

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

% *Judgment Reserved on: 07.12.2010*
 Judgment Delivered on: 09.12.2010

+ **RSA No.110/2003**

MUNICIPAL CORPORATION OF DELHI Appellant
 Through: Ms.Amita Gupta & Mr.Rahat
 Bansal, Advocates.

Versus

PARSHOTTAM LAL GUPTA & ANR. Respondents
 Through: None.

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 appeal has impugned the judgment and decree dated 6.2.2003 which had reversed the finding of the trial judge dated 26.9.1998; vide judgment and decree dated 26.9.1998 suit of the plaintiff had been dismissed; vide the impugned judgment and decree dated 6.2.2003 his suit had been decreed.

2. The plaintiff has filed a suit for permanent injunction. He was stated to be in occupation of an office and open plot in II-F, Lajpat Nagar, New Delhi since 1965; he was running business of building material and as supplier. He was paying Rs.300/- to Som Nath Narula. Property is stated to be rehabilitation property and is owned by Custodian. Plaintiff had been given this accommodation by the Custodian authorities as he was a refugee from West Pakistan; he was yet to be given any other alternative

accommodation. Contention was that the Municipal Corporation of Delhi (MCD) had threatened demolition of the suit property. MCD was the owner of the suit property; it had no right to interfere in the peaceful possession of the plaintiff; suit for permanent injunction was accordingly filed.

3. Defendant contested the suit. It was stated that the defendant is living on government land and is an encroacher; in terms of Section 322 of the Delhi Municipal Corporation Act, 1957 (hereinafter referred to as the 'DMC Act'). No notice is required to be served upon the plaintiff. He is liable to be evicted forthwith.

4. Trial judge has framed four issues, which inter alia read as follows:

1. If any threat was given on 9.8.85/10.8.85 by the staff of the MCD, its effect? OPP
2. Whether the plaintiff is entitled to the relief claimed? OPP
3. Whether plaintiff's suit is not maintainable in view of the preliminary objection taken in their written statement? OPD
4. Relief.

5. Two witnesses had come into the witness box on behalf of the plaintiff. The certificate from the Shop Establishment Department had been proved as Ex.PW1/2; Assessment certificate for the year 1981-82 had been proved as Ex.PW1/3 and Ex.PW1/4; PW-2 UDC in the Land and Development office stated that the land in dispute belong to the Rehabilitation Department and it had not been transferred to the MCD. No evidence was led on behalf of the defendant. The findings were against the plaintiff. It was held that the plaintiff has failed to prove his ownership in the suit property. Issue nos.2 & 3 were decided against the plaintiff. Suit of the plaintiff was dismissed.

6. In appeal vide the impugned judgment and decree dated 6.2.2003 these findings were reversed; the findings returned as follows:

4. This judgment and decree of the learned trial court has been assailed by way of the present appeal on the ground that the impugned judgment was bad in law and facts and that the learned trial court grossly erred in observing that the plea of the plaintiff was that he was owner of the property whereas it was the plaintiff's case that the owner was the Custodian (L&DO) Ministry of Rehabilitation and that since he had paid damages to the L&DO the possession was regularised and the Plaintiff could not be removed, disturbed, or dispossessed from the property unless he had been provided alternate accommodation or it had been sold or lease to him. It was further submitted that no issue regarding ownership had been framed and any such finding by the learned trial court was wholly illegal and unwarranted. It was submitted that it was for the MCD to prove that the land vested in itself which they had failed to prove whereas the plaintiff had proved on record that he had been in continuous and uninterrupted physical possession of the suit property for a period of more than 44 years. It was further submitted that the learned trial court had proceeded on a wrong premise that the plaintiff/appellant was claiming ownership rights whereas the plaintiff/appellant has only sought protection of his possession. He thus prayed that the impugned judgment be set aside and the suit be decreed.

5. I have heard counsel for the appellant and counsel for the MCD. I have carefully considered the record as also the cited judgments. A perusal of the plaint would show that the plaintiff has only sought an injunction against the defendant from demolishing room and office and from taking possession of the plot without due process of law. The plaintiff has stated in the plaint that the property in question was rehabilitation property and owned by the Custodian. Nowhere has the plaintiff staked any claim to the ownership of the suit property. His only contention is that the MCD has nothing to do with the property in question and therefore could not threaten to demolish the plaintiff's properties. It was the MCD who claimed in the written statement that the suit property had been earmarked for a park and claimed that the land belonged to the MCD and thus claimed a right to remove the plaintiff from the suit property.

6. As regards the plaintiff's claim he has established his case on the basis of documents Ex.PW1/2 which is the certificate from the shop and establishment department the assessment certificate for the year 1981-82 which is

Ex.PW1/3 and 4. The PW1 has deposed that he had been in physical possession of the property in question since 1960 stating Sukh Dev Rai was in possession and after the death of Sh.Sukh Dev Rai it came to be in occupation of Sh.Som Nath Narula though not actually allotted to him and he further deposed that the L&DO had demanded arrears of charges of occupation from Som Nath Narula in respect of the said portion which had been in possession of Sh.Som Nath Narula. He deposed that the property belonged to the L&DO and the L&DO Department had conducted Survey of the property in dispute on lastly in 1994. He deposed that some officials of the MCD had come to the property on 9/10.8.85 and threatened to dispossess the plaintiff and dismantle the property. In cross examination the only question put to him was that he had never paid any agency or Teh Bazari charges. This question indeed is an irrelevant question in that the MCD has nowhere claimed that the plot in question had been allotted to any one by it for Teh Bazari or that it was indeed a teh bazari site. He reiterated in cross examination that he had occupied the property as other refugees had occupied land. He admitted that he had carried out the construction of 2 rooms on the disputed land and there was no provision of taking sanction for making the construction where previously there was a Khokha. He admitted that he was not the owner of the suit land nor the allottee and that he was in unauthorised occupation. It is these 2 statements which seem to have been prevailed on the trial court which ignored the testimony of PW-1 Sh.Gautam Shah, Assistant Land and Development Office, Nirman Bhawan, and the testimony of Chattar Singh, UDC, L&DO who deposed that the land/property in question had never been transferred to MCD. In these circumstances it was for the MCD to show as to when and by which mode the suit property had been transferred to it and from where the MCD was deriving its right to interfere in the possession of the plaintiff. Similarly PW-1 Sh.Gautam Shah has deposed from the record that damages had been assessed against Som Nath Narula in the year 1965 w.e.f. 1.1.58 to 31.7.65 for which reminders were also subsequently issued. He placed on record a letter dated 25.8.73 which is Ex.PW1/1 and further admitted that on 27.10.94 the Department had carried out a survey. In cross examination nothing has been brought forth to show that the land/property in question had been transferred to the MCD and that the L&DO had nothing to do with the property in question, a reference may be made to letter Ex.PW1/1 brought on record by this witness. Though the learned trial court had made a reference to this letter he chose to observe that this letter only showed that there was an encroachment of land upto 416 sq. yards to dismiss the case of the plaintiff but what was the important fact that even in 1973 the

property in question was the property of land and Development Office which alone was exercising all rights of management and control. The learned trial court has observed that he did not know on what basis PW-2 had deposed that the land in question had not been transferred to the MCD. The simple answer is to this is from the records. If in the records of the L&DO there is nothing to show that there was a transfer of land in question to the MCD. It is clear that no such transfer took place. In case a transfer had taken place, the MCD would also have its record to establish this fact. In the absence of any evidence the MCD has failed to discharge its onus. It is not a question that the land may belong to anyone and the MCD would derive a right to interfere even assuming that land had been encroached upon when the land belonged to the Ministry of Rehabilitation and the record shows that action had been taken for assessment of damages by the Ministry of Rehabilitation there is no presumption that the MCD had a right in respect of the suit property merely because the plaintiff could not produce any sanctioned plan. It is also a most question whether sanctioned plan was required for the kind structures raised in the suit land. To repeat the Ministry of Rehabilitation is the Authority which can take any action against the plaintiff for encroaching upon its land or violating any term of permissive possession.

7. As regards the right of the plaintiff in respect of the property in question the rights do not arise merely from ownership. The plaintiff claimed protection of his possession and the court ought to have seen whether the plaintiff has succeeded in establishing that right. From the evidence on record it is clear that the plaintiff has established his right through his unsealed testimony and from Ex.PW1/1 that he and others had been in possession of the suit land from 1958 onwards (as PW-1 Gautam Shah has referred to assessment of damages from Sh.Som Nath Narula from 1.1.58), various documents which are Ex.P-1 to PX that he had been in possession of the suit land from 1960 as per the plaint. The learned counsel fro the appellant has relied on the Judgment reported in 1999 IV AD (SC) 468 to contend that the possession of the plaintiff ought to have been protected by the lower court. It has been observed in the said Judgment that the principle of law is that a person who has been in long and continuous possession can be protected the same way by seeking injunction against any person in the world other than the true owner. It was also observed that it was equally well settled even the owner of the property can get back its possession only by resorting to due process of law. In the instant case, when the property did not belong to MCD, the plaintiff/appellant could seek the protection of his possession against it the only exception is against the true

owner which is the Ministry of Rehabilitation in the instant case and which too can get back possession from the plaintiff only through due process of law. Moreover, as rightly pointed out by the learned counsel for the appellant the question of title could not have been looked into by the learned trial court without an issue having been framed. In any case, the learned trial court had misdirected itself inasmuch as the plaintiff had never staked a claim to ownership of the property. As held in the case cited hereinabove, when there was no plea raised on the question of title such a matter could not have been decided to dismiss the plead of the plaintiff/appellant for protection of long settled possession.

8. In the light of the foregoing discussion therefore the appeal has to be accepted and the impugned judgment and decree is set aside.

7. This is a second appeal. After its admission on 27.9.2007, the following substantial question of law was formulated:

“Whether the damages paid by the encroachers to the custodian against the land used entitles the encroacher to continue in the said piece of land?”

8. On behalf of the appellant, it has been argued that under the provisions of Section 322 of the DMC Act a Commissioner may without notice remove an encroacher from a property which has been encroached upon by him. Section 322 of the DMC Act reads as follows:

322. Power to remove anything deposited or exposed for sale in contravention of this Act.—The Commissioner may, without notice, cause to be removed—

(a) Any stall, chair, bench, box, ladder, bale or other things whatsoever, placed, deposited, projected, attached or suspended in, upon, from or to any place in contravention of this Act;

(b) any article whatsoever hawked or exposed for sale on any public street or in other public place in contravention of this Act and any vehicle, package, box or any other thing in or on which such article is placed.

9. A bare reading of this Section clearly shows that what can be removed by the Commissioner without notice is anything deposited or exposed for sale in contravention of this Act. What is sought to be removed in the instant case is the encroacher who is occupying an office in an open plot of land. This is clear from the averments

in the plaint. There is no dispute to this. Section 322 of the DMC Act would apply only to movables and the articles mentioned therein. It would not apply to immovable property. Said provision is inapplicable in the present scenario.

10. No other argument has been urged before this court.

11. Impugned judgment has returned a positive fact finding on the basis of the evidence adduced before it that the land in dispute was never transferred to the MCD. It was the land of the Rehabilitation Department; it was for the MCD to show how it had derived its right to interfere in the possession of the plaintiff. No such evidence had been led before the courts below. The impugned judgment had also returned a finding that a suit for permanent injunction when no specific issue was raised about title the trial court should not have adverted to it. Since the plaintiff was admittedly in possession of the said land he was entitled to the decree of permanent injunction as prayed for by him. These findings in no manner can be said to be perverse; they call for no interference.

12. The question of law as framed by this court and the arguments urged before this court are not really in conformity with one and another. Question of law is also not borne out from the record. It was not the case of the plaintiff that he was an encroacher; this was the case set up by the defendant on which score he had led no evidence.

13. In view of the aforementioned discussion the substantial question of law is answered accordingly. Appeal has no merit; dismissed.

INDERMEET KAUR, J.

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