

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

% **Date of decision: 17<sup>th</sup> November, 2017.**

+ **CM(M) 1281/2017**

**LALIT YADAV & ORS**

**..... Petitioners**

Through: Mr. Pankaj Gupta and Ms. Rimp  
Gupta, Advs.

Versus

**DELHI DEVELOPMENT AUTHORITY  
& ORS**

**..... Respondents.**

Through: Ms. Shobhana Takiar, Adv.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**CM No.40976/2017 (for exemption)**

1. Allowed, subject to just exceptions.
2. The application is disposed of.

**CM(M) 1281/2017 & CM No.40974/2017 (for stay)**

3. This petition under Article 227 of the Constitution of India impugns the judgment (dated 10<sup>th</sup> July, 2017 in Civil Suit No.8/17/16 (New No.613640/16) of the Court of Additional District Judge (ADJ)-02, West, Delhi) deciding the preliminary issue framed in the suit against the petitioners/plaintiffs and resultantly dismissing the suit as not maintainable and directing the decree sheet to be prepared.
4. I have at the outset enquired from the counsel for the petitioners/plaintiffs as to how this petition under Article 227 of the Constitution of India is maintainable and whether not the efficacious

remedy of appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is available to the petitioners/plaintiffs.

5. Neither the counsel for the petitioners/plaintiffs nor the counsel for the respondents/defendants Delhi Development Authority (DDA) appearing on advance notice were prepared to answer the said question and sought time to hand over copies of judgments, if any to be relied upon by them in the course of the day. Resultantly, the file was sent to the Chamber for passing orders. The matter thereafter went on the back burner and this judgment has been released on the date mentioned below.

6. The petitioners/plaintiffs have not placed before this Court the copies of the pleadings in the suit from which this petition arises. However, from a perusal of the impugned judgment, it is found that the petitioners/plaintiffs instituted this suit for the reliefs of (A) recovery of Rs.72 lakhs jointly and severally from the respondent/defendant No.1 DDA and the respondents/defendants No.2 to 4 being the offices of the Commissioner Land Management, Director Land Management-I and Deputy Director Land Management (West), of the respondent/defendant No.1 DDA; (B) for permanent injunction restraining the respondents/defendants from laying any right, title or interest in the piece of land ad-measuring 1500 sq. yds. situated in Khasra No.1300 in Village Abadi of Madipur, Delhi presently known as WZ-274-A, Madipur Village, New Delhi; (C) for mandatory injunction directing the respondents/defendants DDA to remove all its articles/goods lying in any part of the said property, pleading (i) that the petitioners/plaintiffs were in physical possession of the said land and have been dispossessed by the

respondents/defendants DDA therefrom forcibly and without due process of law; (ii) that the respondents/defendants DDA have also, without notice, demolished the structure on the said land; (iii) that the petitioners/plaintiffs had succeeded to the said land by inheritance; (iv) however in the revenue records, the land was erroneously shown as Gaon Sabha land; (v) that the said land was acquired pursuant to Notifications under Section 4 of the Land Acquisition Act, 1894 of the year 1959 and under Section 6 of 2<sup>nd</sup> January, 1969; (vi) that vide Notification of the year 1963 under Section 507 of the Delhi Municipal Corporation Act, 1957, Village Madipur was declared as urbanized land; (vii) that in 1960, Gaon Sabha of Madipur initiated eviction proceedings for part of the land against the predecessor of the petitioners/plaintiffs and eviction order was passed but which was set aside in appeal and the case remanded back; (viii) that vide Notification of 20<sup>th</sup> August, 1974, the land was transferred by Central Government to respondents/defendants DDA; (ix) that a civil suit was filed by the predecessor of the petitioners/plaintiff against the respondent/defendant DDA for declaration of title and for injunction with respect to the said land; however the said litigation did not fructify in view of jurisdiction deciding the title of the land having been vested with the Revenue Authority; (x) that on 17<sup>th</sup> May, 2014, the respondents/defendants DDA demolished part of the structure on the said land, without notice or warning and threatened to take forcible possession thereof; (xi) that the petitioners/plaintiffs filed W.P.(C) No.319/2014 in this Court but the respondents/defendant DDA despite *status-quo* orders in the said writ petition dispossessed the petitioners/plaintiffs; (xii) that the petitioners/plaintiffs have suffered loss and damage in the sum of Rs.60

lakhs by such action of the respondents/defendants DDA; (xiii) that the petitioners/plaintiffs filed W.P.(C) No.6528/2014 claiming relief of re-possession and compensation but the said writ petition, on 24<sup>th</sup> September, 2014 was withdrawn with liberty to take appropriate action; and, (xiv) thereafter, the suit was being filed.

7. The impugned judgment also records that the respondents/defendants DDA in its written statement *inter alia* pleaded (a) that the grandfather of the petitioners/plaintiffs had in or about the year 1980 instituted a suit for declaration and permanent injunction with respect to the said land and which suit was dismissed vide judgment dated 4<sup>th</sup> March, 2003 and the first appeal against the said judgment was dismissed on 29<sup>th</sup> July, 2008 and the second appeal against the said judgment was dismissed on 23<sup>rd</sup> May, 2011 and the SLP preferred thereagainst dismissed on 20<sup>th</sup> March, 2013; (b) that in the judgment dated 23<sup>rd</sup> May, 2011, it was recorded that the petitioners/plaintiffs/their predecessor had been dispossessed from the said property during the Emergency period and on 12<sup>th</sup> November, 1980 had been given alternate plot; (c) that the land belonged to the respondent/defendant No.1 DDA; (d) that the suit was in abuse of the process of the Court.

8. The following preliminary issue was framed in the suit on 17<sup>th</sup> February, 2017:

*“Whether plaintiff’s suit is maintainable in the present form and barred by res judicata? OPP”*

9. The learned ADJ, after hearing the counsels on the preliminary issue, held that though the principle of *res judicata* was not applicable but

the petitioners/plaintiffs had no legal right to the property and it is the respondent/defendant No.1 DDA who is owner thereof and in whom the said property vested and the petitioners/plaintiffs had been repeatedly encroaching the land and the respondent/defendant No.1 DDA had acted in accordance with law and the petitioners/plaintiffs can have no claim for compensation with respect to the said act of respondent/defendant No.1 DDA. The suit was held to be not maintainable and was thus dismissed.

10. Considering the scope of the present judgment i.e. the maintainability of this petition under Article 227 of the Constitution of India, it is not necessary to detail the reasoning given by the learned ADJ to hold as aforesaid.

11. The challenge by the petitioners/plaintiffs to the impugned judgment, besides on merits, is also on the ground of the decision rendered by the learned ADJ being on questions of fact and not merely on the question of law and hence could not have been rendered on a preliminary issue. The petitioners/plaintiffs have also pleaded that though the impugned judgment directs preparation of the decree sheet but the learned ADJ had committed grave procedural and material irregularity and illegality in conducting the proceedings in the suit and the judgment is thus revisable by this Court in exercise of powers under Article 227 of the Constitution of India.

12. The counsel for the petitioners/plaintiffs relies on:

(I) ***Bhupinder Kamal Vs. New Delhi Municipal Committee*** AIR 1980 Del 121, negating the preliminary objection to the maintainability of the Revision Petition on the ground of the

challenge therein being to the judgment holding the suit to be not maintainable, and holding the Revision Petition to be maintainable.

(II) ***Kondapally Vasudev Reddy Vs. Baireddy Venkata Reddy*** AIR 1963 AP 232, also negating the challenge to the maintainability of the Revision Petition on the ground of the challenge therein being to an order on a preliminary issue and the remedy of appeal being available; it was reasoned that since the Court below had followed a procedure contrary to law, a Revision Petition would lie.

(III) ***Surya Dev Rai Vs. Ram Chander Rai*** (2003) 6 SCC 675 laying down that amendment with effect from 1<sup>st</sup> July, 2002 in Section 115 of the CPC cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India and interlocutory orders against which remedy of revision is excluded thereby, are nevertheless open to challenge under Article 227 of the Constitution of India and further laying down the category of orders against which Article 227 of the Constitution of India can be invoked.

(IV) ***Major S.S. Khanna Vs. Brig. F.J. Dillon*** AIR 1964 SC 497 laying down that the jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone; else, all the issues should be tried together by the Court; it was further held that since the Subordinate Court exercised its jurisdiction with material irregularity in passing the order under challenge therein and the said order being non-appealable, the same

was amenable to the revisional jurisdiction of the High Court under Section 115 CPC.

(V) ***S. Satnam Singh Vs. Surender Kaur*** (2009) 2 SCC 562 laying down that the Court, with a view to determine whether an order passed by it is a decree or not, must take into consideration the pleadings of the parties and the proceedings leading up to the passing of the order and the circumstances under which an order made would be relevant.

(VI) ***Mangluram Dewangan Vs. Surendra Singh*** (2011) 12 SCC 773 holding that where an order is neither a decree appealable under Section 96 of CPC nor an order appealable under Section 104 and Order XLIII Rule 1 of the CPC, the remedy is to file a revision petition.

13. Per contra, the counsel for the respondents/defendants DDA has referred to ***Satbir Singh Vs. Mehtab Singh*** 2017 SCC OnLine Del 9923 and ***Pushpa Rathi Vs. Jugnu Bansal*** 2017 SCC OnLine Del 10881 holding that where the remedy under Section 96 of the CPC or other statutory provision is available, the remedy of a petition under Article 227 of the Constitution of India would not be available.

14. It is not in dispute that a decision on a preliminary issue as to the maintainability of the suit, holding the suit to be not maintainable and dismissing the suit, would be a decree and appealable under Section 96 of the CPC. The question which arises is, when a Court reaches such conclusion either by committing gross irregularity of procedure or which could not have been reached on the material on record, whether it is open

to a person aggrieved to contend that the decision, though if correctly made would have been a decree but because has not been so made, is not a decree and the statutory remedy as available in law thereagainst, need not necessarily be availed of and a challenge thereto can be made under the supervisory jurisdiction.

15. I am of the view that if it were to be held that the remedy of Article 227 of the Constitution of India in alternative to the remedy of appeal under Section 96 of CPC, is available by contending gross irregularity of procedure or on merits of the order, it would open the floodgates for challenges being made before this Court also to decrees passed by the Court of Civil Judge against which otherwise appeal to the District Judge or the Senior Civil Judge is maintainable. Further, the Court would then in such cases be first required to conduct an enquiry, whether there is any gross mistake or illegality of procedure in arriving at the conclusion, thereby keeping the petitions pending in this Court for long and axiomatic delays in disposal of the *lis*.

16. I may at the outset only cite ***Rishabh Chand Jain Vs. Ginesh Chandra Jain*** (2016) 6 SCC 675 holding that the order, conclusively determining the rights of parties with regard to one of the issues is a decree and where order passed is a decree under law, no revision lies under Section 115 of the CPC and it is only appealable under Section 96 of the CPC. It was further held that the order impugned therein dismissing the suit on the ground of *res judicata* did not cease to be a decree on account of a procedural irregularity of non-framing an issue and ought to be treated as a decree as if passed, after framing the issue and on adjudication

thereof. It was further held that what is to be seen is the effect and not the process and even if there is a procedural irregularity in the process of passing such order, if the order passed is a decree under law, no revision lies under Section 115 of the CPC in view of the specific bar in Section 115 of the CPC.

17. In my view, the judgment aforesaid is a complete answer to the question aforesaid which arises for decision and in view thereof, this petition has to be dismissed as not maintainable. I may mention that the Full Bench of Madras High Court as far back as in ***P.M.A.R.M. Muthiah Chettiar Vs. Lodd Govinddoss Krishnadoss Varu*** (1921) ILR 44 Mad. 919, dealing with a contention that the appeal against the order purportedly under Order XXII Rule 10 of the CPC was not maintainable since Rule 10 of Order XXII of CPC did not apply to the situation, held that since the District Judge purported to act under Order XXII Rule 10 of CPC and rejected the application, an appeal will lie, even if the Court thinks the Rule to be inapplicable. It was further held that the fact that the District Judge had no power to pass an order under a particular section did not bar the High Court from treating his order as having been passed thereunder for the purposes of entertaining an appeal against the order. Reliance was placed on ***Hurrish Chunder Chowdhry Vs. Kalisunderi Debi*** (1883) ILR 9 Cal. 482 (Privy Council) and on ***Latchmanan Chetty Vs. Ramanathan Chetty*** 1905 ILR 28 Mad 127.

18. It follows, that even if the learned ADJ in the present case wrongly framed the preliminary issue or under the preliminary issue decided matters which could not have been decided without trial, the same would

not make available against the order a remedy which is otherwise not available against a decision on a preliminary issue dismissing the suit.

19. As far as the judgments cited by the counsel for the petitioners/plaintiffs are concerned, though in the light of the recent dicta aforesaid of the Supreme Court, there is no need to deal therewith but I may mention that the judgment of this Court in ***Bhupinder Kamal*** supra is based solely on the earlier dicta of the Division Bench of this Court in ***Siri Krishan Bhardwaj Vs. Manohar Lal Gupta*** AIR 1977 Delhi 226 holding a Revision Petition under Section 115 of the CPC to be available against an order of dismissal of an application for leave to defend a suit under Order XXXVII of the CPC, notwithstanding a consequential decree having been passed. The learned Single Judge in ***Bhupinder Kamal*** supra applied the said principle to hold that a Revision Petition against a judgment to be maintainable, as the decree following the said judgment is consequential. I respectfully disagree. An order of dismissal of an application for leave to defend a suit under Order XXXVII of the CPC and a decree as a consequence thereof, cannot, in my view, be equated with a decree which under Section 33 of the CPC follows a judgment. While a 'judgment', in Section 2(9) of the CPC is defined as a statement given by the Judge of the grounds of a decree or order, Section 2(2) of the CPC defines 'decree' as a formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. The two in my view are inseparable. I may also notice that this Court in ***V.S. Saini Vs. D.C.M. Ltd.*** AIR 2004 Del 219 has held ***Siri Krishan Bhardwaj*** supra to be no longer good law owing to the

subsequent judgment of the Supreme Court in *Shah Babulal Khimji Vs. Jayaben D. Kania* AIR 1981 SC 1786 and owing to the amendment of the CPC of the year 2002.

20. As far as other judgments are concerned, save for *Kondapally Vasudev Reddy*, which also is of the time prior to amendment of the year 2002 of CPC, the others do not directly deal with the issue in hand.

21. The petition is accordingly dismissed as not maintainable.

No costs.

**RAJIV SAHAI ENDLAW, J.**

**NOVEMBER 17, 2017**

‘bs’

*(corrected & released on 19<sup>th</sup> March, 2018)*