

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

+ **Ex. S.A. No.6/2016**

% **28th April, 2017**

DELHI TRANSPORT CORPORATION Appellant
Through: Mr. Sarfaraz Khan, Advocate
with Mr. Ataur Rehman,
Advocate.

versus

M/S. VIDYA MANDIR CLASSES LTD. Respondent
Through: Mr. Rajeev Aggarwal,
Advocate.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The appellant before this Court in this Execution Second Appeal was the plaintiff in the suit. The appellant/plaintiff/decreed holder challenges the impugned judgment dated 22.1.2016 of the first appellate court below deciding the appeal filed by the present respondent, the objector before the executing court. The first appeal in the court below was filed by the present respondent against the order of the executing court dated 6.11.2013 dismissing the objections. The scope of the hearing before the first appellate court was thus necessarily confined to whether or not objections filed in the execution of the money decree were sustainable or not i.e by the impugned

judgment the first appellate court could only have decided whether the judgment and decree dated 14.5.2012 could or could not be executed against the objector. However what the first appellate court has done is that by the impugned judgment dated 22.1.2016, the first appellate court has set aside the judgment and decree dated 14.5.2012 in Suit No. 123/2011 decreeing the suit of the present appellant/plaintiff/deGREE holder for a sum of Rs.1,34,400/- along with *pendente lite* and future interest. Suit was filed as the respondent/defendant/judgment debtor was displaying its advertisements on the Bus Queue Shelters of the appellant/plaintiff/deGREE holder without obtaining any license and also without paying any license fees.

2. It may be noted that this judgment and decree dated 14.5.2012 passed in favour of the appellant/plaintiff/deGREE holder was an *ex-parte* judgment and decree. Against this *ex-parte* judgment and decree, an application was filed by the respondent/defendant/judgment debtor under Order IX Rule 13 of Code of Civil Procedure, 1908 (CPC) and this application was dismissed vide its order dated 8.2.2013. The judgment and decree dated 14.5.2012 therefore became final.

3. (i) When the appellant filed execution proceedings, the present respondent/objector objected against it on the ground that the decree was passed against M/s Vidya Mandir Classes whereas the

objector was M/s Vidya Mandir Classes Ltd. These objections, as stated above, were dismissed by the executing court vide its order dated 6.11.2013 and against which an appeal was filed by the present respondent/objector and which has resulted in passing of the impugned judgment dated 22.1.2016 setting aside the main judgment and decree dated 14.5.2012.

(ii) The first appellate court by its impugned judgment dated 22.1.2016 has however, held against the present respondent/objector that there was no difference between the present respondent/objector M/s Vidya Mandir Classes Ltd. and the defendant/judgment debtor M/s Vidya Mandir Classes. I would like to add an aspect that even when the suit was filed, as per the plaint, the defendant though referred to as M/s Vidya Mandir Classes, was however sued through its Managing Director i.e the description of the defendant in the Memo of Parties may be was defective but the defendant was sued as a company.

4. Let me at this stage reproduce the portions of the judgment dated 22.1.2016 of the first appellate court giving reasons and observing that obvious mistakes in the main judgment and decree dated 14.5.2012 could not be allowed to continue, and thus by the impugned judgment the first appellate court which was only hearing an appeal against the dismissal of the objections in the execution, has set

aside the main judgment and decree dated 14.5.2012. The relevant paras of the impugned judgment are paras 12 to 21, and these paras read as under:-

“12. The Ld. Trial Court, therefore, discarded the photographs and complaints available on judicial file, which were pointed out by the counsel for the defendant. Similarly, by way of the impugned order, the Ld. Executing Court concluded that the appellant and judgment debtor are one and the same legal entity and the appellant could not point out any fraud played upon the court while obtaining the judgment and decree dated 14.05.2012.

13. It was pleaded by the appellant before the Ld. Executing Court that the appellant/objector never dealt with the plaintiff/decree holder as it was a distinct entity and therefore, the decree and judgment dated 14.05.2012 is not legally binding on it. The Ld. Executing Court did not believe the same. Therefore, in the entire facts and circumstances, it becomes imperative to analyse the basis on which the judgment and decree dated 14.05.2012 was passed by the Ld. Trial Court.

14. As observed earlier, Mr. V.N Patil (PW-1) working as Senior Manager (Publicity) was got examined on behalf of the plaintiff, who relied on the afore-mentioned documents Ex.PW-1/1 to Ex.PW-1/15. The document Ex.PW-1/1 is a circular dated 11.03.1997 authorizing the official named therein to sign the legal documents, Affidavit, Agreement etc. As per the documents Ex.PW-1/1, the Senior Manager (Incharge) Publicity at serial no.18 was authorised for matters pertaining to Public Relations and Publicity Department. It is the Secretary/DTC Board at serial no.1, who was authorised for litigations and/or cases arising out of decisions taken by the Board. It is also clarified in the circular Ex.PW-1/1 that the work with regard to engagement of advocates and entrustment of cases etc. would be done by the legal department as was being done earlier. It is nowhere mentioned that the litigation or other ancillary matters would be dealt by the Publicity Department of the plaintiff. It is amply clear that all such litigations work would be done by the legal department of the plaintiff.

15. Admittedly, Shri V.N Patil (PW-1) was working as Senior Manager (Publicity) and was not concerned in any manner with the legal department. There is no evidence available on record to indicate that the matter was ever sent to the legal department of the plaintiff before filing of the same in the court. This material fact was over-looked by the Ld. Trial Court while passing the ex-parte judgment and decree dated 14.05.2012.

16. Another glaring defect over-looked by the Ld. Trial Court is that the affidavit of Shri V.N Patil in support of the suit was sworn and verified on 29.03.2011, whereas the plaint is dated and filed on 05.04.2011, which goes to imply that the affidavit in support of the suit was sworn and verified prior to the preparation and filing of the plaint in the court.

17. Further PW-1 also relied on complaint Ex.PW-1/7 made to the SHO PS-Malviya Nagar and complaint Ex.PW-1/8 made to SHO PS-Janak Puri. As per both the afore-said complaints, the advertisement board found

displayed during survey belonged to “IIT Study Circle” and not to M/s Vidya Mandir Classes. Therefore, the findings returned by the Ld. Trial Court vide its order dated 08.02.2013 while dismissing the application under Order 9 Rule 13 CPC that only those documents tendered in the evidence would be considered, is also not correct. The Ld. Trial Court overlooked the documents i.e. complaints Ex.PW-1/7 and Ex.PW-1/8, wherein it is clearly mentioned that advertisement board found displayed during survey belonged to “IIT Study Circle” and not to M/s Vidya Mandir Classes.

18. There is another documents available on record filed by the plaintiff itself though not relied by it i.e. document dated 31.03.2009, which categorically mentions that advertisement board found displayed belonged to “IIT Study Circle”. There is no reason furnished by the plaintiff why the aforesaid document was not relied upon by it despite filing the same.

19. In the afore-discussed facts and circumstance, it is clear that though the Ld. Trial Court came to a just conclusion that both M/s Vidya Mandir Classes and M/s Vidya Mandir Classes Ltd. are one and the same legal entity, as the legal name of a company and its popular name might be different, the fact remained that the Ld. Trial Court failed to notice that the plaintiff had not led any evidence to establish that defendant or objector had displayed the board unauthorizedly on the BQS in question. There is no evidence available on record of the Ld. Trial Court to indicate in this direction. Even the documents relied on by the PW-1 point out that it was the board displayed by “IIT Study Circle” and not by M/s Vidya Mandir Classes, as pleaded by the plaintiff.

20. I am conscious of the fact that in the present appeal, the judgment and decree dated 14.05.2012 has not been challenged by the appellant. However, the entire record of Suit No.123/2011 is before this court wherein, in my considered opinion, the judgment and decree dated 14.05.2012 ought not to have been passed for the reasons discussed above. When the entire trial court record is before this court wherein, the findings returned by the Ld. Trial Court are not sustainable in the eyes of law, this court cannot sit as a mute spectator and cannot shut its eyes to the patent illegality. The impugned order is clearly emanating from the outcome of judgment and decree dated 14.05.2012, which in my considered opinion, is liable to be reversed for the reasons mentioned hereinabove. Here, it would be useful to mention the provision under Order 41 Rule 33 CPC, which is as under:

“33. Power of Court of Appeal- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

2[provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objections on which the Court from

whose decree the appeal is preferred has omitted or refused to make such order.]

21. In view of the above-referred provision and in exercise of power stipulated therein, I deem it fit to reverse the findings of the Ld. Trial Court RCA No. 161/2013 Page 7/8 given in the judgment and decree dated 14.05.2012 in Suit No.123/2011 as well as the findings given in the impugned order. Accordingly, the judgment and decree dated 14.05.2012 passed in suit no. 123/2011 titled as Delhi Transport Corporation Vs M/s Vidya Mandir Classes are hereby reversed. The suit is accordingly, dismissed with costs. Consequently, the order dated 08.02.2013 on the application under Order 9 Rule 13 CPC in Miscellaneous No. 27/12 and the impugned order dated 06.11.2013 in Execution No. 20/2012 are set aside. Decree sheet be prepared accordingly. Trial court record be sent back with a copy of the judgment. Appeal file be consigned to Record Room.”

(underlining added)

5. I am not only perturbed and disturbed by the impugned judgment dated 22.1.2016, but this Court would like to go on to observe that if courts pass judgments such as the impugned judgment, then there will result a rule of jungle and not the rule of law. This Court even after going through the impugned judgment repeatedly has not been able to understand as to how the first appellate court has demonstrated complete lack of knowledge of basics of law, and, the first appellate court is not a junior judicial officer but holds the rank of an Additional District Judge. In sum and substance the first appellate court by its impugned judgment holds that though it is not hearing an appeal against the main judgment and decree dated 14.5.2012 but simply because the entire record of the suit is before the court, therefore the court since it finds the reasons given by the suit court for passing the judgment and decree dated 14.5.2012 are unsustainable, hence the

first appellate court cannot sit as a mute spectator and shut its eyes to patent illegality and that consequently it was bound to set aside the judgment dated 14.5.2012. Not only the course of action taken by the first appellate court in the impugned judgment is against all canons of law and justice, but the first appellate court has for setting aside the judgment and decree dated 14.5.2012 invoked its assumed powers under Order XLI Rule 33 CPC. I am really amazed as to how the first appellate court could have invoked Order XLI Rule 33 CPC because the provision of Order XLI Rule 33 CPC even on a plain reading thereof would only apply when the first appeal is filed against the main judgment and decree. Order XLI Rule 33 CPC when used in execution proceedings can only be confined to the scope of the execution proceedings. There is nothing whatsoever in Order XLI Rule 33 CPC which empowers an appellate court in execution proceedings to set aside a final judgment and decree passed by a trial court and that too allegedly on the ground that the reasoning and conclusion of the trial court while passing the judgment and decree dated 14.5.2012 were erroneous. I am forced to say that the first appellate court has travelled totally beyond its jurisdiction and assumed powers which no law of this country gives.

6. Since this is an execution second appeal, learned counsel for the appellant states that a substantial question of law be framed, however, in my opinion a substantial question of law is only to be framed in a regular second appeal against a judgment of the first appellate court passed in the first appeal against a judgment of the trial court passed in a suit. Learned counsel for the respondent also argues that he does not press for framing of any substantial question of law. I may also note that the present judgment in any case notes the necessary serious question of law and also answers them.

7. In view of the above position, the following conclusions emerge:-

(i) The judgment and decree of the appellant/plaintiff/decreed holder dated 14.5.2012 decreeing the suit of a sum of Rs. 1,34,400/- along with interest had become final because not only the judgment was not taken in challenge in appeal but even the application under Order IX Rule 13 CPC stood dismissed.

(ii) Once a judgment and decree is final, an executing court has no power under any provision of law not only to not go behind the decree much less have any power to set aside a judgment and decree which has achieved finality.

(iii) By no stretch of imagination can Order XLI Rule 33 CPC be applied by an appellate court in execution proceedings to set aside a final decree passed in the suit and which has become final.

(iv) Observations by the first appellate court in the impugned judgment that it cannot remain as a mute spectator and shut its eyes to illegality is only an apology for acting beyond any and every principle of law known in this country and with which the first appellate court was undoubtedly bound by.

8. In view of the above discussion, the impugned judgment of the first appellate court passed in execution first appeal designated RCA No. 161/2013 is set aside to the extent of its operative portion contained in para 21 which reads as under (already reproduced above):-

“21. In view of the above-referred provision and in exercise of power stipulated therein, I deem it fit to reverse the findings of the Ld. Trial Court given in the judgment and decree dated 14.05.2012 in Suit No. 123/2011 as well as the findings given in the impugned order. Accordingly, the judgment and decree dated 14.05.2012 passed in suit no. 123/2011 titled as *Delhi Transport Corporation Vs. Vidya Mandir Classes* are hereby reversed. The suit is accordingly, dismissed with costs. Consequently, the order dated 08.02.2013 on the application under Order 9 Rule 13 CPC in Miscellaneous No. 27/12 and the impugned order dated 06.11.2013 in Execution No. 20/2012 are set aside. Decree sheet be prepared accordingly.”

The finding in the impugned judgment dated 6.11.2013 that there is no distinction between M/s Vidya Mandir Classes Limited, the objector

and the defendant M/s. Vidya Mandir Classes is however sustained.

The appeal is accordingly allowed and disposed of.

9. A copy of this judgment be sent to Hon'ble the Acting Chief Justice to bring to the notice of Hon'ble the Acting Chief Justice the conduct of this judicial officer concerned, namely, Sh. KXXXXXX, ADJ. The judgment of this Court be also sent to the Inspecting Judges Committee of this Judicial Officer for the year 2016. The Inspecting Judges Committee for the year 2016 is requested to consider not only the illegality in passing the judgment dated 22.1.2016 by the first appellate court but also it may kindly note the strong observations made by this court in the present judgment for setting aside the impugned judgment dated 22.1.2016.

APRIL 28, 2017
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VALMIKI J. MEHTA, J