

(1971) 03 DEL CK 0019

In the Delhi High Court

Case No : Regular Second Appeal No. 9 of 1971

Krishan Gopal

APPELLANT

Vs

Municipal Corporation of Delhi

RESPONDENT

Date of Decision : 24-03-1971

Acts Referred:

Citation : (1972) ILR Delhi 272

Hon'ble Judges : D.K. Kapur, J

Bench : Single Bench

Advocate : Iqbal Krishan and K.K. Raizada, for the Appellant;

Judgement

D.K. Kapur, J.

(1) This is a regular second appeal brought by the plaintiff who has lost in both courts below. The suit out of which this appeal arises was brought by the plaintiff to challenge the notice of demolition issued by the defendant, the Municipal Corporation of Delhi, u/s 343 of the Delhi Municipal Corporation Act. The case of the plaintiff was that he was not served with any demolition notice or order and hence the attempt of the Corporation to demolish part of his house No. 508/1/2 situated in Mohalla Mantola, Pahar Ganj, Delhi, was illegal and ultra-vires. He prayed for a permanent injunction to restrain the defendant from notion . The Corporation stated in its reply that it had duly served the notice u/s 343 of the Delhi Municipal Corporation Act. Further, it was submitted that the construction had been made in the premises without obtaining any permission .It was also pleaded that the notice of demolition had been served on the father of the plaintiff who had field objections thereto, but, as the objections were baseless the same had been rejected and, Therefore, the notice of demolition had been issued.

(2) Both the courts below have held that the notice had been served on one Parmeshwari Dass as shown by the copies of the notices and the said Parmeshwari Dass had also signed the same, the copies being Exhibits D-2, D-4

and D-6. (It was also held that as the plaintiff had not produced his father, Parmeshwari Dass to deny these signatures, it could be held that the notice had been duly served on him. There were also two letters. Exhibits D-3 and D-7 produced by the defendant which were sent to it under the signatures of Parmeshwari Dass which were relied upon to show that if the matter was considered in the light of these replies to the notices, it was clear that Parmeshwari Dass had been served "with the notice. His objections had been considered by the Corporation and then the order of demolition had been issued. Parmeshwari Dass being also an owner of the property the courts below have held the notices to be duly served.

(3) The plaintiff has now appealed to this Court and submits that the notices were not properly served and the courts below have erred in law in coming to the conclusion that- the same were served on the plaintiff's father and reference is made in this respect to the copies of the notices and also to the alleged replies sent by Parmeshwari Dass. It is also pointed out that the signatures on these documents differ markedly from each other. These signatures however have been upheld by the courts below and I do not propose to go into the question whether they are the signatures of the same person or not as I find it unnecessary for the purpose of deciding this appeal.

(4) The main controversy in this appeal turns on the question whether it was necessary also to serve the appellant who is admittedly also an owner of the property. There are three notices in all ;Exhibits D-2, D-4 and D-6. Some are addressed to the "owner/builder" and some are addressed to the "owner/builder or occupier". Assuming that these notices were received by Parmeshwari Dass the father of the plaintiff who is also part owner of the property, the question still remains as to whether the validity of the notice can be challenged on the ground that the plaintiff has not been served with them. If it is necessary that he should also be served before the order can become operative, then this appeal will have to succeed on this ground.

(5) u/s 444(2) of the Delhi Municipal Corporation Act. 1957, it is provided as follows:-

"444(2).Any document which is required or authorised to be served on the owner or occupier of any land or building may be addressed "the owner" or "the occupier", as the case may be, of that land or building (naming that land or building) without further name or description, and shall be deemed to be duly served-

(A)If the document so addressed is sent or delivered in accordance with clause (d) of sub-section (1); or

(B)if the document so addressed or a copy thereof so addressed, is delivered to some person on the land or building or, where there is no person on the land or building to whom it can be delivered, is affixed to some conspicuous part of the land or building."

(6) Now it is quite true that the impugned notices are addressed to the owner or occupier and in some cases builder also and Therefore it may be assumed that the notices are in the proper form for the purpose of this argument but the next step is that these notices have also to be served as required by this sub-section on either, one of the persons to whom they are addressed or to some person on the land or building. Mr. Raizada submits that Parmeshwari Dass was on the land or building when the notice was delivered and Therefore u/s 444(2) the notice could be deemed to be duly served because it was delivered to him. He relies on clause (b) reproduced above. This is at first sight an attractive argument and should normally prevail. However, when one refers to the provisions of Section 343 of the Act to see whether the notices can be said to comply with it, this argument is very much weakened. According to the amended Section 343, as amended by Act No. 42 of 1961, no action can be taken to order the demolition of any building unless a notice has been served in such manner as the Commissioner may think fit on the person against whom an order is sought. This is the substance of the first proviso to Section 343(1) as amended. To determine who is the person who has to be served, reference is necessary to the substantive part of Section 343(1) where the following words occur:-

"....Make an order directing that such erection or work shall be demolished by the person at whose instance the erection or work has been commenced or is being carried on or has been completed...."

(7) In order to comply with the language of this Section, the Corporation has got to serve the notice in such manner as the Commissioner thinks fit on the person at whose instance the erection or work which is the subject matter of the notice has been commenced or carried on. The Corporation has not even attempted to establish on this record as to who is the person at whose instance the work has been commenced or has been carried on. The case of the plaintiff on the other hand is, that no work was commenced or carried on as the construction was an old one. For this purpose, I refer to para 3 of the plaint which is in the following terms:-

"That the said rooms are very old and they have not been constructed or re-constructed a new. Only permissible repairs according to Bye-laws of defendant in the shape of plastering repairing to old walls, etc., not at all actionable were carried out."

(8) In reply to this, the defendant stated in its written statement as follows:-

"That para 3 is denied. The construction is unauthorised. The ground floor and the room on the first floor was built without obtaining any permission from the Municipal Corporation of Delhi for which due notices were served. It is incorrect that only permissible repairs has been carried out."

(9) There is no decision or even an issue framed by the courts below, to determine whether the premises were old or not and there is no ascertainment of the question as to whether there was a new construction. This being so, it cannot

be said that the notice was served on the person at whose instance the construction was being made. There is not a word on record to identify the person at whose instance the work was being carried on. That being so, the next question to see is who should be served u/s 343 when the person at whose instance the work is being carried on is unknown.

(10) The provisions of Section 444(2) to my mind only refer to those provisions of the Delhi Municipal Corporation Act, 1957, where provision has been made for the service of the notice on the owner or occupier of any land or building. There is no provision in Section 343 corresponding to these words. As the notice is not required by Section 343 to be served on the owner or occupier. I cannot hold that Section 444(2) can be made applicable to Section 343(1) by impliedly holding that the person at whose instance the construction is made must be either the owner or occupier. In coming to this view. I principally base my judgment on the words "any document which is required or authorised to be served on the owner or occupier of any land or building" which occur in the beginning of Section 444(2). If the legislature intended that this section should apply to Section 343(1) it would have used the words "owner or occupier" in Section 343(1) instead of the words "person at whose instance the construction is being made. I must hold that/Section 444(2) is a very drastic provision because it states that a document which is so addressed may be served by delivery to any person who may be on the land or building. This seems to be at variance with the rest of the provisions of Section 444, which contain provisions for the service of the person intended to be served personally, unless he cannot be found.

(11) For the purpose of clarifying the legal position I must point out that in Section 444(1). provision is made to serve persons either by registered post or physically by tendering the notice to him and if that cannot be done, the notice may be affixed on a conspicuous part of the last known place of residence of the person or by giving the notice to some adult member of his family. There is also provision in Section 444(4) to enable the Commissioner to determine as to who is the owner of the premises in question. I think in a case like the present where the notice is to be served on a specific person the notice can only be served u/s 444(1)(d) and Section 444(2) is not applicable at all.

(12) I now consider what would happen if the respondent's arguments were to be accepted. The notice could be served on any person who happened to be on the premises u/s 444(2) and the plaintiff would be deprived of his right of appeal u/s 343(2) because the period in which that appeal has got to be filed is specified in the notice of demolition itself. In other words, as Exhibit D-6 in the present case is the order which is under challenge, which also fixes the period during which the appeal can be filed and the said period is only six days i.e., the appeal by the owner or occupier had to be filed within six days. If the owner or occupier does not appeal within six days, his right of appeal is lost. If this notice is not served properly on all the persons affected by it the party concerned will be

deprived of all rights to challenge the same unless the said notice is held to be invalid in this suit. I do not think that the purpose of the legislature in enacting the provisions in Section 444(2) was intended to enable the Corporation to find a way to prevent the person affected by its order from filing an appeal before the District Judge. I, Therefore, come to the view that the order of demolition cannot be operative against the owner or occupier of the building unless it has been served in accordance with Section 343 of the Act.

(13) This brings me back to the principal question as to who should be served with a notice u/s 343 when it is not possible to identify the person at whose instance the erection or work has been commenced or is being carried on. There are two parts of Section 343 as I have indicated already. The first part deals with the "notice that has to be served on the person concerned, giving a reasonable opportunity of showing cause why an order directing the demolition of work should not be passed under the second part. At this stage, it is also possible for the Commissioner to pass a separate order directing the persons concerned to stop the erection. Such an order can be passed under the second proviso to Section 343(1) of the Act. It is, Therefore, clear That it is the person concerned with the erection who has to be served and that person is the person at whose instance the erection or work has been commenced. It seems to me that if such a person cannot be identified then every person at whose instance the work or erection may have been commenced has got to be served. This necessarily includes the owners of the building. In the present case Therefore the plaintiff had to be served u/s 343. If served he could have shown cause and also appealed. I, Therefore, come to the conclusion that as the plaintiff has not been individually served and this is the undisputed case of both the parties, the order of demolition is invalid and the suit should have been decreed by the courts below.

(14) I now come to the question whether the civil court had jurisdiction to entertain the suit. It is provided in Section 343(4) as follows :-

"343(4)See Act as provided in this section, no court shall entertain any suit, application or other proceeding for injunction or other relief against the Commissioner to restrain him from taking any action or making any order in pursuance of the provisions of this section."

(15) The question, Therefore, is whether the civil court has jurisdiction even though there is a bar. This has been the subject-matter of several decisions by the Supreme Court and the following decisions, Firm Seth Radha Kishan (Deceased) Represented by Hari Kishan and Others Vs. The Administrator, Municipal Committee, Ludhiana, State of Kerala Vs. Ramaswami Iyer and Sons, and Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, have established the proposition that the civil court has jurisdiction where there is an express or implied bar to entertain the suit if the authority concerned has acted beyond jurisdiction or contrary to the statute. In the present case, I come to the conclusion that as the authority concerned has acted without serving a notice on

the appellant and has also attempted to demolish the alleged construction without serving the order of demolition on the appellant, he was thereby debarred from filing an appeal to the District Judge u/s 343(3) of the Act and, hence he had no other remedy but to institute the suit out of which this appeal has arisen. It is clear that the Corporation has acted contrary to the statute and thus the civil court does have jurisdiction.

(16) In the circumstances, I come to the conclusion that the civil court had jurisdiction to entertain the suit.

(17) In these circumstances, I come to the conclusion that the notice in the present case has not been duly served on the appellant and Therefore he is entitled to contend that the order of demolition is not effective against him and the property cannot be demolished. I do not go into the question, whether Parmeshwari Dass has been served because I have already expressed my view that the notices are signed in such a manner as to make it appear very doubtful whether Parmeshwari Dass has been served or not because all the signatures differ from each other. The signatures have not been proved by the defendant who does not know who Parmeshwari Dass is, so I leave my doubts on this Point and do not express any opinion on this question of fact. As I have already held this is a case in which the notice has not been served in accordance with law on the plaintiff and he has Therefore a right to challenge the same.

(18) As a result of the aforementioned discussion, the appellant is entitled to succeed in this appeal and, I Therefore, reverse the decision of the courts below and decree the suit. Consequently, a decree for injunction as claimed by the plaintiff to restrain the Corporation from demolishing the impugned construction or any part thereof is granted. In view of the nature of the controversy, I further direct that the parties will bear their own costs throughout and also hold that this decision will be no bar to the Corporation issuing a notice u/s 343(1) to the plaintiff with respect to the impugned construction. I make it clear that the injunction is restricted to the actions already taken by the Corporation or proposed to be taken under the impugned order of demolition.