

R-23

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

% Judgment reserved on: 29.11.2010
Judgment delivered on:01.12.2010

+ **RSA No.75/1985**

DELHI DEVELOPMENT AUTHORITYAppellant
Through: Mr. Pawan Mathur, Advocate

Versus

SHEELA RANI GANDHIRespondent
Through: Mr. S.C. Nigam, Advocate

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 15.12.1984 which had reversed the finding of the Trial Judge dated 28.03.1980. Vide judgment and decree dated 28.03.1980, the suit of the plaintiff Smt. Sheela Rani Gandhi had been dismissed. Vide the finding of the Trial Judge was reversed; the suit of the plaintiff was decreed.

2. Briefly stated the factual matrix is as follows.

(i) Plaintiff had filed a suit for perpetual injunction seeking a restraint against the defendant i.e. Delhi Development Authority (DDA) from in any manner pulling down or injuring the construction of the premises bearing No. 2774, Pratap Market, Sadar Bazar, Delhi.

(ii) Plaintiff claimed herself to be the owner of the afore-stated property comprising of one shop in the ground floor and one room in the first floor with a common stair-case common to her as also the adjoining premises which is premises No. 2773.

(iii) It is averred that this premises is in existence since the last 20-22 years; vide order dated 12.05.1969 of the Municipal Corporation of Delhi (MCD), the plaintiff had been granted permission to carry out necessary repairs in the building. On 27.04.1970, a registered A.D. notice was received by the plaintiff under Section 30(1) and Section 31(1) of the DDA Act alleging that the suit premises were built by the plaintiff after the premises had been notified as a 'development area' under Section 12 (1) of the said Act.

(iv) Defendant threatened to pull down the premises; cause of action arose on 12.05.1970 when the demolition order was passed.

(v) Suit was accordingly filed.

(vi) Written statement contested the suit. It was stated that the jurisdiction of the Civil Court is barred; a demolition order under Section 30 (1) can only be challenged before the Appellate forum. It was submitted that on 24.04.1970, the defendant noted an illegal construction being carried out by the plaintiff on the ground floor and the first floor; the date of the start of the construction was on 26.03.1970; premises having fallen in the notified development area; no such construction could be carried out by the plaintiff. Show-cause notice dated 27.04.1970 was issued to the plaintiff. She filed

objections on 04.05.1970. Her objections were rejected after a due consideration. Thereafter, demolition notice dated 12.05.1970 was served upon her.

(vii) Trial Judge had framed the following five issues:-

1. Whether the disputed construction detailed in plan Marked 'A8' was only repairs and not a fresh construction? OPP
2. Whether the disputed construction is about 20 years old, if so its effect? OPP
3. Whether the demolition order about the disputed construction is illegal and ultravires as alleged? OPP
4. Whether the suit is barred by the provisions of Section 30 of the Delhi Development Act?
5. Relief.

(viii) On examination of the oral and documentary evidence led by the parties and duly considered by the Trial Judge, suit of the plaintiff was dismissed. It was held that the plaintiff had failed to prove that the construction is more than 20 years old; the demolition order having been served upon the plaintiff under Section 30 of the DDA Act, appropriate remedy was to file an appeal before the Appellate Court; jurisdiction of the Civil Court was barred. Suit of the plaintiff was dismissed.

(ix) The Appellate Court vide its impugned judgment dated 15.12.1984 reversed this finding. It was held that the Civil Court can intervene if the statutory authority has not acted within the scope and requirements of the mandate of law which in the instant case, the department had not adhered to. It was held that vide communication dated 12.05.1969, plaintiff had been granted permission by the MCD to carry out necessary repairs which the plaintiff had carried out; it

was not a case of any new construction. Plaintiff was entitled to relief. Suit was decreed.

3. This is a second appeal. After its admission on 31.05.1985, the following substantial question of law was formulated. It reads as follows:-

“Whether the jurisdiction of the Civil Court to question the demolition order is barred by implication or otherwise by virtue of section 30, sub-section (3) of the Delhi Development Act?”

4. On behalf of the appellant, it has firstly been submitted that the plaintiff not having come into the witness-box and her power of attorney having deposed on her behalf as PW-2, such a testimony cannot be read in terms of Order 3 Rule 1 of the ‘Code’. For this proposition, reliance has been placed upon AIR 2005 Supreme Court 439 Janki Vashdeo Bhojwani vs. Indusind Bank Ltd. It is further urged that the impugned judgment decreeing the suit of the plaintiff is a perverse finding. It is pointed out that the premises fall in a development area which has been notified under the DDA Act and placed at the disposal of the DDA; this was vide notification dated 10.02.1974; construction made after this period is illegal; attention has been drawn to the versions of DW-1 & DW-2 of whom DW-2 had inspected the site on 26.03.1970 and noted that it is a vacant land; subsequently on 24.04.1970 when he had gone for a second inspection, he noted the illegal construction having sprung up at the site; the demolition notice was within the parameters of law and as per the object of the statute; the demolition order could only be challenged by way of appeal before the appellate forum; jurisdiction of the Civil Court was barred. Counsel for the appellant has placed reliance upon a judgment of this Court reported in 125

(2005) DLT 574 S.Gurbachan Singh & Ors. vs. Municipal Corporation of Delhi as also the judgment pronounced in LPA No. 976/2004 decided by a division bench of this Court on 21.02.2006 titled as Delhi Development Authority vs. Ambitious Gold NIB Manufacturing Co. (P) Ltd. to substantiate the submission that in such like cases, jurisdiction of the Civil Court would be barred.

5. Arguments have been countered by the learned counsel for the respondent. It is pointed out that the judgment suffers from no infirmity; the judgment has correctly appreciated that this was not a case of a new construction; it was only repairs which were being carried out in terms of the permission which had been granted to the plaintiff vide Ex-P-3 which was a communication dated 12.05.1969 permitting the plaintiff to change the slabs in the roof and alter the condition of the walls. It is stated that pursuant thereto in January, 1970 that is before the area had been notified as a development area, the afore-noted repairs had been carried out by the plaintiff and to advance this submission, attention has been drawn to the version of the PW-2 who had proved the rent receipts Ex-P-7 to Ex-P-8; The assessment order Ex-P-9 as also Ex-P-1 to Ex-P-5 the receipt of the purchase of building material. It is pointed out that the rent receipts are for a period of 1949 to 1958; the assessment order is of the year 1969-1970; this documentary evidence had led the Court to rightly hold that the plaintiff had not made any new construction; building was in existence much prior in time; it was only repairs which were being effected; in these circumstances the demolition order could not have been issued which was rightly challenged before the Civil Court.

6. As a preliminary to his arguments on merits, the learned counsel for the respondent has invoked the principle of *res judicata* as contained in Section 11 of the Code of Civil Procedure (hereinafter refer to as 'Code'). It is pointed out that there were two suits which had been preferred by the present plaintiff i.e. Smt. Sheela Rani Gandhi and another plaintiff Sh. Ram Lal Puri. Sheela Rani Gandhi was the owner of the Shop No. 2774, Pratap Market, Sadar Bazar, Delhi. Sh. Ram Lal Puri was the owner of shop No. 2773, Pratap Market, Sadar Bazar, Delhi. Both the plaintiffs had a common stair-case to access the first floor. Both the suits i.e. Suit No. 493/1976 titled as "Sheela Rani Gandhi vs. DDA" and Suit No. 596/1976 titled as "Ram Lal Puri vs. DDA" were dismissed by a common judgment i.e. the judgment dated 28.03.1980. Both the plaintiffs had filed an appeal; the appeal of Sheela Rani Gandhi was numbered as RCA No. 166/1993. The appeal of Ram Lal Puri was numbered as RCA No. 161/1993. Both the appeals were decided by a common judgment i.e. the impugned judgment dated 15.12.1984, whereby, the suit of both the plaintiffs was decreed. The DDA filed two second appeals against this common judgment. The second appeal filed against the suit property of Ram Lal Puri was RSA No. 37/1985; the said appeal was dismissed in default on 31.07.2003 and admittedly has not been revived. The second appeal qua the suit property of Sheela Rani Gandhi was the present RSA i.e. RSA No. 75/1985. It is submitted that on the strength of the judgment of the Supreme Court reported in AIR 1966 Supreme Court 1332 "Sheodan Singh vs. Daryao Kunwar", where, two suits have been consolidated and have been disposed of by a common judgment by the trial court and thereafter in appeal also, a common judgment

has been passed, one of the two appeals thereafter having been dismissed in default, the result would be that the decision of the trial court stands confirmed and this decision would operate as a *res judicata* as the Appellate Court must be deemed to have heard and finally decided this matter; in such a case, the result is that the decision of the trial court is given confirmation and will operate as a *res judicata* qua the other appeal also. For the same proposition, reliance has also been placed upon a Judgment of the Supreme Court reported in 1993 Supp (2) Supreme Court Cases 146 "Premier Tyres Limited vs. Kerala State Road Transport Corporation". It is pointed out that this judgment would also be applicable to the present case.

7. On this count in rejoinder, the learned counsel for the appellant has submitted that principle of *res judicata* has no application as the parties and the subject matter in the two suits are distinct and different; the said judgments are in applicable.

8. Record has been perused. Provision of Section 11 of the 'Code' enshrines the doctrine of *res judicata*. There are various essential ingredients which have to be fulfilled before this doctrine can be applied. One such ingredient is that the parties must be same under whom they or any of them claim, litigating under the same title; in other words in order to make person bound by *res judicata* it must be proved that he was in some way a party to the suit decided as the judgment binds not only the parties but also the privies.

9. In the instant case, this doctrine would not apply. Admittedly, Sheela Rani had filed a suit for perpetual injunction against the

DDA as she was threatened by a demolition order of the DDA dated 12.05.1970. The premises in dispute were premises No. 2774, Pratap Market, Sadar Bazar, Delhi. The plaintiff in Suit No. 596/1976 was Ram Lal Puri; the property No. was 2773, the pleadings of the said proceedings are not before this Court yet; both the parties admit that not only are the parties distinct and different but the subject matter of the two suits is also distinct and different. However, for administrative exigencies, the two suits were disposed of by a common judgment as common issues had arisen for adjudication. However, this is not the only requirement for the application of this doctrine. In the instant case, the parties to the suit not being the same and the subject matter of the two suits also being different and distinct it is clear that this doctrine is in applicable in the instant case.

10. In the judgment of Sheodan Singh (supra), there were four suits which had been consolidated and disposed of by a common judgment. Out of these four suits, two had been filed by the appellant's father and two had been filed by the respondent; they had become cross-suits and were disposed of by a common judgment. It was in this scenario that the principle of *res judicata* was found to be held applicable. In the judgment of Premier Tyres Limited (supra) one suit had been filed by the appellant for recovery of certain amounts due; respondent filed a second suit for recovery of amounts paid in excess; both the suits were consolidated and tried together; in this scenario, principle of *res judicata* was made applicable. In both two cases relied upon by the learned counsel for the appellant, the parties were the same or/claiming through them.

This is not so in the instant case. Sheela Rani and Ram Lal Puri are

two distinct persons. The subject matter i.e the two properties are also distinct. This doctrine would be in applicable to the facts of the instant case. This argument is accordingly rejected.

11. On merits, the impugned judgment has returned a perverse finding. It has chosen to rely upon the evidence of the plaintiff without in any manner adverting to the evidence adduced by the defendant. The husband of the plaintiff had come into the witness-box as PW-2. He had deposed on the basis of a power of attorney which had been executed in his favour by his wife. Objection of the learned counsel for the appellant that PW-2 could not depose on behalf of his wife in the absence of a valid power of attorney cannot be taken at this stage as this objection was never raised either before the first Appellate Court and or in the grounds of appeal before this Court.

12. The impugned judgment has, however, ignored the version of the witnesses of the defendant without any discussion. DW-2 Sh. M.D. Mathur, S.O. D.D.A. New Delhi on oath deposed that he had inspected the site on 26.03.1970 when he found that the land was vacant. Subsequently on 24.04.1970 when he visited the site, he found construction activity going on and the finishing work was in progress. He had submitted his report Ex-D-1. No suggestion has been given to this witness that he was deposing falsely or as to why he would depose against the interest of the plaintiff. In fact, PW-2 had admitted that DW-2 had come to the site for inspection and had noted unauthorized construction at the site. DW-1 had corroborated the version of DW-2. He had deposed that the disputed area is a development area which had been notified on 10.02.1974. Show

cause notice had been issued to the plaintiff on 27.04.1970 which had been received by her and to which reply/objection had been filed by her on 04.05.1970. The demolition notice was thereafter issued on 05.05.1970. In the reply/objection dated 04.05.1970, the contention of the plaintiff was that she had merely carried out repairs in the said property as the roof was in an old and dilapidated condition; this was done in the beginning of 1970 long before the area had been declared as a development area under Section 12 (1) of the DDA Act. The contention of the learned counsel for the appellant is that a layman writing to the DDA and having full legal knowledge about the impact of a notification under Section 12 of the DDA Act and the plaintiff being fully aware that after an area has been declared as a development area no construction is permitted, in fact clearly shows that the plaintiff is a vigilant party who was aware of the legal nuances and repercussions of this statutory provision and she had used them for her benefit. This argument has force and cannot be ignored straightaway. It is difficult to imagine that a layman would be conversant with such detailed legal provisions.

13. Be that as it may, the evidence led by the plaintiff was rightly rejected by the Trial Judge. In the cross-examination, PW-2 had admitted that although, rent receipts have been issued by his landlord but he does not remember his name; receipts were issued by the munshi; landlord had never come to his shop, he had never visited him; he does not remember if any rent note was executed. In his cross-examination, PW-2 had further stated that he had given this repair work on contract for Rs.650/- along with material. In his examination-in-chief, he had proved Ex-P-1 to Ex-P-5 as the receipts

of the building material; if the work had been given on a contract basis with the material how he was retaining receipts for building material again becomes questionable. No suggestion had also been given to any of the witnesses of the defendant that they are deposing falsely for any ulterior purpose; in fact before this Court, there is no answer to why they would do so.

14. Section 30 of the Delhi Development Act reads as follows:-

30. Order of demolition of building:- (1) Where any development has been commenced or is being carried on or has been completed in contravention of the master plan or zonal development plan or without the permission, approval or sanction referred to in section 12 or in contravention of any conditions subject to which such permission, approval or sanction has been granted-

- (i) in relation to a development area, any officer of the Authority empowered by it in this behalf,
- (ii) in relation to any other area within the local limits of a local authority, the competent authority thereof,.....
.....

Provided that no such order shall be made unless the owner of the person concerned has been given a reasonable opportunity to show cause why the order should not be made."

15. Admittedly, vide notification Ex-DW-2/2 dated 10.02.1974, the area in dispute had been declared as a development area as envisaged under Section 12 of the said Act. No construction could be permitted without prior permission of the Department. Show cause notice dated 27.04.1990 had been duly served upon the plaintiff. Plaintiff had replied vide communication dated 05.05.1970. Apart from the fact that this plaintiff was fully aware of the legal repercussions of the provisions of Section 12 of the DDA Act under which she had sought to take shelter, it is also relevant to state that while drafting the plaint, the plaintiff has not revealed any detail of the repairs which she had been permitted to carry out; neither

these details and nor the dates of the said repair had been mentioned.

16. The premises being a notified development area, no construction could have been carried out without prior permission. Plaintiff had failed to show that this was a case of repairs. It was a new construction. Reasonable opportunity to show cause had been given to her before the final order of the demolition order was passed on 05.05.1970. There was no violation of the provision of Section 30 of the said Act. Plaintiff was aggrieved by the said order, remedy available to her was to file an appeal before the Appellate Tribunal under Section 31 (C) of the said Act. Jurisdiction of the Civil Court was barred. Suit was rightly dismissed by the Trial Judge.

17. Result of the afore-stated discussion is that the appeal is allowed. The judgment and decree dated 15.12.1984 is set-aside. Suit of the plaintiff stands dismissed. No order as to costs.

(INDERMEET KAUR)
JUDGE

DECEMBER 01, 2010
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