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

+ RSA 114/2011

RAJINDER KUMAR SINGHAL & ORS Appellants
Through: Mr.Rahul Srivastava, Advocate.

versus

CHIEF EXEC. OFFICER BSES
RAJDHANI POWER LTD Respondent
Through: Mr.Deepak Pathak, Advocate.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER
17.11.2016

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1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the concurrent Judgments of the courts below; of the Trial Court dated 25.02.2004 and of the First Appellate Court dated 11.02.2011; by which the suit filed by the appellants/plaintiffs seeking mandatory and permanent injunction has been dismissed.

2. Civil Suit No.46/96 was filed against the erstwhile DESU seeking a decree of mandatory and permanent injunction directing the defendant and its officials to remove the sub-station from near the house of the appellants and shifting the same to some other public place as well to restrain the respondent/defendant from augmenting the load from the point of existing load.

3. The grievance of the appellants/plaintiffs is that existence of transformer near their residential unit is a safety hazard for them. Not only

that, two poles supporting the transformer have been constructed in their private property thereby augmenting the supply.

4. In the written statement, after raising the preliminary objection regarding the maintainability of the suit for want of notice under Section 478 of Delhi Municipal Corporation Act as well under Specific Relief Act, it was pleaded that the transformer was installed in the year 1978-79. The suit seeking mandatory and permanent injunction was filed in the year 1996 i.e. after about eighteen years of installation of the transformer. Regarding erection of two poles, it was pleaded that the two poles now appear within the boundary wall of the appellants/plaintiffs not because they were constructed on private property but due to the encroachment made by them.

5. The suit was dismissed by the learned Trial Court inter-alia on the ground that the appellants/plaintiffs had not approached the Court with clean hands. The averments in the plaint instituted on 15.01.1996 that DESU was contemplating enhancement of the load from 400 KVA to 600 KVA was falsified from the legal notice served by the appellants/plaintiffs through Sh.K.L.Hans, Advocate. In the legal notice, it was stated that transformer capacity was already enhanced from 400 KVA to 650 KVA in the year 1991. As per Ex.PW1/9 in August, 1985 Smt. Santra Devi – plaintiff No.1 requested DESU for removing the transformer which was declined but she preferred not to avail her legal remedy. After six years she again served a legal notice Ex.PW1/6 for removal of the transformer but did not avail any legal remedy for almost four years till another notice Ex.PW1/7 was served. Thus, the conduct of the appellants/plaintiffs by not approaching the Court for almost twelve years amounted to acquiescence. Smt. Santosh Devi became the owner on the basis of ‘power of attorney sale’ but the copies

filed on record even did not bear the signature of the seller as executant. Even the khasra number of the property was not correctly mentioned on the 'sale documents'. Somewhere it is recorded as Khasra No.548 min and at other places as 549 min. This colony was unauthorised at that time. The transformer in question had been existing for a long time i.e. 1978-79 much before the houses were built in its vicinity and removal of the same would cause tremendous public hardship. The suit was held to be barred under Section 478 of Delhi Municipal Corporation Act.

6. The First Appellate Court concurred with the findings of the learned Trial Court observing that the general power of attorney on the basis of which the appellants claimed their title, even did not bear signature of the executant/seller Smt.Santra Devi. Learned First Appellate Court has also considered the discrepancies in respect of the khasra number on the 'Power of Attorney/sale documents' noting that the affidavit sworn as part of the sale transaction is not even bearing the signature of the deponent/seller. Not only that even the site plan Ex.PW1/5 was not bearing the directions and dimensions of the property to ascertain the correct boundaries of the said property.

7. It is settled legal position that in second appeal the High Court cannot set aside the concurrent finding of facts by the Courts below. The second appeal can be entertained only if a substantial question of law is raised.

8. On 18.07.2011 when this RSA came up for hearing, learned counsel for the appellants made submissions to the effect that the appellants confine the appeal to the prayer for shifting the transformer and they will pay charges for shifting the transformer. This offer was made presuming that there would be an alternative location to install the transformer, notice was

issued to the respondent confining to the above issue only.

9. Two affidavits have been filed by the BSES explaining the circumstances wherein it is not possible to shift the location of the transformer from its present position.

10. It is a matter of record that the transformer was installed in an unauthorised colony in the year 1978-79 whereas the property was purchased by Smt.Santosh Devi (plaintiff No.2) from Smt.Santra Devi (plaintiff No.1) in the year 1985. The suit for injunction was filed in the year 1996. It is also admitted case of the appellants that the plot was purchased and constructed much after the installation of the transformer by the erstwhile DESU in the year 1978-79. While purchasing the property on the basis of documents which have inherent defect, the construction being raised much after the installation of the transformer, the appellants cannot claim of any encroachment in their property for construction of poles especially when the description and direction of the property purchased by them remained indecisive even at the time of sale transaction of the said property.

11. On behalf of the appellants, an offer has been given to bear the expenses for shifting of the transformer to a location mentioned in a site plan filed in the second appeal. The respondent BSES has rightly contended that the said land does not belong to the appellants and they cannot ask the transformer to be shifted to that place as technically also it is not feasible. In the facts of this case reliance placed by learned counsel for the appellants on the case of Tamil Nadi Electricity Board & Ors. vs. Madasamy Konar (Madras High Court) decided on 01.04.2008, Baby Anjum thr. her Natural Guardian & Anr. vs. The Chief Executive Officer, BSES Rajdhani Power

Ltd. in W.P(C) No.5075/2008 decided on 10.04.2012 and BSES Rajdhani Power Ltd. vs. S.K.Bhatia & Ors. in W.P.(C) No.4288/2011 decided on 28.02.2013 have no applicability to the present case. The respondent has already assured that the transformer with modern technology hence not hazardous and BSES has taken all steps for the safety of the persons residing nearby.

12. Taking into consideration that the transformer installed near the house of the appellant is meant for public purpose after examining all the relevant facts, merely because the appellants feel some inconvenience cannot be a ground to shift the transformer especially when at the time when this property was purchased by the predecessor-in-interest of the appellants the transformer was already existing there.

13. The instant appeal does not raise any substantial question of law under Section 100 of Code of Civil Procedure. As the finding of the learned Trial Court and the First Appellate Court are based on appreciation of evidence, the judgment and decree by the Courts below is affirmed.

14. The Regular Second Appeal is dismissed.

15. No costs.

PRATIBHA RANI, J.

NOVEMBER 17, 2016

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