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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Delivered on: 07th August, 2019

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RSA 116/2018 & CM APPL No.33396/2018

BALVIR AND OTHERS

..... Appellants

Through : Mr.Sunil Chauhan, Advocate.

versus

DELHI JAL BOARD & ANR

..... Respondents

Through : Mr.Sumeet Pushkarna, Advocate
with Mr.Sami, AE for DJB.

Mr.Naushad Ahmed Khan, ASC
for GNCTD with Mr.Zahid Harief
and Ms.Manisha Chauhan,
Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This Regular Second Appeal is preferred by the appellants against the judgment dated 11.04.2018 passed by the learned Additional District Judge-04/South-West District, Dwarka Courts, New Delhi/ (hereinafter as the 'First Appellate Court') in RCA No.121/2017 which upheld the order dated 18.04.2017 passed by the learned Senior Civil Judge, Dwarka Courts (hereinafter as 'learned Trial Court') in CS No.26956/2016.

2. The brief facts which led to the filing of this second appeal are:-

a) in the year 1950-51 the consolidation proceedings took place and the lands bearing khasra Nos.1005(4-16), 1006(4-16), 1007(4-16)

situated in Village Jaffarpur Kalan, Delhi were allotted to the appellants but the Consolidation Scheme did not provide a passage to them;

b) the piece of land adjacent to the land of the Gaon Sabha comprising in Khasra Nos.408, 409, 406, 410, 413/1, 419, 405/1, 411/1, 412/1 located on the main Rawta Road, Delhi, a portion of which was used by the appellants as a passage to their aforesaid land; and

c) the appellants had allegedly acquired easementary rights by continuous use since the year 1950-51. The respondent No.2 decided to transfer the said land to respondent No.1 for construction of water treatment plant and the said decision would allegedly block the easementary rights of the appellants / plaintiffs on the Main Rawta Road, hence the aforesaid Civil Suit for declaration and permanent injunction.

d) The defence of respondent was there was exist way to approach the main road.

3. The learned Trial Court dismissed the suit on following grounds:-

"5.The Ld. Counsel for the defendant No. 1 Shri Suresh Chand Joshi argued that the present suit of the plaintiffs is not maintainable under Section 44 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948. Section 44 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 stipulates that no Civil Court shall entertain any suit instituted or application made, to obtain a decision or order in respect of any matter which the State Government or any Officer is, by this Act, empowered to determine, decide or dispose of.

*6. The Ld. Counsel for the defendant No. 1 (Delhi Jal Board) has also relied upon the Judgment in the case **Hukmi (Deceased) through LRs. Vs. Nathu & Ors. - 2011 V AD (Delhi) 638** which provides that:*

'East Punjab Holding (Consolidation and Prevention of Fragmentation) Act, 1948 - Sec. 2(d), 16(2) & 44 - Land, meaning of - Suit for permanent injunction and declaration - Judgment dismissing - Assailed - Jurisdiction - Immoveable property - Impugned judgment held that jurisdiction of Court is barred u/S. 44; thereafter it was no longer incumbent upon Court to have tried case on merits and to go into details of matter; jurisdictional issue goes to root of matter and root itself

having become uprooted; further scrutiny of evidence was not required - Appeals, meritless.'

7. *The Ld. Counsel for the defendant No. 2 has also argued that the present suit is not maintainable in view of Section 44 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948.*

8. *I have heard the arguments and perused the records of the present case. The application of the plaintiffs under Order 39, Rules 1 and 2 C.P.C. has already been dismissed by my Ld. Predecessor Shri Vishal Gogne by his order dated 31.08.2016.*

9. *After hearing the arguments of the parties on the point of maintainability of the present suit, it is my considered view that the present suit is not maintainable under Section 44 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948."*

4. Being aggrieved, the appellant preferred RCA No.121/2017 before learned first appellate Court, which was also dismissed the appeal observing interalia:-

*"6.At the very outset, a perusal of the impugned order revealed that learned trial court has dismissed the suit of the appellants (plaintiffs) being not maintainable under Section 44 of East Punjab Holdings (Consolidation & Prevention of Fragmentation) Act 1948 and rightly so as the under the said Act jurisdiction of civil courts is barred and no civil court can entertain any suit to obtain a decision in respect of any matter which the Chief Commissioner or any officer is, by this Act, empowered to determine and decide the issue. As per Section 42 of the said Act, Financial Commissioner is authorized to hear the issue. Hence, the appellants have the remedy to seek their claim before the Financial Commissioner under the said Act. Ld trial court has rightly relied upon the judgment in case of **Hyukmi (Deceased) through L.Rs vs Nathu & Ors** 2011 V AD (Delhi) 538 whereby it has been held that it was no longer incumbent upon the Court to have tried the case on merits and to go into the details of matter; jurisdictional issue goes to root of matter and root itself having become uprooted; further scrutiny of evidence was not required. I, therefore, do not find any reason to set aside the impugned order of learned trial court. I find no irregularity or impropriety in the impugned order. The present appeal is, therefore, dismissed.*

7. *Before parting with the judgment, it may note here that appellants have efficacious remedy available with them under East Punjab Holdings (Consolidation & Prevention of Fragmentation) Act, 1948, thus they cannot seek claim from the civil courts when the Revenue Authorities themselves are ready to hear and decide their claim of allotment of passage for ingress and egress to their bhumidari holding."*

5. I may also refer here to an order passed by this Court on 20.08.2018 which, interalia, notes:-

"6. The admitted position is, that in the consolidation proceedings of the year 1950-51, the land which the appellants have been using as a 'rasta' to their land, was allotted to the Gaon Sabha and which land has since been allotted by Delhi Government to Delhi Jal Board (DJB) for a public work. The appellants instituted the suit, from which this appeal arises, for declaration of the said allotment to DJB as bad and for injunction restraining closure of their 'rasta'.

7. Both the Courts below appear to have held, though the orders are without giving any reason, that the suit was barred by the provisions of the Consolidation Act and the remedy of the appellants was to seek 'rasta' from the authorities under the Consolidation Act.

8. The counsel for the respondent No.1 DJB appears on advance notice and states that in fact the appellants have already instituted proceedings under Section 42 of the Consolidation Act before the Financial Commissioner and which are pending consideration.

9. The counsel for the appellants does not dispute but states that there is no other 'rasta' available except through the land which has now been allotted to DJB and unless such allotment is set aside, even in the event of the appellants succeeding before the Financial Commissioner, there would be no 'rasta' available for giving to the appellants.

10. The appellants having not objected for the last over half a century and having used the land of another for 'rasta' knowing fully well that they had no right thereto, have no equities in their favour.

11. The appellants have not filed before this Court Aks Shajra of the village from which it can be determined as to what is the 'rasta' provided therein for the land of the appellants, though, it is stated that the same has been filed before the Suit Court.

12. Let the Suit Court and the First Appellate Court records be requisitioned before the next date of hearing.

13. Mr. Ajay Arora, Executive Engineer of DJB present in Court is made responsible for intimating to the concerned Revenue Authorities to furnish before this Court on the next date of hearing, the complete Aks Shajra of the village, to see the 'rasta'/passage, if any to the land of the appellants.

14. List on 29th October, 2018.

13. At this stage, the counsel for the respondent No.1 DJB, on instructions, states that on the application of the appellants, the Financial Commissioner has directed status quo.

14. The counsel for the appellants also agrees.

15. The appellants to also make a choice by the next date of hearing as to which of the two forums they want to proceed with, inasmuch as they cannot be permitted to proceed in two forums."

6. It is an admitted case the appellant has filed the proceedings before the Financial Commissioner who has directed *status quo* and is still seized of the matter. The order dated 08.01.2019 passed by this Court rather notes this fact.

7. I have also examined the prayer sought by the appellant in the plaint for declaration viz *transfer of the land by respondent No.2 in favour of the respondent No.1 be considered as illegal*. This prayer, even otherwise, cannot be granted since the land does not belong to appellants herein and the appellants have no right in the said land except that they allegedly claim passage through such land for their ingress and egress to their agricultural holding.

8. Admittedly, the Finance Commissioner has powers under the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 to grant such relief and rather has granted status quo in favour of the appellants

9. Per order dated 20.08.2018, an opportunity was granted to the learned counsel for appellants to choose any of the two forums but he is unable to make a choice. Admittedly the proceedings before the Financial Commissioner are still continuing. It is not the case of the appellants the relief sought qua '*Rasta*' in suit cannot be granted by the Financial Commissioner, hence as the appellants are pursuing their remedy before the Commissioner, they cannot be allowed to continue a parallel proceedings in these courts to their benefit, per order dated 20.08.2018. This appeal is, therefore, liable to dismissed and is accordingly dismissed. The pending application(s), if any, also stands dismissed. No order as to costs.

YOGESH KHANNA, J.

AUGUST 07, 2019

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