

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

+ **RSA 206/2011**

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Date of Decision: 12.04.2012

SAROOR SHAH KHAN

..... Appellant

Through : Mr. P.K. Bhardwaj, Advocate

versus

MOHD MEHTAB & ORS

..... Respondents

Through : None

CORAM:

HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.(ORAL)

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CM No. 21465/2011 (condonation of delay)

There is a delay of 12 days in filing the appeal.

In view of the reasoning stated in the application, the delay in filing the appeal is condoned.

Application stands disposed of.

RSA No. 206/2011

1. By way of this appeal under Section 100 CPC, the appellant has challenged the two concurrent judgments i.e. judgment and decree dated 30.09.2009 passed by the learned Civil Judge, Delhi in suit No.220/2009 and the other dated 11.07.2011 passed by learned ADJ, Delhi in RCA No. 90/2009 whereby the appeal challenging the judgment and decree passed by the learned Civil Judge has been dismissed.

2. Briefly, the facts relevant for the disposal of present appeal are as under:-

The appellant herein and respondent no. 3 were plaintiffs before the learned trial court and had filed a suit for permanent and mandatory injunction stating therein that respondent no. 3 i.e. plaintiff no.1 before the trial court is the resident of House No. 1346, Gali Nai Wali, Punjabi Phatak, Billimiran, Delhi-6 and appellant i.e. plaintiff no. 2 before the learned trial court is the resident of House No. 1394, Katra, Bajwarian, Billimiran. The house No. 1393, Katra, Bajwarian is situated between the house of the appellant and the respondent no. 3 i.e. plaintiffs. It was alleged that the respondent herein i.e. defendant no. 1 before the learned Civil Judge had purchased the said property and was doing construction by using heavy iron girders and the construction was being done by him without any site plan of MCD i.e. respondent no. 2 herein and the said construction was of great danger to the lives and properties of the appellant and respondent no. 3/plaintiffs. They had alleged that despite repeated requests made by them, the respondent no. 1 had not stopped the illegal construction and the cause of action had arisen in April, 1991. By way of said suit, prayer was made for a decree of permanent injunction thereby restraining respondent no. 1/defendant no.1, his agents from raising any illegal and unauthorized construction in the suit property bearing No. 1393, Katra, Bajwarian, Billimiran. The prayer was also made for a decree of mandatory injunction directing the respondent no. 1/defendant no.1 to demolish the unauthorized and illegal construction from the suit property. The respondent no. 1/defendant no.1 had filed a written statement denying the allegations made by the appellant and respondent no. 3/plaintiffs. It was alleged that the subject matter had already been decided in appeal filed by the respondent no.

1/defendant no. 1 before the Appellate Tribunal vide Appeal No. 295/1980 decided on 17.02.1992. It was also denied that appellant having used any iron girders or illegal construction as was alleged.

3. Perusal of record shows that during the course of proceedings before the learned Civil Judge the respondent no. 3 i.e. plaintiff no. 1 before the learned trial court had compromised the matter with respondent no. 1. Only appellant had pursued the suit. No evidence was led by the appellant to substantiate his case. Thereafter, he had moved an application for seeking permission for leading the evidence which was rejected vide order dated 18.02.2008 and it was ordered that the evidence already led by the respondent no. 3 i.e. plaintiff no. 1 before the learned trial court will be considered in support of his case. The said order was not challenged by the appellant.

4. On the basis of pleadings of the parties, issues were framed and after appreciating the evidence on record, the learned Civil Judge has held that it was appellant who had to prove that the respondent no. 1/defendant no. 1 had raised unauthorized construction in the suit premises. There was only evidence of respondent no. 3 i.e. plaintiff no. 1 before the learned trial court wherein he has deposed that the respondent no. 1/defendant no. 1 had made construction on the ground floor and the first floor and also constructed further storeys. He has also deposed that respondent no.1/defendant no.1 has also fixed iron girders in the wall. They had made complaint to MCD but no action was taken. The learned trial court noted that the appellant had to prove that the construction was illegal but he did not examine any officials of respondent no. 2 i.e. defendant no. 2-MCD to prove that the construction was illegal. There was report of Local Commissioner. Even the same was not proved by appellant by leading evidence by proving the same. Ld. Civil

Judge also noted that appellant and respondent no.3 had relied upon order dated 06.10.2004 of Appellate Tribunal, MCD i.e. Ex.PW1/D1. Vide the said order, the Appellate Tribunal had set aside the demolition order issued against respondent no.1/defendant no.1 on the ground that before issuing the same, no show cause notice was served upon him, as such, the demolition order of the Zonal Engineer was ordered to be considered as a notice to respondent no. 1/defendant no. 1 and the matter was remanded to the Zonal Engineer for deciding afresh. After considering entire material on record, the learned Civil Judge has held that from the evidence on record it cannot be said that any illegal construction as was alleged had been raised by the respondent no. 1/defendant no. 1 and as such the suit was dismissed.

5. The learned Appellate Court has also appreciated the entire evidence on record and has held that there is absolutely no evidence on record to prove that the construction raised by respondent no. 1 was unauthorized in nature. The relevant portion of the judgment is as under:-

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The appellant did not prove the report of the local commissioner. Even otherwise, the said report only reveals that the respondent no. 1 raised some new construction on second and third floor of the suit property. But from the said report itself, it cannot be held that the respondent no. 1 raised the unauthorized construction. Admittedly, the appellant had not examined any witness from MCD or otherwise to prove that the construction raised by the respondent no. 1 was unauthorized in nature. As per the order dated 17.02.1992 Ex.PW1/D1 passed by the Tribunal the demolition order dated 15.05.1991 was set aside. There is nothing on record to show as to what action had been taken by the respondent no. 2 in pursuance

thereto. Therefore, mere issuance of demolition order which also had been set aside by the competent forum in itself is not sufficient to hold that the respondent no. 1 carried out any unauthorized construction over the suit property. Therefore, there is no substance in the said plea of the counsel for the appellant.”

6. The appellant has failed to place on record any evidence to prove his case. The appellant has also not entered in the witness box before the learned trial court nor has led any evidence to substantiate his case. The appellant is relying on the affidavit of the respondent no. 3 i.e. plaintiff no. 1 before the trial court who had already compromised the matter with the respondent no. 1 and did not pursue the suit as well as appeal before learned ADJ. Nothing relevant is there in the affidavit of respondent no.3 to substantiate that illegal construction has been done by the respondent no.1/defendant no.1. The appellant has also relied upon order dated 17.02.1992 Ex.PW1/D1 passed by the Appellate Tribunal, MCD. The perusal of said order shows that the demolition order dated 15.05.1991 about the alleged construction has already been set aside by the Appellate Tribunal, MCD vide order dated 17.02.1992 and it was ordered that the impugned demolition order was to be treated as a show cause notice served on respondent no. 1 by the Zonal Engineer in respect of alleged unauthorized construction mentioned therein and the matter was remanded back to Zonal Engineer, City Zone for deciding afresh after giving hearing to the respondent no. 1. Nothing has been placed on record by the appellant either before the trial court or before the learned ADJ wherein First Appeal was filed as well as before this court as to what happened to said proceedings. Even the report of the Local Commissioner before the courts

below has not been proved by the appellant in order to prove his case. By merely issuance of demolition order which has already been set aside by the Appellate Tribunal, it cannot be held that any unauthorized construction was being done by the respondent no. 1.

7. In view of above, no substantial question of law arises in this case, as such, the Second Appeal under Section 100 of CPC cannot be entertained.

The appeal stands dismissed.

VEENA BIRBAL, J

APRIL 12, 2012
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