
(2013) 12 DEL CK 0214

In the Delhi High Court

Case No : Regular First Appeal 631 of 2010 and CM No. 15713 and 15714 of 2010

I.P. Power Generation Company Ltd.

APPELLANT

Vs

Siddhartha Extension Resident Welfare Association and Others

RESPONDENT

Date of Decision : 09-12-2013

Acts Referred:

Citation : (2014) 140 DRJ 630

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : S.K. Dubey and Ms. Anandi Mishra, for the Appellant; L.K. Garg, for R-1, Ms. Manika Tripathy and Mr. Ashutosh Kaushik for Advs. for DDA and Mr. R.G. Srivastava, for R-3, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—The appeal impugns the judgment and decree dated 8th October, 2009 of the Court of the Addl. District Judge, Tis Hazari Courts, Delhi of dismissal of Suit No. 745/08/01 filed by the predecessor-in-interest of the appellant, consequent to an order of rejection of plaint on an application by the respondent/defendant no. 1 under Order 7 Rule 11 of the CPC. The appeal was accompanied with applications for condonation of 22 days delay in filing and 88 days delay in re-filing the appeal. Notice of the appeal and applications was issued and the matter adjourned from time to time. Replies to the applications for condonation of delay have been filed by the respondent/defendant no. 1 only and to which a rejoinder has been filed by the appellant/plaintiff. The respondent/defendant no. 2 DDA, the respondent no. 3 Delhi Urban Arts Commission and the respondent no. 4 MCD have not filed any replies. Respondent No. 2 DDA though has filed a counter affidavit to the appeal.

2. The suit from which the appeal arises was filed on 21st May, 2001 by the then Delhi Vidyut Board (DVB), being the predecessor in interest of the appellant,

pleading:-

(a) that the respondent/defendant no. 1 is a Residents Welfare Association of Pocket-A, Sidhartha Extension which is a colony just at the back of the DVB colony in Sidhartha Extension;

(b) that the suit, for the reliefs of declaration and other consequential reliefs was being filed as the respondent/defendant no. 1 was casting a cloud on the right of the appellant/plaintiff to it's immovable property;

(c) that the appellant/plaintiff was, in the years 1967-1968, for consideration, allotted by the Land & Building Department of the then Delhi Administration a piece of land admeasuring 16 acres in Sarai Kale Khan and was put into possession thereof and is the owner thereof.

(d) that the said land was allotted for construction of staff quarters;

(e) that the appellant/plaintiff got the layout plan approved and constructed 592 quarters for the members of its staff; necessary public utility services by way of roads, parks etc. were also provided as per the layout plant sanctioned in February, 1980 by the respondent/defendant no. 2 DDA and by the respondent/defendant no. 3 Delhi Urban Arts Commission on 21st September, 1979;

(f) that as the respondent/defendant no. 2 DDA had not constructed any road outside as per the Master Plan, the appellant/plaintiff had provided access to it's colony by constructing its own road within the plot and since then this road was under the use of the appellant/plaintiff as an approach road, having a pucca boundary wall;

(g) that the staff members along with their families of the appellant/plaintiff were residing in the flats so constructed and for security reasons a six feet high boundary wall on the outer periphery of the land so allotted to the appellant/plaintiff with necessary gate for ingress and egress had also been constructed;

(h) that in or about the year 1986-87 the respondent/defendant no. 2 DDA constructed its own flats under the SFS Scheme in Sidhartha Extension and these flats were built in the Sarai Kale Khan area just behind the DVB colony;

(i) according to the Zonal Master Plan, a separate road was earmarked for giving access to appellant/plaintiff's colony and Sunlight Colony;

(j) that the respondent/defendant no. 2 DDA had provided access to Pocket-A/Block-A of the said SFS flats from the pathway measuring around 60 feet wide which was to pass by the side of adjoining nallah as well as North/East boundary of the DVB colony;

(k) however in the course of time, a part of this land on which the said road was to be constructed was encroached upon and as a result whereof the said road could not be constructed;

(l) that the residents of Block-A of Sidhartha Extension started claiming access

from the Ring Road;

(m) that the respondent/defendant no. 2 DDA, in order to cover its own lapse started claiming that the internal road of the appellant/plaintiff's colony was the access road for Block-A of Sidhartha Extension from Ring Road;

(n) that the appellant/plaintiff resisted such efforts of the respondent/defendant no. 2 DDA and though various meetings were held and surveys conducted but the appellant/plaintiff stuck to its stand that the internal road of its colony could not be permitted to be a public pathway for access to another colony i.e. Block-A of Sidhartha Extension;

(o) that though the respondent/defendant no. 1 had filed a suit in this regard but the said suit was ultimately withdrawn;

(p) that the respondent/defendant no. 1 had also filed a writ petition No. 786/1992 in this regard in this Court but which was also dismissed as withdrawn;

(q) that the respondent/defendant no. 1 thereafter filed a fresh writ petition being CWP 5963/1998 in which the counsel for the appellant/plaintiff did not file the counter affidavit in time and as a consequence whereof the writ petition was decided ex parte against the appellant/plaintiff;

(r) that against the said ex parte order, by virtue of which the internal road of the appellant/plaintiff's colony was declared to be a feeder road for Block-A of Sidhartha Extension, the appellant/plaintiff filed LPA No. 14/2000 in which the ex parte judgment in CWP No. 5963/1998 was set aside and the matter remanded to the Single Judge; and,

(s) that it was the stand of the appellant/plaintiff in the said writ petition which was still pending at the time of institution of the suit that the same involved disputed questions of fact which could not be adjudicated without permitting the parties to adduce their respective evidences.

accordingly, the reliefs of declaration that the subject road was the internal road of the colony of the appellant/plaintiff and not a public road and of injunction restraining the respondents/defendants from using and allowing use of the said internal road as a public road were claimed.

3. The said suit was entertained and remained pending in this Court till the year 2003 when on account of changes in pecuniary jurisdiction, it was transferred to the Court of the District Judge.

4. The respondent/defendant no. 1 on 7th September, 2005 filed the application under Order 7 Rule 11 of the CPC on the ground (i) that in a high level meeting held on 16th July, 1990 between the appellant/plaintiff and the respondent/defendant no. 2 DDA, the dispute was sorted out and it was resolved that the missing link between the appellant/plaintiff's colony and Block-A of Sidhartha Extension be connected by removing the wall and in pursuance thereof the said wall around the colony of the appellant/plaintiff at the said point was

demolished; (ii) that the dispute was between the appellant/plaintiff and the respondent/defendant no. 2 DDA which were two departments of the Government of India and ought not be allowed to be litigated in the Courts; and, (iii) that the notice u/s 53B of Delhi Development Act, 1957 and Section 478 of the Delhi Municipal Corporation Act, 1957, had not been served.

5. The learned Addl. District Judge has allowed the said application of the respondent/defendant no. 1 and rejected the plaint, finding/observing/holding:-

(i) that as per the dicta of the Supreme Court in Oil and Natural Gas Commission and Another Vs. Collector of Central Excise, and Collector of Central Excise, Calcutta Vs. Jeasop and Co. (1999) 9 SCC 181, the controversy between the appellant/plaintiff and the respondent/defendant No. 1, both being government departments, stood resolved in the meeting of the High Powered Committee (HPC) of the two government departments and the matter was not cleared for litigation and thus no cause of action for the suit survived to the appellant/plaintiff;

(ii) that as per the R.K. Aneja Vs. Delhi Development Authority and Another, , the Court is debarred from entertaining a suit instituted without complying with the provision of mandatory notice u/s 53B supra, on the analogy of similar provision of Section 80 CPC; and,

(iii) that the matter had been resolved between the appellant/plaintiff and the respondent/defendant no. 2 DDA by mutual consultation and no cause of action survived to the appellant/plaintiff.

6. The counsel for the respondent/defendant no. 1, as aforesaid, has opposed the applications for condonation of delay.

7. The appellant/plaintiff seeks condonation of 22 days delay in filing the appeal merely by pleading that the delay is neither intentional nor deliberate and that the appellant/plaintiff has a strong prima facie case in its favour and will suffer irreparable loss and injury if the delay is not condoned. The reason given for condonation of 88 days delay in re-filing the appeal is the ill health of the associate Advocate of the Advocate for the appellant/plaintiff and whose affidavit is also filed in support of the application.

8. The counsel for the respondent/defendant no. 1 has argued that no reason less sufficient cause has been given for condonation of 22 days delay in filing the appeal. Qua the delay in re-filing, it is contended that even though the appeal as filed was defective and was returned but was repeatedly filed without removing the objections and which shows negligence on the part of the appellant/plaintiff and which ought not to be condoned. Reliance is placed on J.L. Gugnani Vs. M/S. Krishna Estate and Others, in this regard.

9. The settled position in law (See Vedabai @ Vijayanatabai Baburao Pateil Vs. Shantaram Baburao Patil and Others, , Improvement Trust, Ludhiana Vs. Ujagar Singh and Others, , G. Ramegowda, Major and Ors Vs. Special Land Acquisition

Officer, Bangalore, and Directorate General of Civil Aviation and Another Vs. M/s Global Vectra Helicorp Ltd. and Another,) however is of adopting a liberal policy in condoning the delays. The conduct of the appellant/plaintiff in the present case is not found to be of such gross negligence so as to disentitle the appellant/plaintiff from the indulgence which the Courts have repeatedly granted in such matters. Moreover, it cannot be lost sight of that the issue involved in the suit from which this appeal arises pertain to valuable immovable property and it is not deemed appropriate to allow such rights to be defeated on mere technicalities. It cannot also be lost sight of that the appeal has now remained pending in this Court for nearly three years and the contesting respondent/defendant no. 2 DDA has also filed counter affidavit thereto. Moreover, none of other respondents/defendants than the respondent/defendant no. 1 have opposed the application. The counsel for the respondent/defendant no. 2 through whom the respondent/defendant no. 1 derives right, though appearing, has not opposed the applications. The delay in re-filing is not subject to the rigorous tests which may be applied in excusing delay in filing, as held in *Indian Statistical Institute Vs. Associate Builders* AIR 1971 SC 335 , *Ansal Properties and Infrastructure Ltd. and Another Vs. Col. Y.L. Sud and S.R. Kulkarni* Vs. *Birla VXL Limited*, . The counsel for the appellant/plaintiff in this regard has invited attention to *A. Nawab John and Others Vs. V.N. Subramaniam*, and *Mannan Lal Vs. Chhotaka Bibi, (Dead) by Lrs. B. Sharda Shankar and Others*, laying down that the time for payment of Court Fees can be extended subsequently also.

10. Thus, the delay in filing and re-filing the appeal is condoned and the counsels have been heard on the merits of the appeal.

11. The fate of Civil Writ Petition No. 5963/1998 which was remanded vide order dated 26th July, 2000 in LPA No. 14/2000 has been enquired. It is informed that the said writ petition was disposed of vide order dated 7th December, 2001, in view of the suit from which this appeal arises having been filed and making an interim arrangement between the parties.

12. It is next enquired from the counsel for the respondent/defendant no. 1 that what is there to show that the dispute had been resolved between appellant/plaintiff and the respondent/defendant no. 2 DDA.

13. The counsel for the respondent no. 1 draws attention to the written statement of the respondent/defendant no. 1 in this regard and which in turn refers to the counter affidavit of the respondent/defendant no. 2 DDA in writ petition No. 5963/1998 stating as under:-

2. The Delhi Development Authority as per approved scheme designed a road link of 13.5 meters from the Ring Road to Sidhartha Extension Pocket A passing by the side of DESU colony at Sarai Kale Khan.

3. This road link was obstructed by Respondent No. 2 officials and some other residents of DESU colony.

4. Since the matter related to the two departments, namely Delhi Development Authority and Delhi Electric Supply Undertaking controlled by the state, high level meeting was held on 16.7.90 to sort out this problem. It was chaired by Shri C. Noronha Vice-Chairman, DDA. The meeting was attended by following officers of the DESU;

(i) Shri S.P. Chopra, Superintending Engineer (Plg) I,

(ii) Shri A.C. Bhatnagar

(iii) Shri S.C. Chattopadhyay, Executive Engineer

(iv) Shri H.T. Krishna Murti, Executive Engineer

(v) Shri D.K. Suri, Executive Engineer (Plg) I

The item of the removal of obstruction to the above road link was duly mentioned in the agenda in the following words-

Item No. 2:

Sub: Road link for Pocket-A Sidhartha Extension, from DESU colony to Ring Road R. 3(4)/90-MP.

The residents of Sidhartha Extn., Pocket A are representing for long for a passage through DESU colony to Ring Road and they have to go to their colony through a long road from Pocket B or through Sun Light Colony. These approaches are very long. A majority of the residents of DESU colony have agreed for a link road between their colony and Pocket A Sidhartha Extn. So a proper road can be laid as per plan laid on the table (D-18). A 13.50m road already passes through DESU colony and only a small stretch is required to be built to connect Sidhartha Extn. Pocket-A, with DESU colony road of 13.50m. This Road will lead to Ring Road and will meet the need of the residents of Sidhartha Extn. Pocket A. The matter is placed before the Technical Committee for approval of construction of a small portion of road as extension of 13.50m road of DESU colony.

After discussion the following minutes were recorded of the decision unanimously taken in the meeting-

Item No. 2"

Sub: Road link for Pocket-A, Sidhartha Extn., from DESU colony to Ring Road, F. 3(4)/90-MP.

Decision: Technical Committee examined the proposal for connecting the missing link between 13.5 m wide DESU colony road and Sidhartha Extn., Pocket A, the Technical Committee found the proposal technically feasible and approved the same and desired that this may be constructed by the DDA.

5. The DDA was requested by the above said committee to execute the above

decision. In pursuance of the above decision the DDA removed the obstructions on 18.2.91 and constructed the said road.

14. There is however on the Trial Court record a replication filed by the appellant/plaintiff to the said written statement of the respondent/defendant no. 1 and in which the appellant/plaintiff had denied any settlement with the respondent/defendant no. 2 DDA.

15. A perusal of the Trial Court record shows that no written statement was filed by the respondent/defendant no. 2 DDA to the suit and in fact its right to file the written statement was closed.

16. Finding, that the plea taken by the respondent/defendant no. 1 of the cause of action having not survived owing to a settlement having been reached between the appellant/plaintiff and the respondent/defendant no. 2 DDA was based on the basis of a plea taken by the respondent/defendant no. 2 DDA not in the suit from which this appeal arises but in the earlier writ petition being Civil Writ No. 5963/1998, it has been enquired from the counsel for the respondent/defendant no. 1 that if that was the admitted position, why were the writ petition and the LPA preferred there against not disposed of in terms of the said settlement and why was the writ petition disposed of leaving the controversy to be adjudicated in the suit from which this appeal arises.

17. No answer whatsoever has been forthcoming from the counsel for the respondent/defendant no. 1.

18. I am of the view that the learned Addl. District Judge has erred in concluding that no cause of action for the suit existed in favour of the appellant/plaintiff for the reason of a settlement having been arrived at between the appellant/plaintiff and the respondent/defendant no. 2 DDA, when the said plea itself of the respondent/defendant no. 1 was controverted by the appellant/plaintiff and when there was no basis therefor except for a unilateral averment of the respondent/defendant no. 2 DDA in the counter affidavit filed in an earlier proceeding and in which proceeding the said plea was not accepted. Had there been any merit in such a plea, the writ petition and the LPA arising therefrom would have been disposed of on those terms and the parties would not have been relegated to the suit. I have also enquired from the counsel for the respondent/defendant no. 1 whether there exists on record the minutes of the meeting held on 16th July, 1990.

19. The answer is in the negative, though the counsel states that he can apply for the copy of the said minutes now under the RTI Act.

20. If the respondent/defendant no. 1 has for all these years not bothered to even obtain copy of the minutes on the basis whereof a plea of settlement has been taken, I am not inclined to grant any further time for the same now. It shows the non-serious manner in which the said plea has been taken and pursued.

21. It is also important to note the well settled principle of law (See Saleem Bhai and Others Vs. State of Maharashtra and Others, and Mayar (H.K.) Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others,) that for deciding an application under Order 7, Rule 11 only the averments in the plaint are germane and a plaint cannot be rejected on the basis of allegations made by the defendant in his written statement or in an application for rejection of the plaint.

22. The plea in the counter affidavit of the respondent/defendant no. 2 DDA itself is ambiguous and does not show the appellant/plaintiff to have allowed the road which it claims to be its internal road to become a public road for use of persons other than the residents of the colony of the appellant/plaintiff.

23. The rejection of the plaint in the suit filed by the appellant/plaintiff thus cannot be sustained on this ground.

24. As far as the second reason for rejection given in the impugned judgment on the basis of the dicta in ONGC Vs. Collector of Central Excise supra is concerned, the Supreme Court now in Electronics Corporation of India Ltd. Vs. Union of India (UOI) and Others, has recalled the earlier judgment. Reference in this regard can also be made to the judgment of the Division Bench of this Court in Air India Ltd. Vs. Union of India and Others, . The said ground of rejection also thus cannot be sustained.

25. That leaves the ground, of the suit filed by the appellant/plaintiff being barred by Section 53B of the DDA Act. The counsel for the respondent/defendant no. 1 in this regard has relied on the Division Bench's dicta of this Court in Smt. Prinda Punchi and Another Vs. Municipal Corporation of Delhi and Others and on D.C.M. Ltd. Vs. Delhi Development Authority, .

26. Per contra, the counsel for the appellant/plaintiff refers to Karamvir Singh Vs. D.D.A., of the Division Bench judgment of this Court in Smt. Yashod Kumari Vs. Municipal Corporation of Delhi AIR 2004 Delhi 225, paras 6 & 16 of A.B. Singh Vs. Chunnilal Sawhney 2011(9) AD (Delhi) 235 and Ajay Enterprises Ltd. Vs. Municipal Corporation of Delhi .

27. I am afraid, the judgment in DCM Ltd. cited by the counsel for respondent/defendant No. 1 has been overruled in DCM Limited Vs. DDA . The other judgments cited by the counsel for the appellant/plaintiff hold that the right under the said provision is capable of being waived or that the suit cannot be dismissed on such technical ground after it has been contested and that notice u/s 53B is not required when there is earlier litigation between the parties.

28. It is also significant that the rejection on the ground of non-compliance of Section 53B is being sought by the respondent/defendant no. 1 and not by the respondent/defendant no. 2 DDA for whose benefit the said provision has been made. The respondent/defendant No. 1 cannot be said to have any locus standi to raise the issue as has also been held in A.B. Singh supra. The respondent/

defendant no. 2 DDA as aforesaid, has not even chosen to file any written statement.

29. Thus there is no merit in the third ground of rejection also and which also has not been correctly decided by the learned Addl. District Judge.

30. No other ground for rejection of the plaint has been urged before me.

31. The counsel for the respondent/defendant no. 1 also contended that the issue of the said road which has been brewing between the parties for the last three decades should not be allowed to further linger on. He further contended that under the Zonal Plan the subject road is shown as a public road.

32. Though opportunity was given to the counsel for the respondent/defendant no. 1 to satisfy this Court, of the said road even though earlier an internal road of the appellant/plaintiff's colony having acquired the status of a public road, but nothing worthwhile could be argued/shown. The matter will thus have to be adjudicated upon. Though undoubtedly the issue has lingered for over two decades, the said delay is largely attributable to the respondent/defendant no. 1 and not to the appellant/plaintiff.

33. The appeal thus succeeds. The impugned judgment and decree of dismissal of suit consequent to rejection of the plaint and the order of rejection of the plaint are set aside. The application of the respondent/defendant no. 1 under Order 7 Rule 11 of the CPC is dismissed.

34. Axiomatically, the suit has to proceed further with and is remanded to the concerned District Judge having territorial jurisdiction over the area for proceeding further from the stage where the suit was prior to rejection of the plaint.

35. The parties to appear before the concerned District Judge/Addl. District Judge to whom the suit may be marked, on 30th January, 2014. The Trial Court file which was requisitioned to this Court be also forthwith remitted back. No costs.

Decree sheet be drawn up.