

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **R.S.A. No.156/2014**

Decided on : 25th February, 2015

SHIV INDUSTRIES Appellant
Through: Mr. V.K. Goel, Advocate.

Versus

TATA POWER DELHI DISTRIBUTION LTD Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. This is a regular second appeal filed by the appellant against the judgment dated 22.3.2014 passed by Sh. Pankaj Gupta, the learned Additional District Judge in R.C.A. No.59/2013 by virtue of which the judgment and the decree dated 13.8.2013 passed by Ms. Ruchi Aggarwal Asrani, the learned Civil Judge was upheld.

2. Briefly stated the facts of the case are that the present appellant, M/s. Shiv Industries, a proprietary concern had filed a suit through its sole proprietor Vinod Kumar Gupta for permanent and mandatory injunction. The prayer in the suit was that the respondent, that is, North

Delhi Power Limited be restrained from raising and realizing the amount of theft bill in respect of electricity connection No.K-002-1267367-IP and 002-1267376-IL installed at premises No.A-9, Group Industrial Area, Wazirpur, Delhi-52. It may be pertinent here to mention that in the year 1998, an inspection of the premises was conducted and it was found that he was indulging in fraudulent abstraction of electricity. The main ground on the basis of which the restraint order was sought, is that these are stale claims.

3. The respondent filed its reply and contested the claim.

4. On the pleadings of the parties, issues were framed and the trial court dismissed the suit of the appellant solely on the ground that the present appellant, in support of its case, had examined only one witness Ram Kumar Gupta in the capacity of an attorney while as Vinod Kumar Gupta, the proprietor, had not entered into the witness box at all. The learned trial judge dismissed the suit holding that the attorney could testify only with regard to filing of the suit and not with regard to the matters in respect of which he had no personal knowledge. So far as the report of inspection, which was conducted in the year 1998 is concerned, it was observed that as he was not a signatory to the inspection report,

therefore, he would not be deemed to have the knowledge about the inspection when the fraudulent abstraction of electricity was found. Accordingly, the suit was dismissed.

5. Feeling aggrieved, the appellant preferred the first appeal which affirmed with the judgment and the decree passed by the learned civil judge dismissing the suit.

6. Still not feeling satisfied, the present regular second appeal has been filed. I have heard the learned counsel for the appellant who has sought to urge before this court that a substantial question of law which arises for consideration before this court is whether the respondent could raise a bill on the basis of alleged theft of electricity in respect of the inspection conducted in the year 1998 when a notification has been issued by the Lieutenant Governor in the year 2007 giving immunity of raising the claim in respect of arrears of electricity charges pertaining to erstwhile DESU or DVB.

7. In this regard, the learned counsel has also sought to place reliance on case titled *Lalit Gulati vs. Government of NCT of Delhi*; 176 (2011) DLT 1 where this court had upheld the validity of the notification passed by the Lieutenant Governor on 16/19.5.2008 issued by the Department of

Power, Government of NCT of Delhi in exercise of powers conferred under Section 108 of the Electricity Act, 2003 read with Notification dated 20.2.2004 issued by the Ministry of Home Affairs, Government of India. Accordingly, it is stated that the respondent could not raise a stale claim and this is a substantial question of law arising in the present appeal.

8. So far as the aforesaid judgment in *Lalit Gulati's* case (*supra*) is concerned, this is not applicable to the facts of the present case for two reasons. Firstly, in the said case the issue was as to whether the aforesaid notification was discriminatory in nature or not. The reason for the discrimination which was sought to be nullified by the judgment was that some people had challenged the electricity bills pertaining to erstwhile suppliers, namely, DESU and DVB and their matters were pending before the court. The benefit of the notification was sought to be given to such persons whose matters were pending in court with regard to these bills. It was in this context that the Hon'ble High Court observed that the notification was sought to be applied in a discretionary manner by raising an artificial distinction between those persons who had gone to the court challenging their dues and those who had not approached the court and

accordingly, the notification was stated to be applicable to all the persons across the Board.

9. There is no such question involved in the present appeal. On the contrary on the basis of the aforesaid judgment the question sought to be raised is that the claim which is sought to be raised by the respondent is a stale claim and, therefore, he should not be made to pay without realizing the fact that it was not the respondent who had gone to the court but it was the present appellant who had sought an injunction, both permanent and mandatory, against the respondent and it is his suit which has been dismissed by the two courts below by a concurrent finding.

10. Moreover in a suit unlike in a writ petition as in *Lalit Gulati's* case (*supra*), a party has to plead and thus prove by adducing evidence, unlike in a writ where which is treated not only as a pleading but also the proof of that fact as it is filed by way of affidavit.

11. In the present case, there is not even an iota of averment that the claim in respect of which injunction is being sought by the appellant is a stale claim much less is a proof which has been produced, therefore, this argument of desperation raised by the appellant to wriggle out of the payment which is being demanded by the respondent. In my considered

opinion because of these defects, the judgment of *Lalit Gulati's* case (*supra*) would not be applicable to the facts of the present case.

12. On the contrary, the trial court as well as the first appellate court have rightly dismissed the suit of the appellant because its sole proprietor Vinod Kumar Gupta has not entered into the witness box. The Supreme Court in *Vidhyadhar vs. Mankikrao & Another*; *AIR 1999 SC 1441* has clearly held that where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. Based on the same analogy, as Vinod Kumar Gupta, the sole proprietor has not entered into the witness box in the instant case, consequently, the case which has been set up by him cannot be deemed to have been proved and accepted by the court.

13. The concurrent finding returned by the two courts below is a question of fact and it does not raise, in my considered opinion, question of law much less a substantial question of law and accordingly, the present appeal is dismissed.

V.K. SHALI, J.

FEBRUARY 25, 2015/‘AA’