

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

% **Date of decision: 13th September, 2018.**

+ **RSA 253/2013 & CM No.17976/2013 (for stay)**

DELHI DEVELOPMENT AUTHORITY **..... Appellant**

Through: Mr. Nikhil Goel and Mr. Ashutosh
Ghade, Advs.

Versus

DIWAN CHAND & ORS **.... Respondents**

Through: Mr. Bhagwat Parshad Gupta & Mr.
Priyanshu Aggarwal, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 17th May, 2013 in RCA No.74/11/11 of the Court of Additional District Judge-5 (West)] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellant Delhi Development Authority (DDA) against the judgment and decree [dated 30th March, 2011 in Suit No.172/2006 of the Court of Civil Judge (West)] allowing the suit filed by the four respondents/plaintiffs against the appellant DDA for permanent injunction restraining the appellant/defendant DDA from demolishing any part of property bearing Municipal No.128A and 128/1, Village Kilokri, New Delhi without due process of law.

2. The counsel for the appellant/defendant DDA states that it is the plea of the appellant/defendant DDA in its written statement that the property of the respondents/plaintiffs is situated in Khasra No.738 of Village Kilokri

which is an acquired land and vests in DDA. It is stated that according to the respondents/plaintiffs, their property falls in Khasra No.1232/716/1 of Village Kilokri and to which the appellant/defendant/DDA does not lay any claim.

3. Notwithstanding the limited controversy aforesaid which was to be decided, the following issues were framed in the suit on 16th September, 1997:-

- “1. Whether the suit property forms part of abadi deh comprised in khasra no.1232/716/1 of village Kilokri, Delhi? OPP*
- 2. Whether the suit is bad for want of notice u/s 53-B of DD Act? OPD.*
- 3. Whether the suit is bad for non-joinder of Union of India as necessary party?*
- 4. Whether the plaintiff is entitled to the relief as claimed for? OPP*
- 5. Relief.”*

and the Suit Court, on the basis of the reports of the commissions issued during the pendency of the suit and the evidence led in the suit, held that since the report of the commissions was in favour of the respondents/plaintiffs, onus had shifted upon the appellant/defendant DDA to show that the property falls in Khasra No.738 and which onus the appellant/defendant DDA had failed to discharge. Accordingly the suit was allowed and the appellant/defendant DDA restrained from demolishing, without due process of law, any part of property bearing no.128A and 128/1, Village Kilokri, New Delhi.

4. The First Appellate Court dismissed the first appeal preferred by the appellant/defendant DDA agreeing with the reasoning given by the Suit Court.
5. This appeal came up first before this Court on 13th November, 2013 when, notice only of the application for condonation of delay in filing the appeal was ordered to be issued. Vide order dated 6th July, 2015, the delay in filing the appeal was condoned and notice of the appeal was issued without expressing satisfaction that a substantial question of law arises and without framing any substantial question of law and the Trial Court record was requisitioned.
6. Vide order dated 15th October, 2015 in this appeal, it was found that the commissions issued by the Suit Court were carried out without intimation to the appellant/defendant DDA and behind the back of the appellant/defendant DDA and it was thus held that the reliance by the Suit Court on the reports of the commissions was misconceived; in view of the limited controversy aforesaid, observing that the dispute could be resolved by demarcation by the Revenue Authorities, demarcation by Total Station Method was ordered.
7. Since then the demarcation report was being awaited.
8. The demarcation report has been received.
9. The counsel for the appellant/defendant DDA states that the demarcation report does not report whether the property falls in Khasra No. 1232/716/1 or in Khasra No.738 and contends that a notice be issued to the Revenue Authorities to explain the same.

10. The demarcation report is of Khasra No.738 only. It is not evident from the report or the site plan annexed thereto, whether the subject property falls in the said Khasra or not.

11. Neither party has however filed any objections to the demarcation report.

12. The counsel for the respondents/plaintiffs however states that no notice of demarcation proceedings was issued to the respondents/plaintiffs though ordered so on 15th October, 2015.

13. I have however enquired from the counsel for the appellant/defendant DDA, that the claim of the respondents/plaintiffs in the suit being only for injunction against demolition save by due process of law, what purpose, defending the suit, pursuing the First Appeal and this Second Appeal serve, inasmuch as even if this Appeal were to be allowed, the appellant/defendant DDA still, will have to take action of demolition in accordance with law.

14. The counsel for the appellant/defendant DDA agrees.

15. A large number of appeals arising from such suits filed against the appellant/defendant DDA have been coming up before me, some after as much as twenty years of institution of suit. I have repeatedly brought it to the attention of the counsels for DDA as well as to the attention of the Chief Legal Advisor of DDA, that contesting such suits by the appellant/defendant DDA and keeping the suits thereby pending for decades, leads to delays. Unless the plaintiff, just prior to the institution of the suit has trespassed into the property of the appellant/defendant DDA or raised unauthorised constructions or is in the process of doing so, the appellant/defendant DDA, for taking action for recovery of possession and/or of demolition, will have

to act in accordance with law i.e. the procedure applicable to it for taking such actions. DDA does not seem to realise that all that is being claimed in such suits is that it should not act without due process of law. DDA, instead of making statements in the said suits on the very first day that it will act in accordance with law, defends such suits which results in action according to law, which the DDA is required to take, being also delayed for decades. Such conduct of cases shows total apathy for the public properties and leads to the persons in unauthorised occupation continuing in occupation.

16. A copy of this judgment be forwarded to the Vice Chairperson of appellant/defendant DDA to consider the aforesaid aspect and to ensure remedial action so that suits of such nature are not allowed to languish, thereby delaying the action to be taken by the appellant/defendant DDA as well.

17. In the present case, the counsels agree that this Court, in order dated 15th October, 2015, disapproved of the reports of the Commission and on the basis of which reports the Suit Court and the First Appellate Court held in favour of the respondents/plaintiffs.

18. I have perused the orders issuing the commission in the Suit Court file and find that vide order dated 12th June, 1990, commission was issued, not to find out the Khasra number in which the property aforesaid was situated but only to take photographs of the property to establish the possession of the respondents/plaintiffs. Similarly, vide order dated 12th July, 1990, commission was issued in the background of averment of the respondents/plaintiffs that the appellant/defendant DDA, inspite of interim order restraining demolition, had carried out demolition; the mandate of the

Commissioner was to visit the spot and determine the present condition of the property and the demolished portion.

19. I have also perused the reports of the two commissions issued. While the report of the commission issued on 12th June, 1990 was that in the property identified by the respondents/plaintiffs, the respondents/plaintiffs had their *gher* where they were tethering cattle and *bittoras* were lying and the respondents/plaintiffs were in possession of the rooms and the appellant/defendant DDA had intention to extend its boundary wall and grab the property of the respondents/plaintiffs, the report of the commission issued on 12th July, 1990 was of a new brick wall about 4½ feet high, without plaster, having come up around the property of the respondent plaintiffs.

20. It will thus be clear that the commissions issued were not concerned with determination of Khasra number in which the land was situated and qua which controversy issue no.1 supra was framed in the suit.

21. The Suit Court in its judgment dated 30th March, 2011 did not hold that the respondents/plaintiffs had proved the property to be situated in Khasra No.1232/716/1 as claimed by the respondents/plaintiffs. The Suit Court further held that the appellant/defendant DDA had also failed to prove that the property was not situated in Khasra No.1232/716/1 but in Khasra No.738. However since the respondents/plaintiffs were found to be in possession of the property, against demolition of which stay was sought, and since the appellant/defendant DDA was found to be in the process of expanding its boundary wall, decree for injunction as aforesaid was granted.

22. However the First Appellate Court in the judgment dated 17th May,

2013 though not on the basis of reports of the commission but otherwise held that the respondents/plaintiffs led convincing evidence to prove that the suit land fell in Khasra No.1232/716/1 and the appellant/defendant DDA failed to adduce any convincing evidence to prove that the suit land fell in Khasra No.738 and the respondents/plaintiffs had encroached over the same. Resultantly the First Appellate Court confirmed the judgment and decree of permanent injunction.

23. The counsel for the respondents/plaintiffs has not even attempted to justify that there is any evidence of the property falling in Khasra No.1232/716/1 as found by the First Appellate Court. On the contrary, the counsel for the respondents/plaintiffs acquiesced to this Court, vide order dated 15th October, 2015, ordering demarcation by Revenue Authorities.

24. The counsel for the respondents/plaintiffs and the counsel for the appellant/defendant DDA state that the question, in which Khasra number the land is situated, is still at large.

25. I have hereinabove observed that the appellant/defendant DDA, even if were to succeed in this appeal, will still have to take action in accordance with law for demolishing the construction raised by the respondents/plaintiffs on the land which the appellant/defendant DDA claims to be owned by it and to recover possession of the said land. In this view of the matter, rather than adjudicating the question, in which Khasra number the subject property falls, in this Second Appeal, it is deemed appropriate that the said question, if arises in the proceedings to be so initiated by the appellant/defendant DDA, be adjudicated in the said proceedings only. Otherwise also, it is invariably found that objections are filed to the

demarcation reports by parties and which exercise cannot otherwise also be conducted in Second Appellate jurisdiction.

26. What emerges is that the respondents/plaintiffs, on whom onus of issue no.1 aforesaid framed in the suit was, failed to discharge the said onus. The same should have resulted in dismissal of the suit.

27. The following substantial question of law arises in this Second Appeal:-

Whether the factual finding of the First Appellate Court and the Second Appellate Court as to the Khasra number in which the suit property was situated are based on no evidence and thus perverse.

28. The aforesaid substantial question of law is answered in the affirmative as aforesaid.

29. Supreme Court in ***Hero Vinoth Vs. Sheshammal*** (2006) 5 SCC 545 and ***Damodar Lal Vs. Sohan Devi*** (2016) 3 SCC 78 has held that finding of fact based on no evidence is interferable in second appeal.

30. The appeal thus succeeds.

31. The judgments and decrees of the Suit Court and the First Appellate Court allowing the suit of the respondents/plaintiffs are thus set aside.

32. However since the respondents/plaintiffs were found to be in possession of the property against the demolition of which decree for permanent injunction was sought and since the respondents/plaintiffs presumably have continued in possession of the subject property during the pendency of the suit, First Appeal and this Second Appeal, rather than dismissing the suit it is deemed appropriate to maintain the judgment and

decree of permanent injunction restraining the appellant/defendant DDA from, save by due process of law, demolishing the property no.128A and 128/1, Village Kilokari, New Delhi but with the clarification that the appellant/defendant DDA shall be entitled to in accordance with law applicable to it take action for demolition of the said property and for recovery of possession of the land underneath the same.

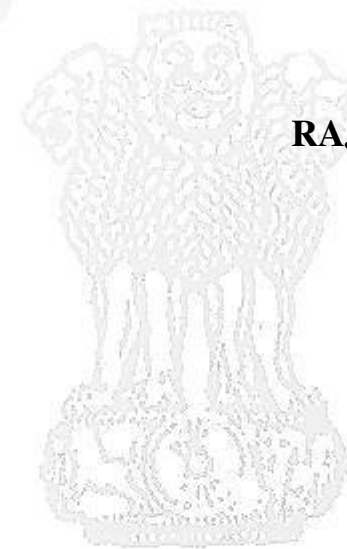
No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 13, 2018

‘pp’..



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