

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

%

Date of decision: 8th July, 2013

+

RFA 213/2012

MAHANAGAR TELEPHONE NIGAM LTD Appellant

Through: Mr. Ravi Sikri with Ms. Neha
Bhatnagar, Advs.

versus

AD KUKREJA & ANR Respondents

Through: Mr. Sanjeev Bajaj, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. Admit.
2. The Trial Court record has been received.
3. With the consent of the counsels, the appeal is taken up for hearing and counsels have been heard.
4. The appellant has preferred this appeal against the judgment and decree dated 7th February, 2012 of the Court of SCJ-cum-RC (Central), Delhi in Suit No.839/06/05 filed by the respondents and directing the appellant by a decree for mandatory injunction to remove the cables and two pillar boxes in front/adjoining the shop of the respondents situated in property No.D-26, Kamla Nagar, Delhi – 110 007; further direction has been issued to the appellant to install the pillars boxes at some other place and a decree for permanent injunction has also been passed restraining the

appellant from establishing or making any sort of permanent structure in front/adjoining the shop aforesaid of the respondents.

5. Notice of the appeal was issued and vide *ex parte ad interim* order dated 9th May, 2012 (subsequently confirmed vide order dated 18th March, 2013) the operation of the impugned judgment and decree stayed. Though possibilities of settlement between the parties were explored but have remained unsuccessful.

6. The two respondents had filed the suit from which this appeal arises pleading:-

- (a). that they had started their business of Mobile Shoppee in the aforesaid shop “sometime back”;
- (b). that the shop of the respondents was two sides open shop but the respondents had been operating from only one side;
- (c). that in the month of January, 2003 the officials of the appellant “came upon the site of the boxes where the main telephone lines have been installed feeding to Kamla Nagar area..... and started digging the earth beneath the boxes to mend some of their cable work at such a level that it started touching the foundation of the shop (of the respondents) and hence created great concern” for the respondents; and
- (d). that on 28th January, 2003 the respondents sent notice under Section 80 of the CPC calling upon the appellant to remove the cables and the two pillar boxes in front of the shop of the respondents and also called upon the appellant to pay to the

respondents Rs.3 lacs as damages towards loss suffered by the respondents up to 31st January, 2003.

7. The appellant contested the suit pleading:-

- (A). that the shop in question had no opening or shutter or gate towards the side where the pillars had been installed at the time when the pillars were installed;
- (B). that the respondents had acquired and occupied the said shop in the year 2002 with opening only towards the main road and a brick wall existed towards the side of the shop where the pillars of the appellant are situated; and,
- (C). that the said pillars are for catering the services of the subscribers of the appellant and were installed long back before the respondents occupied the shop. It was also denied that any loss had been caused to the respondents. It was further pleaded that the pillars were at a distance of approximately one meter from the wall of the shop of the respondents.

The respondents filed a replication but to which it is not deemed necessary to advert to.

8. On the pleadings of the parties the following issues were framed:-

“1). Whether the defendants have installed the telephone boxed in such a manner that the plaintiff is not able to enjoy his premises in question? OPP

2). *If so, whether the defendants can be directed to remove the cables and two pair boxes in front/adjoining the shop of the plaintiff situated at D-26, Kamla Nagar, Delhi? OPP*

3). *Whether the suit is not maintainable on ground of public policy? OPD*

4). *Relief.”*

9. The respondents examined only the respondent no.1 as a witness. The appellant also examined only one of its officials in support of its defence.

10. The Trial Court, while decreeing the suit of the respondents, in the impugned judgment has held:-

- (i). that as on the date of institution of the suit the boxes installed by the appellant were obstructing the side view of the shop of the respondents and the shutter of the show window could not be opened nor anything displayed therein as the boxes were of full height;
- (ii). that there was seepage inside the shop of the respondents as the cable was passing through the shop;
- (iii). that the Court Commissioner appointed had also opined that the boxes should be relocated as the side street was too small even for walking by a person and because the side show window of the shop owing thereto could not be used for display;

- (iv). that the appellant had installed the telephone boxes in such a manner that the respondents were not able to enjoy their premises;
- (v). merely because the appellant had no suitable place for shifting the pillars did not mean that the respondents could be deprived of their valuable right;
- (vi). that no expenditure for shifting of the boxes could be asked to be shared by the respondents;
- (vii). merely because there was no shutter on the said side of the shop on the date of installation of the pillars was no ground to deny relief to the appellants as on the date of institution of the suit the shop was two side open; and
- (viii). that with the advancement of technology the huge pillars were not justified and alternative arrangement should have been made so that the public interest does not suffer and the respondents are also able to make use of their premises.

11. The impugned judgment though relating to telegraphs, does not refer to the provisions of the Indian Telegraph Act, 1985. The counsel for the appellant states that a ground in this regard has been taken in the memo of appeal though admits that no such plea was taken before the Trial Court.

12. The counsel for the respondents / plaintiff also does not controvert the applicability of the said law. The said Act under Section 3(1AA) thereof while defining 'telegraph' provides the same as meaning any appliance,

instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions etc. ‘Telegraph Line’ is defined in Section 3(4) as meaning a wire or wires used for the purpose of a telegraph, with any casing, coating, tube or pipe enclosing the same, and any appliances and apparatus connected therewith for the purpose of fixing or insulating the same. Section 4 of the said Act vests the exclusive privilege in the Central Government for establishing, maintaining and working of telegraphs. Part III of the said Act titled “Power to Place Telegraph Lines and Posts”, in Section 10 thereof vests the ‘telegraph authority’ (defined in Section 3(6) as Director General of Posts and Telegraphs and including any officer empowered by him to perform all or any of the functions of the telegraph authority) with the authority to, from time to time place and maintain a telegraph line under, over, along, or across and posts in or upon any immovable property. What emerges therefore is that the appellant in the course of its telegraph business was entitled to install the boxes aforesaid which are ‘telegraph’ within the meaning of Sections 3(1AA) and 3(4) of the Act.

13. The counsel for the respondents, though before the Trial Court had not referred to, however invites attention to Section 17 of the said Act which is as under:

“17. Removal or alteration of telegraph line or post on property other than that of a local authority.—(1) When, under the foregoing provisions of this Act, a telegraph line or post has been placed by the telegraph authority under, over, along, across, in or upon any property, not being property vested in or under the control or management of a local authority, and any person entitled to do so desires to deal with that property in such a

manner as to render it necessary or convenient that the telegraph line or post should be removed to another part thereof or to a higher or lower level or altered in form, he may require the telegraph authority to remove or alter the line of post accordingly:

Provided that, if compensation has been paid under section 10, clause (d), he shall, when making the requisition, tender to the telegraph authority the amount requisite to defray the expense of the removal or alteration, or half of the amount paid as compensation, whichever may be the smaller sum.

(2) If the telegraph authority omits to comply with the requisition, the person making it may apply to the District Magistrate within whose jurisdiction the property is situated to order the removal or alteration.

(3) A District Magistrate receiving an application under sub-section (2) may, in his discretion reject the same or make an order, absolutely or subject to conditions, for the removal of the telegraph line or post to any other part of the property or to a higher or lower level or for the alteration of its form; and the order so made shall be final."

14. Attention is also invited to the judgment of this Court in ***Mahanagar Telephone Nigam Ltd. Vs. District Magistrate*** 163(2009) DLT 472 to contend that upon desire having been expressed by the respondents to deal with their shop aforesaid by having an opening thereto towards the side where such telegraph boxes are installed, the appellant was obliged to remove the same and to fix / install the same elsewhere. It was also argued that the appellant was not justified in claiming any expenses therefor from the respondents inasmuch as such entitlement is only when compensation for installation has been paid to the owner of the property. It is contended that no compensation in the present case has been paid.

15. Even if the aforesaid were to be accepted, the power under Section 17 of the Act is of the District Magistrate and not of the Court. The respondent admittedly did not approach the District Magistrate for removal of the aforesaid boxes. Though the counsel for the respondents has argued that the District Magistrate is to order removal and re-location of the telegraph line/equipment/apparatus on mere desire being expressed in that regard but the same cannot be accepted. The District Magistrate under Section 17(3) is empowered to even reject the request so made to him or to grant it subject to any conditions. The said powers obviously have to be exercised by the District Magistrate for appropriate reasons and cannot be at the whims and fancy of the District Magistrate. A District Magistrate, if directing re-location is expected to consider the feasibility thereof as well as the availability of alternative place. This Court is not equipped to take such a decision. This is also obvious from the fact that the impugned judgment though directs removal of the boxes aforesaid, does not decide as to where the same are to be re-located. Considering the locality of Kamla Nagar which has a high-density of population, it may well nigh be possible that the appellant is unable to relocate the said boxes. No owner of immovable property likes to have such pillars/boxes installed/abutting or adjoining his / her property as the same, as contended by the respondents also, lower the utility and value thereof. Even in the judgment relied upon by the respondents, it was the SDM who had exercised the jurisdiction and which as aforesaid is expected to have complete and intricate knowledge of the area falling in his/her jurisdiction.

16. The counsel for the appellant has referred to the Division Bench judgment of this Court in *M/s The Scindia Potteries Pvt. Ltd. Vs. M/s Purolator India Ltd.* AIR 1980 Delhi 157 and has contended that the boxes in the present case are admittedly not on the property of the respondents but on a public street. Under Section 298 of the Delhi Municipal Corporation Act, 1957 all public streets vests in the municipal authority. It has also been so held in *Municipal Committee, Karnal Vs. Nirmala Devi* AIR 1996 SC 892. The pillars/boxes are thus not even on the property of the respondents but on a public street which vests in the Municipality and the respondents cannot have any grievance with respect thereto unless they have a right of access or otherwise from the said street.

17. I have enquired from the counsels whether any site plan has been filed. Although counsels state that no site plan has been filed before the Trial Court however a perusal of Trial Court file shows the respondents/plaintiff to have proved the Sale Deed in their favour as Ex.PW1/8 and last page whereof is a site plan of the shop purchased thereunder by the respondents. The shop as shown in the said Sale Deed has an opening only towards the main road i.e. towards west as depicted in the site plan and not towards the street / service lane / gali on the North where the said boxes of the appellant are installed. The respondent no.1 in his cross-examination also admitted that the boxes aforesaid were in existence since prior to the purchase of the shop by the respondents. What therefore emerges is that at the time when the respondents brought the shop, there was no opening thereof towards the side where the boxes are installed and the

question of the respondents thus suffering any prejudice therefrom does not arise.

18. The counsel for the respondents has next contended that even if the opening did not exist earlier, the respondents are always entitled to open a shutter towards the gali / street on the North, the property in which the shop of the appellant is situated being a two side open property.

19. I have enquired whether any permission from the municipal authorities has been taken therefor. Though the counsel for the respondent does not state that any such permission was taken but contends that no permission is required.

20. I am unable to agree. An owner of immovable property where the municipal and building bye-laws applies is not entitled to have opening thereof, even if several are possible, wheresoever he / she may deem fit and the layout plans of the colonies and the sanction plans for construction of the building provide for the side on which the opening is permissible and no openings on any other side, even if possible, can be made. The sanctioned building plans show details of windows and doors of the property and opening of doors/access points towards streets without such sanction leads to chaotic conditions of movement on the street. In the present case, from the site plan annexed to the Sale Deed in favour of the respondents, it is evident that the building in which the shop of the respondent exists had no opening in the street towards the North and had opening only towards the road on the West and the opening even if any made by the respondents towards the North is thus unauthorized and illegal and the respondents on the basis of

their unauthorized action cannot seek any relief against the appellant. Moreover, without the respondents proving/establishing that they have a right to have a opening of their shop towards the streets where the pillar boxes are installed, and which the respondents have failed to establish/prove, the question of the respondents suffering in any manner from the said boxes does not arise.

21. Unfortunately, all these aforesaid aspects have not been dealt with in the impugned judgment. The learned Trial Judge has granted relief to the respondents without reference to any legal provisions and the impugned judgment thus cannot be sustained.

22. The appeal therefore succeeds. The impugned judgment and decree are set aside.

23. However in the circumstances no costs. Decree sheet be prepared.

24. Before parting with the judgment, I may record that the reason given by the Trial Judge of technological advancement does however have merit. In today's day and time where telecom has shifted largely from wire to wireless, continuance with obsolete equipment / technology cannot possibly be justified. The counsel for the appellant has contended that the boxes aforesaid were installed in the year 1985. I am sure that in the last nearly 30 years there must be several new technologies which would not justify the continuance of such huge boxes which in any case are a nuisance for the public in general. It is therefore clarified that setting aside of the impugned judgment will not come in the way of the appellant exploring the possibility

for removal of the boxes aforesaid even if it be on the basis of sharing of expenses thereof with the respondents and other occupants of the locality.

JULY8, 2013

pp/‘gsr’..

RAJIV SAHAI ENDLAW, J