

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

+ **RSA No.140/2013**

% **26th October, 2016**

BSES RAJDHANI POWER LIMITED Appellant

Through: Mr. Rajeev Mehra, Senior Advocate
with Mr. Anupam Verma, Advocate,
Mr. Nikhil Sharma, Advocate, Ms.
Niti Arora, Advocate and Ms. Shruti
Aggarwal, Advocate.

versus

SH. CHAND SINGH Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/defendant no.1/Delhi Vidyut Board (now known as BSES Rajdhani Power Ltd.) impugning the concurrent Judgments of the courts below; of the Trial Court dated 3.2.2011 and the First Appellate Court dated 16.4.2013; by which the suit for mandatory injunction and permanent injunction as also for damages of Rs.2.50 lacs was decreed to the extent that the appellant/defendant no.1 was directed to remove the electricity transformer installed on the subject land of the respondent/plaintiff comprised in Khasra no.13/3, area of 100 sq yds in
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village Khaira, Najafgarh, Delhi. The appellant/defendant no.1 was also directed to remove the overhead cables passing through the land of the respondent/plaintiff as depicted in the site plan Ex.PW1/1.

2. The issue in the present case is as to whether the appellant/defendant no.1 had illegally installed a transformer/sub-station on the land belonging to the respondent/plaintiff in November, 2001 i.e without any permission or consent of the respondent/plaintiff, inasmuch as the case of the respondent/plaintiff was that no consent/permission was taken by the appellant/defendant no.1 to install the transformer/sub-station or the overhead cables.

3. The appellant/defendant no.1 contested the suit by pleading that a transformer was installed on the land of the respondent/plaintiff around 20-25 years prior to filing of the suit. This was a sub-station having capacity of 100 KVA. In November, 2001 because of increase in demand of load, this sub-station was augmented by increasing the load from 100 KVA to 400 KVA. It was therefore denied that the transformer/sub-station was installed in November, 2001 or that it was installed without any permission/consent of the respondent/plaintiff. It was further pleaded that augmentation of load and changing of equipment already installed way back did not require any fresh permission/consent of the respondent/plaintiff. Suit was hence prayed to be dismissed.

4. After pleadings were complete, the trial court on 14.1.2003 framed the following issues:-

- “1. Whether plaintiff is entitled to mandatory injunction as prayed?
OPP
2. Whether plaintiff is entitled for recovery of damages of Rs.2,50,000/-? OPP
3. Relief.”

5. The relevant issue was issue no.1 and the trial court held this issue in favour of the respondent/plaintiff by observing that no permission has been proved to have been granted to the appellant/defendant no.1 by the respondent/plaintiff to install the transformer/sub-station and the overhead electricity lines, and therefore, the respondent/plaintiff as the owner of the land always was entitled to seek removal of the transformer/sub-station and the overhead lines because the legal owner of the land has complete right to use his land in the way he wishes. The relevant paras of the trial court judgment deciding issue no.1 in favour of the respondent/plaintiff and against the appellant/defendant no.1 read as under:-

“Issue no.1.

The onus to prove issue no.1 was upon the plaintiff. PW 1 i.e. plaintiff deposed that the agricultural land measuring 16 bigha 15 biswa, is owned by him, which is situated in village Khaira, tehsil Najafgarh, and over Khasra number 13/3, the defendants have installed a transformer, some time in November 2001, without any expressed permission from him and have also installed overhead electricity cables over the rest of the land owned by him, illegally and forcibly. PW 1 further deposed that besides the land owned by him, the whole of the agricultural land of this revenue state has been converted to non agricultural use and is presently being used for colonies etc. The transformer as well as cables were installed by the defendants for providing agricultural connection only and defendants are

supplying electricity for residential connection, through two different transformers. PW 1 proved the site plan as Ex.PW 1/1, as prepared on his instructions and proved the copy of legal notice as Ex.PW 1/2. the original Khatoni, Khasra Girdhawri for the year 2001-2002 and original Aks Sizra are proved as PW 1/7 to PW1/9. In his cross examination, PW 1 denied the suggestion that the transformer was installed 22-25 years back in Khasra number 13/3, however, PW 1 confirmed that he is consuming the electricity through transformer/line/substation from the present transformer. PW2 is Sh.Om Singh, who prepared the site plan Ex.PW 1/1. PW 3 is Sh. Rakesh, Halka Patwari, deposed that as per record, Khata no. 26/19-28 belongs to Sh.Chand Singh S/o Sh.Chelu Ram i.e. plaintiff and also proved the Aks Sizra as Ex.PW 1/9. PW 4 Sh.Hari Ram, who is the resident of Village Khaira, Delhi, deposed that the transformer was installed about two years ago, over the land belonged to plaintiff and overhead electricity cable had been installed by the DVB and which goes through the land of the plaintiff. He further deposed that DVB is supplying electricity through different cables to the colony and abadi areas, situated nearby, through the poles, which are erected in common pathway, which have hampered the peaceful user of land by the plaintiff. In his cross examination, he denied the suggestion that transformer was installed 20-22 years back in Khasra number 13/3, or that substation was augmented from 100 KVA to 400 KVA to meet the increased load demand in the area.

The ownership of the plaintiff, over the land of Khasra number 13/3, wherein, transformer has been installed on area about 100 square yards and the fact that overhead electric wires are passing over the land of the plaintiff is not disputed. The main contention of Id. Counsel for defendant was that the substation, having capacity of 100 KVA was erected 22-25 years back and in the year 2001, the substation was augmented from 100 KVA to 400 KVA to meet the increased load in the area. No document is filed by the defendant to show that substation was erected around 22-25 years back, on the land of the plaintiff. No explanation has come on record, on behalf of defendant as in which capacity, they erected the substation of 100 KVA or 400 KVA, on the land of the plaintiff. No written consent of the plaintiff for authorising the defendant to erect a substation, over his land or to permit the overhead cable, over his land, is filed on record. Section 39 of The Specific Relief Act, 1963, provides that mandatory injunctions to be granted, when to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complaint of, and also to compel performance of requisite acts.

Adverting back to the fact of present case, the ownership of the plaintiff over the land, where a substation has been erected and the electricity cables are passing through, have not been denied. No evidence is led by defendant as to show any right to install overhead electricity wires or substation, over the plaintiff land. Being owner of the land, plaintiff has shown an obligation in his favour by not permitting the defendant to

continue with the substation or overhead electricity cables, passing through the land of the plaintiff.

Accordingly issue no.1 is decided in favour of plaintiff and against the defendant.”

6. The first appellate court has also upheld the findings and conclusions of the trial court by observing as under:-

“11. **Issue no. 1:-** The case of the defendant/appellant has not been proved. It has come on record that the plaintiff/respondent applied for connection but nowhere any permission for installation of any transformer or sub station was given by the plaintiff. It is not disputed that the plaintiff is owner in possession of suit land and has right to use the same as per his whims and wishes. The defendant should have brought on record as to how they were authorised to install the sub station or high tension wire for meeting of the requirement of the area on the land of the plaintiff The written statement is vague. During the course of arguments it was argued that they had taken the permission from plaintiff regarding installation of transformer/sub-station. The application dated 19.1.77 relied upon by the defendant is on record and it is clear law that if a document is produced it can be read against the party producing it even though it is not formally proved. In this application the plaintiff has only stated that electricity connection be given to him on the land. No where it proves the case of the defendant. In sanction for tube well connection name of Chand Singh is mentioned. Security has been taken from him. Hence the case of defendant is not proved in any way. Ld. Trial Court has rightly given its findings on issue no. 1 and the same are hereby reaffirmed. Accordingly issue no. 1 is decided in favour of the plaintiff/respondent and against the defendant/appellant.”

7. In this Regular Second Appeal, the following substantial question of law was framed by a learned Single Judge of this Court on 24.7.2013:-

“Whether a Civil Court had the jurisdiction to pass the impugned order or not?”

8. In my opinion, actually the following substantial questions of law need to be framed and which I am framing in exercise of my powers under the proviso to Section 100 CPC:-

“1. Whether the courts below have fallen into a clear cut gross illegality and perversity in passing the impugned judgments in ignorance and violation of the provision of Section 60(b) of the Indian Easements Act, 1882 which states that if a licensee executes work of a permanent character by incurring expenses in the execution of the work, then, license cannot be terminated?

2. Whether the courts below have not committed a complete and gross illegality and perversity in failing to comply with the principle of estoppel contained under Section 115 of the Indian Evidence Act, 1872 against the respondent/plaintiff because it was not possible to overnight or in a day or two construct or renovate/re-install a transformer/sub-station with overhead high tension and low tension cables and wires?”

9. In my opinion, the substantial questions of law framed above have to be answered in favour of the appellant/defendant no.1 and against the respondent/plaintiff. The reasons for the same are given hereinafter.

10. In order to appreciate the issue of permission/consent being given by the respondent/plaintiff to appellant/defendant no.1 for installing the transformer/sub-station and the overhead wires and cables, it is necessary to refer to certain paras of the written statement of the appellant/defendant no.1 and the corresponding paras in the replication filed by the respondent/plaintiff and which paras read as under:-

“Paras of Written Statement of appellant/defendant no.1

2. In reply to the contents of para 2 of the plaint it is submitted that the sub-station having capacity of 100 KVA was erected around 22-25 years back to provide tube well connection in the rural area.

4-5. That the contents of paras 4 & 5 of the plaint are wrong and denied. It is submitted that a sub-station was augmented from 100KVA to 400 KVA to meet the increased load in the area with the approval of the competent authority and work executed by XEN(S/STN)W.II. The increased capacity of transformer was installed at the old place and lines already there to provide/utilisation of the power.

8-9. In reply to the contents of paras 8 & 9 of the plaint, it is submitted that the lines were erected at the time of erection of 100 KVA sub-station around 22-25 years back. The work was executed by XEN(S/STN)W.II and no report was received from him during the execution of CWO. It is a case of modification of sub-station on the exiting place, hence defendant is not liable to pay compensation for such type of works as the plaintiff and his family is also beneficiary of the same.

Paras of Replication of respondent/plaintiff to the written statement

2. That the contents of para 2 of the reply on merits of the written statement in so far as the installation of sub-station having a capacity of 100KVA about 22-25 years ago **are denied for want of knowledge.** However, it is submitted that the exact location of the sub-station which is alleged to have been erected about 20-25 years back has not been given by the defendant intentionally. It is further submitted that the plaintiff never permitted the defendant to either install any electricity transformer or pass over head electricity cables through his land by any express permission. even otherwise, the electricity transformer as shown in the site plant at point “X” was installed initially in the month of November 2001 only **without any express permission or consent by the plaintiff.**

4-5. That the contents of paras 4-5 of the reply on merits of the written statement are controverted whereas those of the plaint are reaffirmed as correct. It is absolutely wrong to allege that the sub-station was augmented from 100 KVA to 400 KVA to meet the increased load in the area with the approval of the competent authority or that the increased capacity of the transformer was installed at the old place. **As a matter of fact, as already stated, there was no need to increase the load in the area from 100 KVA to 400 KVA as the transformer/sub-station was earlier erected to provide tube-well connection in the rural area alone.** The agricultural activities in the area having come to an end on account of colonisation as such there is no need for providing any tube well connection at present. As already stated, except the holding of the plaintiff the entire area near and adjacent to it has been colonised. Thus, there is no necessity whatsoever for either the transformer of the over head electricity cables.

7. That in reply to para 7 of the written statement the plaintiff submits that despite the protest made by the plaintiff the sub-station was energised in November 2001. The defendants are thus guilty of committing trespass over the land of the plaintiff without his consent.

8-9. That the contents of paras 8-9 of the reply on merits of the written statement are controverted whereas those of the plaint are reaffirmed as correct. in the absence of any written consent or permission from the plaintiff the defendant is liable to pay damages to the plaintiff for unauthorized user of his immovable property.” (emphasis is mine)

11. Besides the aforesaid paras of the pleadings in the trial court, it is necessary to refer to the pleadings of the respondent/plaintiff made in the first appellate court while replying to an application for additional evidence filed by the appellant/defendant no.1 and which para reads as under:-

“2. That the contents of para 2 of the application are absolutely wrong hence denied. it is wrong and denied that the judgment and decree has been obtained on the basis of misrepresentation of facts and by withholding vital documents from the Court. It is wrong that the said documents are being filed herewith. As a matter of fact, the applicant had ever an opportunity and right to produce the said documents before the Trial Court. However, the said opportunity was not availed which fact is apparent from record of the Trial Court itself. In any case, the documents sought to be produced and proved by the applicant merely shows that an agricultural connection was applied for by the respondent which was sanctioned and emergised. This fact itself is not sufficient to set aside the decree of possession passed by the learned Trial Court since admittedly the suit property is the part and parcel of the agricultural land of the respondent over which the appellant had installed a sub-station merely as a licensee of the respondent. The said license having been terminated as such, the appellant is now an unauthorised occupant and thus, cannot be permitted to remain in occupation of the said land for ever. Thus, the application as also the appeal is liable to be dismissed.” (emphasis is mine)

12(i) It is to be noted and seen that when in the written statement, the appellant/defendant no.1 specifically stated in para 2 that the transformer/sub-station was installed about 20-25 years ago, in the replication the respondent/plaintiff only denied the same ‘for want of

knowledge'. Obviously, this denial is no denial in the eyes of law as repeatedly held in various judgments of this Court and the Supreme Court. Obviously, this convenient denial for want of knowledge thus cannot be believed.

(ii) Paras 2 and 4-5 also impliedly admit to the installation of transformer/sub-station way back because it is specifically admitted that the transformer/sub-station was erected earlier to give a tube well connection and further it is pleaded that the installation is no longer required as the area is subsequently urbanized. There are clear admissions of transformer installed way back before November, 2001.

(iii) It may be noted that the appellant/defendant no.1 is a private entity but when the works in question were done of the installation of transformer/sub-station with overhead lines and cables, these works were done by the predecessor-in-interest of the appellant/defendant no.1 which would be a public body, namely, Delhi Electricity Supply Undertaking or the Delhi Vidyut Board. Therefore, the transformer/sub-station would have existed for many years prior to the filing of the subject suit by the respondent/plaintiff in April, 2002 and it appears that respondent/plaintiff wants to take advantage of the old records of respondent/plaintiff given consent not existing in November, 2001 and which record was with the predecessor bodies of the appellant/defendant no.1.

(iv) Further, it is impossible to believe that if the work was done at site in November, 2001 whether of installing a new transformer/sub-station for the first time or for replacing the existing one installed 20-25 years back prior to filing of the suit, if the same was done illegally and forcibly, the first thing which the respondent/plaintiff would have done was to rush to the court for seeking injunction or in any case file a police complaint with respect to illegal trespass, and admittedly none of these things were done by the respondent/plaintiff. Obviously therefore, it is clear that the transformer/sub-station was installed many years prior to the filing of the suit and at best was replaced in November, 2001 and which is clear from the admissions of the respondent/plaintiff in paras 2 and 4-5 of the replication. Whatever ambiguity which existed as regards alleged lack of consent/permission, the same is removed from the reply of the respondent/plaintiff to the application filed by the appellant/defendant no.1 in the first appellate court wherein the respondent/plaintiff admits appellant/defendant no.1 to be a licensee and the license being terminated.

(v) Even if we take that the transformer/sub-station was installed for the first time along with overhead cables and wires in November, 2001, then, why the respondent/plaintiff took no action whatsoever till April, 2002 and only when the subject suit was filed inasmuch as it is impossible to believe that any person, much less a public authority or a large company

like the appellant/defendant no.1, to simply walk into a private land and start installing transformers/sub-stations and that too with overhead cables and wires of high tension and low tension. Obviously, consent/permission of the respondent/plaintiff to the works done by the appellant/defendant no.1 was there to the work of installation of the transformer/sub-station and the overhead cables and wires.

13. At this stage, it would be therefore necessary to reproduce Section 60 of the Indian Easements Act and Section 115 of the Indian Evidence Act and which Sections read as under:-

“Section 60 of the Indian Easements Act:

60. Licence when revocable.- A licence may be revoked by the grantor, unless-

- (a) it is coupled with a transfer of property and such transfer is in force;
- (b) the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution.

Section 115 of the Indian Evidence Act

115. Estoppel.-When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

14. It is clear from the facts of the present case that once it is impossible and inconceivable for the appellant/defendant no.1 to install the transformer/sub-station along with high tension and low tension overhead wires overnight or in a day or two, then surely and really it has to be held that there existed consent/permission of the respondent/plaintiff to the works

being carried out by the appellant/defendant no.1. In law there is no express consent required in the form of writing and implied consent is clearly to be discerned as existing from the facts of the present case, inasmuch as, and as already stated above, works in the nature of installing of transformer/sub-station, replacing the same and installing overhead high tension and low tension wires and cables is a work installation of which would run into many days and thus which work could not have been done without the consent/permission of the owner of the land. Thus, not only the respondent/plaintiff is estopped as per Section 115 of the Indian Evidence Act, respondent/plaintiff also would have no right to seek the reliefs in the suit because of Section 60(b) of the Indian Easements Act and which states that a license cannot be terminated once works of permanent character are done by incurring expenses. Once there is no requirement in law of express consent, and implied consent in this case is necessarily found to exist in favour of the appellant/defendant no.1 and against the respondent/plaintiff because of the nature of the works and time, the same would have involved for being executed. In law there is no requirement of express consent and implied consent is sufficient for application of Section 115 of the Indian Evidence Act, inasmuch as, the doctrine of estoppel under Section 115 of the Indian Evidence Act is the doctrine of standing whereby implied consent/permission is presumed in favour of the person who carries out the

works of permanent nature and incurs expenses and the owner of the land standing by and not objecting to the work being undertaken. The implied consent once exists, the respondent/plaintiff hence is estopped under Section 115 of the Indian Evidence Act from seeking the reliefs as prayed for in the subject suit.

15. In view of above said discussion, the substantial questions of law are answered in favour of the appellant/defendant no.1 and against the respondent/plaintiff, and therefore, the impugned Judgments of the courts below dated 3.2.2011 and 16.4.2013 are set aside. The Regular Second Appeal is allowed, suit of the respondent/plaintiff will stand dismissed. Decree sheet be prepared. Parties are left to bear their own costs.

OCTOBER 26, 2016

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VALMIKI J. MEHTA, J