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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 01.11.2019

Pronounced on: 06.05.2020

+ W.P.(C) 9846/2018, CM APPL. 38370-38371/2018

SMT. KAMLA SHARMA

..... Petitioner

versus

NORTH DELHI MUNICIPAL CORPORATION Respondent

+ W.P.(C) 9824/2018, CM APPL. 38264 & 46101/2018

SMT. KAMLA SHARMA

..... Petitioner

versus

NORTH DELHI MUNICIPAL CORPORATION Respondent

+ W.P.(C) 9835/2018, CM APPL. 38298 & 46102/2018

SMT. KAMLA SHARMA

..... Petitioner

versus

NORTH DELHI MUNICIPAL CORPORATION Respondent

Present: Mr.R.K.Saini and Mr.Ankit Singh, Advs. for the petitioner.
Ms.Puja Kalra, Adv. for R-1/North DMC in W.P.(C) 9824/2018.
Mr.Vidur Kamra and Ms.Jyoti Taneja, Advs. for R-1/North DMC in W.P.(C) 9835/2018.
Ms.Renu Gupta, Standing Counsel with Ms.Nirmalya Shukla, Adv. for R-1/North DMC in W.P.(C) 9846/2018.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

W.P. (C) 9846/2018

1. This writ petition is filed by the petitioner seeking to impugn the show cause notice dated 15.09.2014, the demolition order dated 29.04.2015, the order of the ATMCD dated 10.08.2016 and the order of the Appellate Authority dated 10.08.2018.
2. The case of the petitioner is that the property bearing No. 8770/14B, Shidi Pura, Karol Bagh, Delhi (measuring 85 sq. yards) was purchased by Late Sh.Prem Nath Shrama, husband of the petitioner on 20.09.1982. Prior to the said property, he had also purchased the adjacent property bearing No. 8771/14 B (measuring 160 sq. yards) on 28.10.1972. Sh. Prem Nath Sharma died on 11.05.1996. Pursuant to a Will, the petitioner became the absolute owner of the two properties.
3. It is further stated that the said property No. 8770/14B was built up to first floor when the property was purchased in 1982. After purchase of the property, Sh. Prem Nath Sharma constructed a basement and second floor and made alterations on the ground floor. Reliance is placed on a survey carried out by the House Tax department on 01.04.1968 and 22.03.1997. Hence, it is claimed that since April 1996 the property comprises basement, ground floor, first and second floor.
4. It is stated that due to old age construction and ordinary wear and tear, the property required extensive repairs. The respondent vide its letter dated 26.05.2014 is said to have permitted the petitioner to carry out repairs stating that no permission for repair is required.

5. The construction on the third floor was raised in 2004 which was not pursuant to any sanctioned building plan. However, reliance is placed on the National Capital Territory of Delhi Laws (Special Provisions) Second Act, 2011 to claim that the same is not liable to be demolished.

6. It is further claimed that the respondent issued a vague show cause notice on 15.09.2014 stating that there is unauthorized construction in the shape of second floor and third floor. The petitioner filed a detailed reply to the said show cause notice. It is claimed that ignoring the reply, the respondent passed the impugned demolition order dated 29.04.2015.

7. I may look at the demolition order. The said demolition order dated 29.04.2015 notes that the unauthorized construction of basement, shops at ground floor and first floor were noticed by the Department on 01.09.2014 and the same were booked. The demolition order was passed on 11.09.2014 as per law for the said portion of the property i.e. basement, ground floor and first floor. The record shows that prior to the demolition order dated 11.09.2014 a work stop notice was issued under Section 344 of the DMC Act on 26.08.2014 but the petitioner did not desist and continued to raise construction unauthorisedly. It is stated that when the first show cause notice dated 01.09.2019 was issued it pertained only to the basement, ground floor and first floor. It is manifest that there was no second floor and third floor in existence at that time and so the said first show cause pertained to only the basement, ground floor and first floor. At that stage as no second floor and third floor existed, the first demolition order did not cover the said floors. The order further notes that there is nothing to show when the basement was constructed in the existing building originally. The plea that property tax was paid on the basement was not accepted as the documents of house tax

payment did not give the description and form of the basis of calculation. The said order concludes that the entire fresh construction from the basement to third floor has been raised unauthorisedly without any sanctioned plan. It was further held that the earlier order of demolition dated 11.09.2014 for basement, ground floor and the first floor had attained finality. Hence, the order concludes that the second and third floors have been unauthorisedly constructed. The same were directed to be demolished.

An appeal was filed before the ATMCD by the petitioner challenging the second demolition order dated 29.04.2015. The same was also dismissed vide impugned order dated 10.08.2016.

8. The petitioner thereafter filed an appeal under Section 347(D) of the DMC Act before the District Judge challenging the order dated 10.08.2016 of the ATMCD. This was also dismissed vide impugned order dated 10.08.2018.

9. I have heard learned counsel for the parties.

10. Learned counsel for the petitioner has vehemently relied upon the documents placed on record, namely, the survey report of the House Tax Department dated 22.03.1997 to contend that the property from basement to second floor has been in existence since long time. Hence, it is pleaded that there is no unauthorized construction and only repairs have been carried out which are mischievously sought to be shown as unauthorized construction by the respondent. Regarding the third floor, it is reiterated that it was raised in 2004 as is apparent from the house tax receipt and hence, it is protected under the National Capital Territory of Delhi Laws (Special Provisions) Second Act, 2011. He denies the findings that there is amalgamation of the two properties, namely, 8770/14B and 8771/14B. It is also strongly urged

that merely because the first demolition order dated 11.09.2014 pertained only to the basement, ground floor and first floor does not imply that on 11.09.2014 second and third floor did not exist. He urges that such a reasoning is wholly incorrect.

11. A perusal of the impugned order passed by the ATMCD (this is a common order for both the properties i.e. 8770/14B Shiddhi Pura and 8771/14B Shiddhi Pura) shows that the Tribunal concluded that the third floor construction was raised after 2007 without any sanctioned building plan. The order notes that there is no document on record which shows that any construction existed earlier on the third floor. Hence, the same is not protected under the National Capital Territory of Delhi Laws (Special Provisions) Second Act, 2011 as claimed by the petitioner.

The order further notes that a joint inspection was carried out of the first floor and the second floor and a report was filed. The impugned order compares the dimensions of the godowns, rooms, halls, passages, etc. as available in the house tax records i.e. the survey report relied upon by the learned counsel for the petitioner dated 22.03.1997 and also the accommodation as stated by the report filed pursuant to the survey carried out. The comparison of these two documents showed that there is a difference in the size of the rooms. There was no explanation given as to why there is a difference in the existing construction and the construction as per earlier records.

The impugned order also notes that both the properties No 8770/14B and 8771/14 B are two separate properties but as per the status report/photographs/site plan, the properties have been amalgamated by the petitioner as both the properties have only one staircase and one kitchen

whereas as per the house tax records both the properties have separate staircase and kitchen. It further notes that the construction has been done in such a manner that it is difficult to ascertain which portion is in 8770 and which is in 8771.

The impugned order concludes that it appears all the internal walls of both the premises have been removed and re-constructed to change the size of the rooms. The entire second floor has been reconstructed by amalgamating the two properties. Hence, the order concludes that the said construction cannot be said to be as case of repair or renovation and dismissed the appeal on 10.08.2016.

12. The Appellate Authority also notes that a joint inspection of the properties was ordered to be carried out on 18.12.2014 and a detailed report as to measurement of each room floor wise was filed. Photographs of the property were also filed. The submission of the petitioner regarding the construction of the second floor and third floor of the properties being old construction which have been renovated was rejected. Regarding the third floor, the Appellate Authority noted that there is no record to show that the third floor was constructed prior to 2007.

13. I may note that the petitioner has not placed on record the report of the inspection that was carried out which have been relied upon by the impugned orders. Comparison of the dimensions as exist in the house tax record and the existing construction which was reiterated by the report along with photographs as stated by the impugned order reads as follows:-

Floor	As per House Tax record size (Length X Breadth) of godown/rooms/hall/passageway etc in feet Property No.8770	As per House Tax record size (Length X Breadth) of godown/rooms/hall/passageway etc. in feet Property No.8771	Existing construction as per Corporation Report dated 13.07.2016
Second	Three Rooms 12 x 14m 8X14 & 8X18 One kitchen 5X23 L+B, stairs and open chhajja	Two Rooms 15X15 each One Room 15X30 One kitchen 10X15	One room 13.1X11.3 One room 15.5X11.3 One room 24.8X7.7 One room 17.9X12.2 One room 17.11X12.1 One hall 31.7X24.2 Kitchen 3.6X11.2 Two toilet bathroom 11.10X13.4 Two passage Staircase Projection on road side and gali side

14. Clearly there is change in the dimension of the premises now existing as compared to the previous record. There is no plausible explanation given by the petitioner. Further the new report with photographs shows that the two premises i.e. 8770/14B and 8771/14B have been illegally amalgamated.

Regarding the third floor, there is nothing to show that it was constructed before 2007.

Hence, there is sufficient material on record to hold that the conclusion of facts reached by the authorities/appellate authorities was a plausible finding.

15. It is a well settled law that in exercise of writ jurisdiction the High Court will not disturb findings of fact recorded by appropriate tribunal/functionaries when there is challenge to an order except in a situation where the finding can be termed as arbitrary, irrational and wholly contrary to the record on the face of it. Reference in this context may be had to the judgment of the Supreme Court in the case of **Registrar General,**

High Court of Judicature of Madras vs. K. Muthukumarasamy, (2014) 16

SCC 555 where the Court held as follows:-

“10. Undoubtedly, in the exercise of the writ jurisdiction, the High Court would have the power and competence to disturb findings of fact so long such findings are opposed to the weight of the materials on record and the view taken cannot be sustained on a reasonable consideration of such materials. This wholesome power has to be exercised by the High Courts only on a careful appraisal of the facts of a given case. Care must be taken not to act as a Court of Appeal or in review of the decisions of the fact-finding authority. The decision of this Court in *Yoginath D. Bagde v. State of Maharashtra* [(1999) 7 SCC 739] relied upon by the learned counsel for the respondent is coincidentally to the above effect. It also appears to us from the order of the High Court that additional materials not produced before the enquiry officer were also considered by the learned Judges in coming to the impugned conclusions. It is, therefore, clear that the High Court had exceeded its jurisdiction in coming to the impugned findings with regard to the culpability of the delinquent and in reversing the order of compulsory retirement.”

16. Reference may also be had to the judgment of the Supreme Court in the case of ***Radhey Shyam & Anr. v. Chhabi Nath & Ors., (2015) 5 SCC 423*** where the Supreme Court held as follows:-

“10. In *T.C. Basappa v. T. Nagappa* [AIR 1954 SC 440] , question before this Court was as to the scope of jurisdiction under Article 226 in dealing with a writ of certiorari against the order of the Election Tribunal. This Court considered the question in the background of principles followed by the superior courts in England which generally formed the basis of decisions of the Indian courts. This Court held that while broad and fundamental norms regulating exercise of writ jurisdiction had to be kept in mind, it was not necessary for Indian courts to look back to the early history or procedural technicalities of the writ jurisdiction in England in view of express constitutional

provisions. Certiorari was meant to supervise “judicial acts” which included quasi-judicial functions of administrative bodies. The Court issuing such writ quashed patently erroneous and without jurisdiction order but the Court did not review the evidence as an appellate court nor substituted its own finding for that of the inferior tribunal. Since the said judgment is followed in all leading judgments, the relevant observations therein may be extracted: (*T.C. Basappa case* [AIR 1954 SC 440] , AIR pp. 443-44, paras 5-11)

“5. The principles upon which the superior courts in England interfere by issuing writs of ‘certiorari’ are fairly well known and they have generally formed the basis of decisions in our Indian courts. It is true that there is lack of uniformity even in the pronouncements of English Judges, with regard to the grounds upon which a writ, or, as it is now said, an order of ‘certiorari’, could issue, but such differences of opinion are unavoidable in Judge-made law which has developed through a long course of years.

.....

11. In dealing with the powers of the High Court under Article 226 of the Constitution, this Court has expressed itself in almost similar terms, vide *G. Veerappa Pillai v. Raman & Raman Ltd.* [AIR 1952 SC 192] and said: (AIR pp. 195-96, para 20)

‘20. Such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made.’”

17. In my opinion, the findings recorded by the respondent, by the ATMCD and the Appellate Authority are plausible findings based on the stated facts and material on record. There is no illegality or manifest error to warrant any interference in the findings of the fact recorded in the said impugned orders.

18. There is no merit in this petition and the same is dismissed. Pending applications, if any, also stand dismissed.

W.P. (C) No. 9835/2018

19. By this writ petition, the petitioner seeks appropriate writ to quash the show cause notice dated 15.09.2014, the demolition order dated 29.04.2015 passed for demolition of the second and third floor of the demised property No.8771/14B, the order dated 10.08.2016 of the ATMCD and the order dated 10.08.2018 of the Appellate Authority. The facts of the present case are virtually identical to WP (C) 9846/2018 which has been discussed above. The allegation is that the two properties which are subject matter of this writ petition, namely, property No. 8771/14B and the property which is subject matter of WP(C) 9846/2018 being property No. 8770/14B were freshly constructed in 2014 and amalgamated into one unit. For the reasons stated in WP(C) 9846/2018, for the same reason the present writ petition is also dismissed. Pending applications also stand dismissed.

WP(C) No. 9824/2018

20. This writ petition is filed by the petitioner seeking to impugn the order dated 10.08.2016 passed by ATMCD and order dated 10.08.2018 of the Appellate Authority.

21. This writ petition pertains to a show cause notice dated 01.09.2014 issued to the petitioner which pertains to the property No. 8770/14B and 8771/14B being the basement, shops on the ground floor and the first floor. Subsequently, a demolition order was passed for both the properties on 11.09.2014. An appeal was filed against the said demolition order regarding the property No. 8770/14B. However, no appeal was filed regarding the property No. 8771/14B. The appeal was however dismissed as withdrawn on 24.09.2014 on the alleged assurance of the respondent that a hearing would be provided, and a fresh order would be passed. As no hearing was given the petitioner again filed a fresh appeal against the demolition order dated 11.09.2014 in respect of the property No. 8770/14B. The petitioner also filed an appeal against the demolition order dated 11.09.2014 in respect of the other property being No.8771/14B.

22. Both the appeals regarding the two properties came before the ATMCD. On 10.08.2016, the ATMCD allowed the appeal pertaining to property No. 8771/14B and remanded the case back with the direction to pass a speaking order after considering reply and documents filed. However, Appeal No. 270/2015 pertaining to the second property was dismissed on the ground that it is barred under Order 23 Rule 1 CPC and not maintainable. The petitioner filed a second appeal before the District and Sessions Judge against the said order of ATMCD. The same was also dismissed on 10.08.2018.

23. I may note that the first appeal that was filed by the petitioner was dismissed as withdrawn on 24.09.2014 and the following order was passed

“On instructions from my client, it is submitted that the NDMC is ready and willing to give personal hearing to the appellant, therefore, the appellant does not wish to pursue the matter any further. I may be permitted to withdraw the present appeal in view of the above circumstances”

24. Based on the above, the ATMCD has concluded that the second appeal filed by the petitioner for the same property is barred by Order 23 Rule 1 CPC as no liberty was sought to file a fresh appeal if required.

25. Order 23 Rule 1 CPC reads as follows: -

“1. Withdrawal of suit or abandonment of part of claim. —

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An Application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other, person.

(3) Where the Court is satisfied, —

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.”

26. Hence when a suit is likely to fail on account of a formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit, the court may grant permission to withdraw such suit with liberty to institute a fresh suit. Where the plaintiff withdraws a suit without permission as referred to in Sub Rule 3, he is precluded from instituting a fresh suit in respect of such subject matter.

27. This court in the case of ***Deepa Dua vs. Tejinder Kumar Muteneja, 2013 (137) DRJ 653*** held as follows: -

“22. The plaintiff has not placed on record a copy of the application filed by the plaintiff to withdraw the suit in the Karkardooma Courts. Hence, I am not aware what relief was sought by plaintiff in the said application. A perusal of the order dated 04.07.2012 clearly indicates that no permission to withdraw the suit under Order XXIII Rule 1 CPC has been given by the Court. There is no application of mind by the court

of being satisfied with the ingredients of Order XXIII Rule 1(3) CPC, namely, that the suit must fail by reasons of some formal defect or there is sufficient ground for allowing the plaintiff to institute fresh suit for the subject matter of the suit or part of the plaint.

23. In the absence of a specific order to the said effect, it is clear that no permission under Order 23 Rule 1 CPC was given to the plaintiff to withdraw the earlier suit.”

28. Similarly, the Allahabad High Court in ***Lallu v. The Board of Revenue, U.P., Allahabad & Ors., AIR 1973 All. 195***, held as follows:

“4. This view of the Board of Revenue is manifestly erroneous in law. The Court is empowered to grant the liberty to institute a fresh suit only after finding that the suit must fail by reason of some formal defect or that there are other sufficient grounds for granting the liberty. After recording these findings, the Court must pass a specific order granting liberty to institute a fresh suit. If no such specific order is passed granting liberty to institute a fresh suit, it is not permissible to infer such an order by "constructive interpretation," as the Board has done. Where two reliefs are prayed for and the Court specifically grants one relief, the only inference that can be drawn is that the other relief has been refused.”

29. The principles as above/ the above provisions would normally apply to appeals/other proceedings. It is clear that the petitioner did not seek liberty to file a fresh appeal when the first appeal was withdrawn. Hence, to that extent there is no error in the impugned order.

30. Even otherwise, the impugned order dated 10.08.2016 of the Tribunal clearly notes that in the circumstances the petitioner should have filed an application for revival of the old appeal withdrawn on 24.09.2014. There is no explanation why instead of seeking revival of the old appeal, the

petitioner has chosen to challenge the order of the Tribunal dated 10.08.2016 before the Appellate Authority and thereafter filed this writ petition.

31. There is no merit in the petition and the same is dismissed. The petitioner is free to avail of the option noted by the Tribunal in the impugned order as per law. Pending applications also stands disposed of.

32. As the court is presently hearing matters vide video conferencing, the court master may also inform Ld. Counsels for the parties on phone about the present pronouncement.

May 6, 2020

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JAYANT NATH, J.



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