondent/MCD to demolish the encroachment made by the petitioner on the public road. The said order was made in a suit instituted by the respondent No.1 alleging encroachment on public road/land by the petitioner and impleading the petitioner and the respondent No.2/DDA and the respondent No.3/MCD as

defendants and seeking the relief of removal of encroachment. The suit was accompanied with an application for interim relief. It appears that the trial court called for the status report from the respondent No.3/MCD. The MCD reported that there were encroachments on the public road. The trial court vide order dated 14th July, 2009 directed the respondent No.3/MCD to remove /demolish the entire encroachment as depicted in the status report filed by the MCD. The concerned SHO was also directed to provide the necessary police force in order to avoid any law and order situation at the time of removal of the encroachment.

2. The petitioner herein filed an application before the trial court under Order 21 Rules 26 and 29 of the CPC. The case of the petitioner in the said application was that and as also contended by him in the written statement, he had himself earlier filed a suit for injunction to restrain the MCD from removing the portion of his property which was claimed by the MCD to be an encroachment on public land/road; the said suit was dismissed; the petitioner had preferred a first appeal against the judgment dismissing the suit but which had also been dismissed; that RSA 56/2008 preferred by the petitioner against the dismissal of the first appeal had been filed and the next date of hearing therein is 15th February, 2010.

3. The petitioner thus contended that since the appeal against dismissal of his suit was pending before the High Court, the property subject matter of that appeal should not be demolished by an interim order in the suit instituted by the respondent No.1 herein. Though the provisions of Order 21 Rules 26 and 29 of the CPC relate to execution but the counsel for the petitioner contends that the principles enshrined therein were sought to be invoked.

4. The trial court, upon filing of the application aforesaid by the petitioner and pending its consideration directed the respondent No.3 MCD to stay the operation of the earlier order dated 14th July, 2009 (supra). Subsequently, vide order dated 7th October, 2009 impugned in this petition, the application of the petitioner under Order 21 Rules 26 and 29 of the CPC has been dismissed and the order dated 14th

July, 2009 i.e., directing the MCD to demolish/remove the encroachment has been ordered to be complied with. The petitioner preferred revision petition before the District Judge against the said order and which was obviously dismissed as not maintainable. Thereafter, this petition has been preferred for setting aside of the orders dated 14th July, 2009 and 7th October, 2009 of the trial court.

5. The order dated 14th July, 2009 of the trial court directing the MCD to demolish/remove the encroachment allegedly by the petitioner was on an application under Order 39 Rules 1 and 2 of the CPC. Order 43 of the CPC provides for an appeal against such an order. Ordinarily a petition under Article 227 of the Constitution of India would not lie when the remedy of appeal has been provided for. Upon the same being put to the counsel for the petitioner he contends that the District Judge was approached but has declined the relief. However, the District Judge was approached by way of a revision petition under Section 115 of the CPC, which lies before this court only and not by way of an appeal under Order 43 of the CPC. However, I note that the Additional District Judge has also observed *“the orders dated 14th July, 2009 and 7th October, 2009 are miscellaneous order and therefore are not appealable under Order 43 of the CPC.”* The Additional District Judge has erred in holding that the order dated 14th July, 2009 on an application under Order 39 Rules 1 and 2 of the CPC is not appealable under Order 43 of the CPC. Be that as it may the counsel for the petitioner also contends that the remedy of appeal is not available against the order dated 7th October, 2009 dismissing his application under Order 21 Rules 26 and 29 of the CPC. Though in my opinion, the grievance of the petitioner is against the order dated 14th July, 2009 only and not against the order on the application under Order 21 Rules 26 and 29 of the CPC because what is stated therein is merely a defence of the petitioner to the application under Order 39 Rules 1 and 2 of the CPC but in the entirety of the facts aforesaid and for the reason of the urgency expressed by the counsel for the petitioner, the matter has also been considered on merits.

6. I will first take up the contention of the counsel for the petitioner forming the basis of the application under Order 21 Rules 26 and 29 of the CPC. The same also forms the crux of the arguments of the counsel for the petitioner. The trial court has rightly held that since the suit filed by the petitioner for restraining the MCD/respondent No.3 from demolishing /removing the encroachment has been dismissed and the appeal thereagainst has also been dismissed, mere pendency of a second appeal would not entitle the petitioner to have the application for interim relief, in the suit filed by the respondent No.1 herein also for direction to the MCD to remove the encroachment, dismissed. The remedy, if any, of the petitioner is to apply in the court where the second appeal is pending for interim order restraining the MCD. The counsel for the petitioner admits that the application for interim relief has been filed in the said second appeal also. Obviously, no such order has been granted to the petitioner in that second appeal. No merits have been found by the trial court and the appellate court in the suit filed by the petitioner in the case of the petitioner of there being no encroachment and/or the alleged encroachment being part of his property. The question which arises is, when the petitioner has not succeeded in persuading the court where the second appeal is pending, should he be permitted a second chance in the suit filed by the respondent No.1. The answer has to be in the negative. There being findings of two courts in the suit filed by the petitioner of the petitioner having encroached upon public road/property and the MCD inspite of so having not removed the encroachment, the respondent No.1 became entitled to the interim relief in the suit filed by him for removal of the said encroachment.

7. It is often found that officials of the civic / municipal agencies fail to perform their statutory duties and which failure affects the citizens/residents of the locality and for whose benefit such civic/municipal bodies have been constituted. The citizens/residents are then compelled to approach the courts for a direction to the said civic/municipal bodies to perform their statutory functions. The case of encroachment having been made out in the suit filed by the petitioner himself and

the court where the second appeal of the petitioner is pending having not granted any protection to the petitioner, nothing wrong calling for interference by this court can be found in the order of the trial court.

8. The counsel for the petitioner taking a clue from the same, next contended that the suit itself was not maintainable and such power for issuing directions to the civic / municipal bodies vests only in the High Court in exercise of jurisdiction under Article 226 of the Constitution of India. Though no such plea has been taken in the petition filed before this court but even otherwise I do not find any merit therein. The respondent No.1 instituted the suit from which this petition arises claiming that he was a resident of the same road on which the petitioner had encroached; that his right of use of the said road was affected by the encroachment by the petitioner; that the MCD and the DDA inspite of representations had failed to act and therefore the suit was filed impleading all three as defendants for removal of the encroachment. Such a suit lies under the provisions of the Specific Relief Act inasmuch as the respondent No.1 has made out a case of his rights having been affected by encroachment at the instance of the respondent No.1 and by the failure of the respondents 2 and 3 being entrusted with the task of ensuring that no such encroachment takes place, to perform their statutory duties.

9. It is too late in the day for the petitioner to contend that the jurisdiction of the civil courts cannot be invoked in these matters and the jurisdiction is of the writ court only.

10. The counsel for the petitioner next urged that the respondent No.1/plaintiff had withdrawn his application under Order 39 Rules 1 and 2 of the CPC and thus the trial court erred in passing the order dated 14th July, 2009 directing the demolition. Though the said ground has been taken in the memorandum of the petition but no copy of the order of the trial court recording withdrawal of the application has been filed. The counsel for the petitioner seeks time to file the copy of the said order. I was inclined to adjourn the matter for the said purpose

but the counsel insists that in the interregnum the operation of the impugned order be stayed. For that I was not willing and as such the petition has been heard.

11. The plea of the petitioner of the application under Order 39 Rules 1 and 2 of the CPC on which order for removal of encroachment has been made, being withdrawn is not borne out from the order dated 7th October, 2009. The counsel for the respondent No.1/plaintiff was also present before the court on that date and had he not been pressing for interim relief, the occasion for the said order would not have arisen.

12. The counsel for the petitioner next contended that neither any notice had been issued by the respondent No.3/MCD to the petitioner nor any opportunity has been given to the petitioner to explain his version. That, in my view, is not the subject matter of the suit filed by the respondent No.1/plaintiff. The disputes between the petitioner and the MCD were not subject matter thereof. The petitioner had availed his remedy against the MCD and has lost in the two courts. In any case, if at all there is any merit in his said pleas, his remedy is in the court where the second appeal is pending and not before this court. From the perusal of the judgment of the trial court in the suit filed by the petitioner, it transpires that it was dismissed after the evidence has been recorded and has been found therein that the petitioner had indeed encroached on public land/road. For this reason also it cannot be said that the petitioner has not been given an opportunity. The petitioner has had full opportunity in the suit filed by him to establish that he had not encroached upon the public road

13. . Even otherwise encroachment on public land/road and unauthorised construction is a menace. It ought not to be tolerated. The petitioner has succeeded in thwarting action at the instance of the MCD inspite of his suit being dismissed and the appeal thereagainst having also been dismissed and there being no stay order in his favour from the court where the second appeal is pending. Now when, another resident of the locality aggrieved by such encroachment has

approached the court and sought directions for removal of encroachment and when the respondent MCD also confirms encroachment, in this proceeding the petitioner cannot be given a relief which he failed to obtain in his own suit.

14. There is no merit in this petition. The same is dismissed. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**November 5, 2009
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