

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

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Date of decision: 26th July, 2013

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RFA No.114/2002

SHIV KUMAR

..... Appellant

Through: None.

Versus

MUNICIPAL CORPORATION OF DELHI Respondent

Through: Ms. Prabhsahay Kaur, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. None has appeared for the appellant inspite of matter having remained on board for a considerable time.
2. The appeal is of the year 2002 and the counsel for the respondent MCD points out, has on two earlier occasions been dismissed in default of appearance of the appellant, though was restored.
3. A perusal of the order sheet shows that notice of the appeal was issued on 05.03.2002 and the appeal was admitted on 18.08.2003; thereafter the same was dismissed in default of appearance of the appellant on 21.07.2011 and upon the appellant applying for restoration, restored vide order dated 08.02.2013; the appellant however again failed to appear on 25.02.2013

when again the appeal was dismissed in default; the appellant again applied for restoration and the appeal was restored on 10.04.2013.

4. However instead of simply dismissing this first appeal in default, it is deemed appropriate to peruse the matter and which has been done with the assistance of the counsel for the respondent MCD.

5. The appeal impugns the judgment and decree dated 26.09.2001 of the Court of the Additional District Judge, Delhi of dismissal of suit No.148/1999 filed by the appellant. The said suit was filed for recovery of Rs.3,42,700/- pleading that:

- (i) the appellant was carrying on business in sanitary goods with a godown at property No.4/5183, Krishna Nagar, Karol Bagh, New Delhi;
- (ii) that some of the goods of the appellant were lying outside the godown on 30.10.1996 when the same were taken away by the respondent MCD;
- (iii) that the respondent MCD did not return the goods inspite of requests and reminders of the appellant; and,

- (iv) that the appellant on 15.01.1997 deposited Rs.2,112/- as fine for which receipt was issued to him but the goods still not returned.

Accordingly, the suit was filed for recovery of the value of the goods.

6. The learned Additional District Judge in the impugned judgment though has held that the goods were not returned by the respondent MCD to the appellant but assessed the value thereof at Rs.1,87,200/- and thus held the appellant entitled to the said amount with *pendente lite* and future interest at 9% per annum; however the learned Additional District Judge at the same time held the suit to be barred by limitation provided therefor under Section 478(2) of The Delhi Municipal Corporation Act, 1957 (DMC Act); resultantly, the suit was dismissed.

7. Section 478 of the DMC Act is as under:

“478. Notice to be given of suits. - (1) No suit shall be instituted against the [a Corporation] or against any municipal authority or against any municipal officer or other municipal employee or against any person acting under the order or direction of any municipal authority or any municipal officer or other municipal employee, in respect of any act done, or purporting to have been done, in pursuance of this Act or any rule, regulation or bye-law made thereunder until the

expiration of two months after notice in writing has been left at the municipal office and, in the case of such officer, employee or person, unless notice in writing has also been delivered to him or left at his office or place of residence, and unless such notice states explicitly the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of residence of the intending plaintiff, and unless the plaint contains a statement that such notice has been so left or delivered.

(2) No suit, such as is described in sub-section (1), shall unless it is a suit for the recovery of immovable property or for a declaration of title thereto, be instituted after the expiry of six months from the date on which the cause of action arises.

(3) Nothing in sub-section (1) shall be deemed to apply to a suit in which the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the institution of the suit.”

8. Notice of this appeal was issued on the contention of the counsel for the appellant that the provisions of Section 478(2) of the Act supra are not attracted in the facts of the case.

9. The counsel for the respondent though has also challenged the finding of the learned Additional District Judge of the goods having not been returned to the appellant, has primarily rested her case on judgments of this

Court in ***G.C. Sharma Vs. Municipal Corporation of Delhi*** MANU/DE/0179/1979 and ***B.L. Gupta Vs. Municipal Corporation of Delhi*** 2005 (116) DLT 416 and has contended that the reasoning given by the learned Additional District Judge as to the applicability of Section 478(2) of the DMC Act is in consonance with the said judgments.

10. This Court in ***G.C. Sharma*** supra was concerned with a suit against the MCD for recovery of damages and compensation for loss of reputation and mental agony suffered by the plaintiff in that case on account of actions of the MCD; the said claim was defended by the MCD *inter alia* relying on Section 478(2) supra. It was the contention of the defendant in that case that Section 478 was concerned only with acts of the MCD and / or its officials in consonance with the provisions of the DMC Act and if the action of the MCD was held and found to be not in consonance with the DMC Act and the Rules, regulations and bye-laws framed thereunder, the bar therein of institution of the suit after the expiry of six months from the date of cause of action would not arise. It was however held:

- (a) that while Section 477 of the said Act provides protection only for acts done in good faith, Section 478 is much wider and

protects even the improper acts of the MCD and its officials and the ambit of Section 478 is wide and broad on account of its protective words;

- (b) that the opening words of Section 478 ‘bar a suit’ and thus once a suit is found to be barred under the said provision, no investigation into the facts is required to be done;
- (c) that the object of Section 478 is to afford protection against belated claims to persons acting in pursuance of the enactment; that the protection afforded by Section 478 is not an absolute protection– it does not bar suits but only requires that they must be brought within six months - it is a restriction of the ordinary right of the subject; and,
- (d) the words “..... in respect of any act done or purporting to have been done, in pursuance to this Act or any rule, regulation or bye-law made hereunder.....” in Section 478 are of great weight and authority; the test therefore is, was the act done in statutory capacity or private capacity – if it is done or professed to be done in pursuance of the enactment, the statute will afford

protection – a person acting under statutory powers may erroneously exceed the powers, yet he is acting or purporting to act in pursuance of the Statute; the Statute affords protection even when an actionable wrong has been committed in exercise of statutory powers – such is the significance of the word ‘purporting’ used in the Section.

11. The counsel for the respondent MCD has contended that the effect of the belated claims is that even the records are not available as in the case in hand where the subject file is no longer available with the department. She has further contended that once the Additional District Judge had held the suit to be barred under Section 478(2), findings on other issues ought not to have been returned.

12. In ***B.L. Gupta*** supra, the suit challenged the assessment in pursuance to a notice under Section 126 of the DMC Act and which was stated to be illegal having been served after the prescribed date, but still the bar of Section 478 (2) was held to apply. It was held that once the action of the MCD or its officials is within the confines of the DMC Act and cannot be said to be *de hors* the Act, Section 478 applies.

13. The counsel for the respondent in this regard has also referred to Section 3(2) of the General Clauses Act, 1897 defining 'acts done' as extending to 'illegal omissions' and has thus contended that the contention of the appellant in his written arguments on record that Section 478(2) is not applicable, owing to the actions of the respondent MCD in this case being beyond the purview of the statute, has no merit.

14. The counsel for the respondent MCD has further, fairly informed that the Supreme Court in *Municipal Corporation of Delhi Vs. Smt. Sushila Devi* AIR 1999 SC 1926 has held Section 478 to be of no application to a claim against the MCD for compensation for death on account of injury sustained due to fall of a branch of a tree, however the Supreme Court in the said judgment held the liability in that case to be arising under the law of torts and thus Section 478 was held to be not applicable.

15. The counsel for the respondent MCD has further contended that if Section 478 is held to be not applicable on the mere plea of the impugned act of the MCD being illegal, there would be no situations in which Section 478 would apply.

16. I have also perused the written arguments dated 23.04.2013 of the appellant on record. The appellant has neither relied on any case law therein nor raised any other argument which would make the law laid down by this Court in *G.C. Sharma* and *B.L. Gupta* supra inapplicable to the facts of this case.

17. The counsel for the respondent MCD has also invited attention to Sections 321, 322 and 326 of the Act dealing with prohibition of deposit etc. of things in the street and empowering the MCD to remove such things from the street and in exercise of powers whereunder, the goods of the appellant admittedly lying on the street were seized by the respondent MCD. From a reading thereof also, it appears that the return of the goods is simultaneous to payment of charges for removal and storage. Though the counsel for the respondent MCD clarifies that the respondent MCD has not done so but Section 326(2) also authorizes the MCD to sell the things so removed and the limitation provided therein also for the owner to claim the sale proceeds from the MCD is of one year only from the date of sale and whereafter the money is to be credited to the Municipal Fund. In the present case, the goods were seized from the street on 30th October, 1996 and under Section 326(1) the respondent MCD was entitled to, unless the owner of the goods turned

up to take back the goods on payment of removal and storage charges, dispose of the goods 'within such time as it thinks fit'. The appellant turned up to pay the removal and storage charges only on 15th January, 1997 i.e. after 2½ months. Even though the appellant claims that the goods were not returned to him, he waited till 28th October, 1999 i.e. for two years and ten months to institute the suit. Section 326(2) provides that when MCD, on failure of owner to claim back the goods, disposes the goods, the sale proceeds can be received within one year of such sale only. The scheme of the Act thus does not permit delays, as the appellant has indulged in.

18. The action of the respondent MCD, of seizure of goods of appellant admittedly lying on the street was thus in exercise of power under Sections 321 and 322 of the DMC Act; similarly the liability of the MCD to return the goods and which it is alleged to have not done, was also under Section 326 of the Act. The claim for compensation therefor is thus within the ambit of Section 478 and ought to have been filed within six months from the date when cause of action accrued. Cause of action in the present case accrued on the date of seizure of the goods on 30th October, 1996. The appellant, as aforesaid, was to approach the MCD immediately for return of the goods on payment of removal and storage charges as Section 326 does not prescribe

any period before which the respondent MCD is not authorized to sell the goods and leaves it to the discretion of the MCD. Be that as it may, even if the appellant can be said to have approached the MCD for return of the goods within the reasonable time on 15th January, 1997 and inspite of the appellant paying the removal and storage charges the goods were not returned to him, the appellant again ought to have acted immediately inasmuch as the limitation for claiming the sale proceeds also is of one year only. The appellant however waited for two years and ten months as aforesaid. Thus, even if the cause of action is taken to have accrued on 15th January, 1997, the suit has been filed much beyond six months therefrom.

19. I therefore do not find any error in the judgment of the learned Additional District Judge and dismiss this appeal. However the appellant having failed to appear no costs.

20. After the judgment aforesaid has been dictated in open Court, the counsel for the appellant appeared and sought opportunity to argue and which was allowed.

21. The counsel for the appellant has sought to meet the judgments aforesaid cited by the counsel for the respondent MCD by referring to *M/s*

Niagara Hotels & Builders (P) Ltd. Vs. Union Of India (65) 1997 DLT 826 and *Well Protect Manpower Services Pvt. Ltd. Vs Commissioner MCD* 2012 (1) AD (Delhi) 305. He has argued that the failure of the respondent MCD to return the goods of the appellant is not in exercise of any statutory power and is illegal and thus the limitation for filing a suit for recovery of the value of the goods would be three years from the date when the goods against receipt of removal and storage charges on 15th January, 1997 ought to have been returned and not of six months as provided in Section 478(2) of the DMC Act.

22. As far as the judgments relied upon by the counsel for the appellant are concerned, it may at the outset be mentioned that the judgment in *G.C. Sharma* was not considered in *M/s Niagara Hotels & Builders (P) Ltd.* though subsequent in point of time. Similarly *B.L. Gupta* also was not noticed in *Well Protect Manpower Services Pvt. Ltd.* (supra). The suit in *M/s Niagara Hotels & Builders (P) Ltd.* (supra) was for recovery of the amount stated to have been collected by the Delhi Development Authority in excess of that due towards stamp duty and transfer duty under the DMC Act. MCD on whose account transfer duty was collected was also made a party to the suit. MCD took the plea of the suit as far as against it being beyond the

period of limitation prescribed in Section 478(2). It was held that the limitation for recovery of tax illegally collected is of three years and thus Section 478 is not applicable. It was further reasoned that the suit was not in respect of any act done by the MCD but was in respect of the act of the DDA of collecting transfer duty in excess, though on behalf of the MCD. It would thus be clear that the said judgment has no application to the facts of the present case as the action subject matter thereof was not of MCD.

23. The suit in *Well Protect Manpower Services Pvt. Ltd.* (supra) was for recovery of balance amount payable under three agreements entered into by the plaintiff with the MCD. Section 478 was held to be not applicable as the rights and obligations of the parties were held to be governed by the agreement between them and the grievance was not against any action of the respondent MCD acting in its statutory capacity. This judgment also is entirely on its own facts and does not take a view different from *G.C.Sharma*.

24. On the contrary the actions complained of in the present case are in exercise of the statutory powers of the MCD under Sections 321, 322 and 326 of the Act and thus Section 478 would apply.

25. The arguments of the counsel for the appellant thus do not make me change the view taken aforesaid. In fact during the hearing it was inquired from the counsel for the appellant that in what situation Section 478 would apply. He replied that if the appellant was wanting to take back the goods without paying the removal and storage charges then Section 478 would be applicable. The said argument is to be noticed to be rejected. Once the grievance is with respect to the actions done in the exercise of statutory powers, it matters not what the grievance is and Section 478 would apply.

26. The appeal therefore fails and is dismissed. However in the facts no costs. Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J

JULY 26, 2013

‘gsr.’