

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

% *Judgment Reserved on: 02.11.2010*
Judgment Delivered on: 11.11.2010

+ **RSA No.28/2001 & CM No.73/2001 (for stay)**

1.SMT.SUBHADRA

2. SMT. CHANDERWATI Appellants

Through: Mr.Vipin K. Singh, Advocate.

Versus

DELHI DEVELOPMENT AUTHORITY

.....Respondent
Through: Mr.Bhupesh Narula, Advocate.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. This second appeal has impugned the judgment and decree dated 10.1.2001 which had endorsed the finding of the Trial Court dated 2.5.2000 whereby the suit of the plaintiffs i.e. Smt.Subhdara & another was dismissed.

2. There were two plaintiffs who had filed the present suit which was a suit for permanent injunction. The plaintiffs were stated to be in possession of two residential houses bearing no. 20-H and 20-I in Khasra No.48/7, 4 bighas 4 biswas in Village Humayunpur of which a portion of land i.e.75 sq. feet stood in the name of each plaintiff. It was stated that the plaintiffs were

paying house tax and water tax in respect of the suit property. The
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property had been described as being bounded on the northern side by property bearing no.B-4/182 and B-4/206, Safdarjung Enclave; on the west there was a land measuring 12 feet; on the east there was a pucca road. The contention of the plaintiffs was that on 10.3.1987 a demolition notice under Section 30(1) read with Section 31(1) of the Delhi Development Act, 1957 (hereinafter referred to as the Act) was served upon the plaintiffs restraining them from raising any construction in the land. On 8.9.1987 the officials of the DDA visited the site and threatened them with demolition. A decree for permanent injunction was accordingly prayed for by filing the present suit.

3. The defendant/DDA had contested the suit; it was submitted that the land belongs to the department; suit was not maintainable. It was denied that the suit land forms a part of the Khasra no.48/7, Village Humayunpur; contention was that the plaintiffs have illegally and unauthorizedly encroached upon the land of the defendant which land falls in Khasra no.48/5; they had illegally raised construction therein; Khasra no.48/5 had been acquired by the government vide Award no.1170 and has been placed at the disposal of the DDA under Section 22(1) of the said Act vide notification dated 3.11.1961.

4. Trial Judge had framed four issues. On 15.02.1989 the Patwari had been appointed as a local commissioner to demarcate the suit property. His report had been filed on 27.9.1989. No objections had been filed to the said report.

5. The plaintiffs in support of their case examined three witnesses of whom the Patwari Sunil Kumar was examined as PW-3. The department had also examined two witnesses of whom

the Patwari Gulfam Ahmed was examined as DW-1.

6. Trial Judge returned a finding that the plaintiffs are not the owners in possession of the residential houses bearing no.20-H and 20-I falling in Khasra No.48/7, Village Humayunpur; they had failed to establish that the suit land falls in aforementioned khasra. The demarcation report dated 27.9.1989 of the Patwari holding that two house fall in Khasra No.48/7 was ignored; it was held that the demarcation report had clearly stated that no permanent point could be found in the absence of which this was a violation of the Punjab High Court Rules and the said Rules not having been adhered to, this demarcation report could not be relied upon in evidence.

7. The relevant extract of the finding of the Trial judge qua this observation was recorded as follows:

“As per demarcation report dt. 27.9.89, it has been mentioned that houses of both the plaintiffs falls in Kh. No.48/7 and vacant land in front of the house does not fall in Kh. No.48/7. Counsel for pltf. during the course of arguments has submitted that as per aks sajra placed on record Ex.PW-3/1, under no circumstances vacant land in front of house can fall in Kh. No.48/5 because Kh. No.48/5 is in the Northern side of Kh. No.48/7 whereas vacant land is shown in the Eastern side of the suit property by Naib Tehsildar in the site plan prepared with the demarcation report. Copy of jamabandi has been placed on record and according to the same, land of Khasra No.48/7 is total measuring 34 bigha 3 biswas out of which 20 bigha is banjar and 14 bigha 3 biswa is gair mumkin. It is land Shamlat Thok of village Humayunpur and has been entered in the name of different persons. But still the question is same whether the suit land falls in Khasra No.48/7 or 48/5. In demarcation report, it has been mentioned that no permanent point was found on the site. According to Punjab High Court Rules regarding dispute of Boundaries, demarcation is required to be carried out at least from 3 permanent points and demarcation is a material piece of evidence only. Demarcation report has neither been exhibited nor proved by examining the persons who conducted the

demarcation. Moreover, at the same time, plaintiffs cannot deny some part of demarcation and can rely upon on other part of the demarcation. The demarcation report cannot be relied upon partly in favour of plaintiffs and partly against them. SLO for DDA submitted that at least vacant land which falls in Kh. No.48/5 be protected. But in my opinion as demarcation has not been carried out according to the rules as provided and it has not been proved in any manner, hence, cannot be relied upon to decide the question whether the suit land falls in Kh. No.48/7 or 48/5."

Suit of the plaintiff was dismissed.

8. The Appellate Court endorsed this finding. The first Appellate Court had also ignored the report of the Tehsildar. The finding on this issue *inter alia* reads as follows:

"The record of the learned trial Court would reveal that the court had directed the Nayab Tehsildar to carry out the demarcation in order to determine whether the suit property fell in khasra no.48/7 or in khasra no.48/5. The record of the learned trial Court contains one report of the Nayab Tehsildar, Attar Singh dated 13.9.89 submitting that the entire area is heavily built up and thus, it was only after inquiries that it was determined that four walls on khasra no.29 were very old and were taken as a measuring point after determining the measurements of khasra no.29 and finding the same correct. However, further demarcation was not conducted on that date on account of heavily built up properties in khasra no.30. After further directions were given for use of bamboos etc. Shri Attar Singh carried out the demarcation on 27.9.89 once again observing that the area was heavily built up and khasra no.29 with its four boundaries were found to be correct as per the field book measurement and from there the various measurements were commenced. The learned trial Court, however, did not look into this report on the ground that they were not proved by Shri Attar Singh. Moreover, the learned trial Court observed that the measurements were not taken from three permanent points as required under the Punjab High Court Rules and therefore, did not find it appropriate to rely on the demarcation report. According to the learned counsel for the appellants since the demarcation report had been sought for by the court it had become part of the court records. It was also submitted that since no objections had been filed therefore, the learned trial Court could not have rejected this report.

8. No doubt neither side had filed any objections to the Nayab Tehsildar's demarcation report. Moreover, when an area is heavily built up it is quite possible that permanent points as required for demarcation may not be easily traceable. However, even if the demarcation report is taken as an acceptable report it is difficult to see how the plaintiffs would be helped in their case. Admittedly the khasra no.48/5 is acquired land. Equally the khasra no.48/7 is private land. The demarcation report only says that the two houses fell in khasra no.48/7 whereas the area in front of these houses which was open land did not fall in 48/7. Having measured up to the houses it is not known why the Patwari failed to ascertain as to in which khasra the open vacant land fell. It was submitted that since 48/5 was towards the North of 48/7 as per Aks Shajra the vacant land could not be considered to be in that khasra number and thus, the learned counsel for the plaintiffs/appellants have submitted that the vacant land lying to the east of the constructed portion was clearly not part of the acquired land. Reliance has been placed on Ext.PW3/1 which is one Aks Shajra brought on record by the Patwari, PW3 examined by the plaintiffs. But it may be noticed that in this Aks Shajra whereas there are clear lines demarcating various khasras, only dotted lines seem to be delineate khasra no.48/5 and 48/7 which itself leaves the demarcation uncertain. 48/7 is rather extensive, as also 48/5 unless these two khasras were clearly demarcated by straight line. In the absence of such division no conclusion can be reached that 48/5 was only towards the North of 48/7 and not towards the East of 48/7 as certain portions have been separated only by dotted line towards the East also.

9. The plaintiffs in the plaint have set out confusing claims in that whereas they claim that in khasra no.48/7 the land belonging to Shri Nathu Ram, Har Narain owned 4 bighas and 4 biswas. They also claimed that there remained only 1500 sq. yard after disposing 2 bighas and 4 biswas by the forefathers but the extent of land belonging to Nathu Ram & Har Narain etc. is not clear at all. Moreover, the plaintiffs claim in the plaint that each had 75 ft. of built up area. No extent of vacant land adjacent to the built up area is mentioned. The Patwari's report is also silent about the extent of the built up area and the extent of the vacant land except to say that 70 ft. shown in black colours in his site plan did not fall in 48/7.

10. No doubt the Patwari, PW3, Shri Sunil Kumar deposed that khasra no.48/7 was in the ownership of Har Narain but it is claimed that khasra no.48/7 measures only 2 bighas and plaintiff Subhadra was in possession to the extent of 3 biswas and Smt.

Chandra Wati to the extent of 2 biswas. But these measurements were never mentioned in the plaint. Moreover, extract of which has been placed on record as Ext.PW1/2 is nowhere mentioned that Smt. Subhadra is in possession to the extent of 3 biswas and Chandra Wati to the extent of 2 biswas. Besides when the plaintiffs themselves claim equal extent of 75 ft. of built up area the testimony of PW3 Sunil Kumar that one plaintiff has 3 biswas and the other 2 biswas creates only contradiction in the case of the plaintiffs.

11. As regards the testimony of DW1 Gulfam Ahmad Patwari, he no doubt had stated that at the time of the filing of the written statement the DDA had believed that the subject matter in dispute fell in khasra no.48/5 and claimed that after demarcation the disputed land was taken by Nayab Tehsildar and Kanungo, it came to their knowledge that it fell in khasra no.48/7 which was not acquired by Government. It is clear that the Patwari's report restricts only the built up portion of the disputed property as falling in khasra no.48/7 excluding the vacant portion. Thus, DW1 has himself gone beyond the Patwari's report.

12. In these circumstances, neither can the plaintiffs/appellants seek any help from the Patwari's report nor from the oral testimonies of the witnesses to prove that the suit premises fell in khasra no.48/7. The only admitted fact is that khasra no.48/7 is not acquired and khasra no.48/5 is. But in the light of the contradiction pointed out hereinabove it is clear that the learned trial Court was justified in coming to the conclusion that there was no conclusive evidence to decide whether the suit land fell in khasra no.48/7 or 48/5. Even if the issue no.2 was decided against the DDA it is not as if the plaintiffs/appellants would be entitled to a decree in as much as they had to prove that the entire suit property comprising of built up and vacant land fell in khasra no.48/7 which belonged to the plaintiffs or their families as ancestral property. They have failed to discharge this onus. It is for the plaintiffs to prove their case as to their entitlement for an injunction and they have to stand on their own legs irrespective of how successful the defendants are in proving their defence."

9. This is a second appeal. After its admission on 5.12.2003 the following substantial question of law were formulated which inter alia read as follows:

"Whether in view of the statement of DW-1, Gulfam Ahmed, Patwari, New Lease Section, DDA, who deposes to the effect that

the house in question falls in Khasra NO.48/7, it would be proper for the courts below to have disregarded his evidence?"

10. On behalf of the appellant, it has been vehemently argued that the impugned judgment had illegally ignored the report of the Patwari. It is pointed out that the Patwari had been appointed under the orders of the Court. Admittedly no objection had been filed by either side to his report. In these circumstances, there was a patent illegality on the part of the two Courts below in ignoring this report. Once this report is read in evidence, it categorically establishes that the suit land falls in Khasra No.48/7; the land which has been acquired by government vide Award no.1170 is the land falling in Khasra No.48/5; the plaintiffs in these circumstances are lawfully entitled to a decree of permanent injunction.

11. Arguments have been countered by the department. It is submitted that the Courts below had returned positive findings and given cogent reasons for ignoring the report of the Patwari which was wholly for the reason that Patwari had failed to follow the mandatory procedure which is ordained under the Delhi High Court Rules which specifically postulate that for disputes relating to boundary, three permanent (pucca) points have to be located by the Tehsildar before the demarcation is effected. In the absence of this procedure having been followed by Patwari this report could not be looked into; it was not authentic.

12. No other argument has been urged before this Court.

13. Perusal of the record shows that on 22.2.1989 a local commissioner had been appointed to set at rest the controversy raised between the parties as to whether the suit land falls in Khasra No.48/5 or 48/7. The extract of the order dated 22.2.1989

reads as follows:-

“The controversy between the parties is regarding the Kh. No. in which the property in question is situated. The case of the pltffs. are that the property in question is situated in Kh. No.48/7 which has not been acquired whereas the case of the deft. is that the suit property is situated in Kh. No.48/5 which is acquired. It is not disputed that Kh. No.48/7 has not been acquired. In order to resolved the controversy between the parties Naib Tehsildar Mehrauli is appointed as the Local Commissioner, he will inspect the suit property and find as to whether the same falls within Kh. No.48/7 or falls within Kh. No.48/5. He will also find out as whether the suit land has been acquired or not. He will inspect the suit property after given notice to both the parties. His fee for that purpose is fixed Rs.500/- which will be shared equally by both the parties. The fees of the L.C. to be deposited within 10 days thereafter the notice will be sent to the L.C. Case adjourned for the report of L.C. for 5.4.89.”

14. On 15.9.1989 the Court had reiterated that no separate notice would be given to the parties; local commissioner would inspect the suit property on 27.9.1989 at 1.00 P.M. Report dated 27.9.1989 is on record. This is the report of Attar Singh, Naib Tehsildar, Mehrauli. As per this report the disputed land falls in Khasra No.48/7 in village Humayunpur. It further states that as per the directions of the Court the identification of the suit land as to whether it fell in Khasra No.48/5 or Khasra No.45/7 had to be determined and this was possible only after ‘nishandehi’/identification of the permanent points; it stated that ‘nisandehi’/identification of the permanent points was not feasible as there were houses located in the suit land; measurement in Khasra Nos.29 and 30 was taken with approximation whereupon the aforementioned conclusion had been arrived at; site plan was also prepared at the spot. The rough site plan appended along with the report had depicted the houses of the two plaintiffs in red colour

with a road on the east and the west side and a gali on the north. No further details or measurement had been depicted in this site plan. What was the built up area had not been explained and informed by the Patwari in his report except to show that the black portion in the rough site plan prepared by him did not fall in Khasra No.48/7. Aksjira report had proved through the version of PW-3 Sunil Kumar, the Patwari at the relevant time and is Ex.PW-3/1. Ex.PW-3/1 shows that there are dotted lines which had demarcated Khasra Nos.48/5 and 48/7; dotted lines are not deciphered anywhere else in Ex.PW-3/1; it was obviously for the reason that the demarcation of Khasra Nos.48/5 and 48/7 was uncertain. It was primarily for this reason that the local commissioner had been appointed to ascertain and identify as to whether the suit land falls in Khasra No.48/5 or 48/7. PW-3 who was the witness of the plaintiffs had stated that Subhadra i.e. the plaintiff no.1 is in possession of 3 biswas of land; plaintiff no.2 Chander Devi is in possession of land measuring 2 biswas of land; no such measurement has been detailed or mentioned in the plaint. Plaintiffs themselves appear to be confused.

15. DW-1 Gulfam Ahmed, Patwari (at the relevant time) had on the basis of the demarcation report dated 27.9.89 deposed that the subject matter of the suit property (as per the report) falls in Khasra No.48/7 and Khasra No.48/7 is not acquired by the government. The acquired khasra is Khasra No.48/5. There is no dispute to this factual averment of DW-1.

16. However, the question which has to be answered is as to whether the suit land falls in Khasra No.48/7 or 48/5. Both the Courts below had given concurrent findings of fact that the

demarcation report not having followed the procedure relating to enquiries to be made by Revenue Officers in boundary disputes, the said demarcation report could not be relied upon. The demarcation report had clearly stated that since there were houses in the vicinity no pucca/permanent points could be established for the purpose of 'paimaish'/measurement.

17. The Punjab Land Revenue Act, 1887 extends to the Union Territory of Delhi. Chapter VII deals with surveys and boundaries. Under Section 100, the Financial Commissioner has powers to make rules as to matters in which the boundaries of all or any estates in any local area are to be demarcated. Part C of the Delhi High Court Act 1966 relate to the instructions to Civil Courts. The procedure has been entailed for "Hadd Shikni" cases/boundary disputes under the aforementioned instructions which are binding instructions. As per these instructions the Field Kanungo should with his scale read on the map, the position and distance of those points from a line of square, and then with a chain and cross staff mark out the position and distance of those points. If there is no map on the square system available, he should then find three points on different sides of the place in dispute as near to it as he can, and if possible, not more than 200 kadams, apart which are shown in the map and which the parties admit to have been undisturbed. Further, these instructions should be followed by the Revenue Officers of Field Kanungos whenever they are appointed by a Civil Court as a Commissioner in suits involving disputed boundaries. This is a mandate.

18. These instructions/guidelines had not been adhered to as is evident from the demarcation report. The Tehsildar had admitted

that there is construction and houses have been raised in land in dispute; it is not possible to identify pucca/permanent points as a result of which the paimaish/measurement could not be taken. Only on approximations, the demarcation report had drawn a conclusion that the suit land falls in Khasra No.48/7. This was not the answer which was required to be given to the Court. A positive finding had to be returned in the absence of which both the Courts below had rightly ignored the demarcation report.

19. The plaintiffs had alleged that the suit land falls in Khasra No.48/7; the onus was upon him to prove it. They had failed to discharge this onus. This Court is not a third fact finding Court.

20. The question of law as formulated on 5.12.2003 was to the effect that the statement of DW-1 that the houses in dispute fall in Khasra No.48/7 could not have been ignored. Testimony of DW-1 was based on the demarcation report. That report itself has been ignored for the reasons aforementioned. It could not have been read in evidence. In this view of the matter, the testimony of DW-1 based on demarcation report is of no relevance. It is not as if DW-1, the Patwari had made an independent factual enquiry himself and had drawn the said conclusion. Both the Courts below had appreciated the fact that the demarcation report not having adhered to the procedure and the requirements which have been set out under the Punjab Land Revenue Act, 1887 applicable to the Union Territory of Delhi as also the Delhi High Court Act 1966 and Rules framed thereunder, this report was only a piece of paper; it had based its conclusion on approximations alone; paimaish/measurements could not be taken by the local commissioner. This report was thus rightly ignored. Substantial question of law is answered

accordingly.

21. There is no merit in the appeal. The appeal as also the pending application is dismissed.

(INDERMEET KAUR)
JUDGE

NOVEMBER 11, 2010
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