

(1997) 09 DEL CK 0044

In the Delhi High Court

Case No : Regular Second Appeal No. 79 of 1977

Manmohan Singh

APPELLANT

Vs

Municipal Corporation of Delhi

RESPONDENT

Date of Decision : 12-09-1997

Acts Referred:

Delhi Municipal Corporation Act, 1957 — Section 343

Citation : (1997) 5 AD 911 : (1997) 68 DLT 801 : (1997) 43 DRJ 172 : (1997) 4 RCR(Civil) 187 : (1998) 2 RCR(Civil) 150 : (1998) 1 RCR(Rent) 363

Hon'ble Judges : Mohd. Shamim, J

Bench : Single Bench

Advocate : Abhinav Vashisht and Amita Gupta, for the Appellant;

Judgement

Mohd. Shamim, J.

(1) This appeal has been preferred by the plaintiff/appellant (hereinafter referred to as the appellant in order to facilitate the reference) against the judgment and decree dated March 11, 1977 passed by an Additional District Judge, Tis Hazari Courts, Delhi, whereby he affirmed the judgment and decree passed by the learned Sub Judge on May 16, 1974 dismissing the suit of the appellant.

(2) Brief facts which led to the presentation of the present appeal are as under: that the appellant herein filed a suit before the learned lower Court which was registered as Suit No. 684/69 wherein he prayed that the defendant/respondent (hereinafter referred to as the respondent for the sake of convenience), their servants and agents be restrained from demolishing the tin shed existing at the rear portion of premises bearing No. B-29B, Kailash Colony, New Delhi, fully shown in the plan annexed with the plaint. The case of the appellant is that he is the owner of premises bearing No. B-29B situated at Kailash Colony, New Delhi, which consists of a tin shed situated at the back side of the above said premises shown by red colour in the plan annexed with the plaint. The aforesaid accommodation including the tin shed (hereinafter referred to as the disputed property for the sake of brevity) has been in existence from before the

enforcement of the Delhi Municipal Corporation Act, 1957 (for short 'Act'). The above said property is assessed to house tax. The officers of the respondent came to the above said place on September 19, 1969 in the evening and threatened to demolish the disputed property on the ground that the same was an unauthorised construction. The appellant who is the owner of the disputed property has never been served with show cause notice as required under Sections 343(1) and 344(1) of the Act. He has in view of the above, neither been heard nor has been given any opportunity to lead evidence in support of his case. No demolition order u/s 343 of the Act has so far been served on the appellant who is the owner of the said tin shed. Consequently the threatened action of demolition is illegal, invalid, ultra virus and without jurisdiction. It has thus been prayed that the respondent their servants and agents be restrained from demolishing the above said tin shed.

(3) The respondent put in contest, inter alia, on the following grounds: that the suit of the appellant in fact was suit for declaration and as such, the same was not maintainable without the service of the notice u/s 478(1) of the Act. The notices under Sections 343 & 344 of the Act were issued and served on M/s Fritz & Singh who were the tenants of the appellant in the disputed property and an opportunity of being heard was also granted to them. The aforesaid M/s Fritz & Singh filed an appeal before the District Judge against the demolition notice. However, the same was got dismissed as withdrawn vide order dated May 13, 1969. In view of the above the present suit was not maintainable and was liable to be dismissed. Even otherwise, the suit of the appellant was not maintainable as an equally efficacious remedy was available to the appellant. The impugned tin shed was an unauthorised construction. Hence, the respondent had got every right to demolish the same. The suit was false and frivolous and the same was liable to be dismissed. The learned lower Court framed the issues on April 14, 1970 and recorded the evidence of both the parties.

(4) After hearing the learned counsel for both the parties and after the appraisal of the evidence the learned Sub Judge was of the view that the present suit was not maintainable as M/s Fritz & Singh had already availed of an opportunity to challenge the impugned demolition order by preferring an appeal. He was further of the view that no show cause notice was necessary to be served on the appellant inasmuch as he was not the builder of the alleged unauthorised construction.

(5) The appellant challenged the said judgment and decree through an appeal before the District Judge which was assigned to an Additional District Judge for disposal. The learned Additional District Judge agreed with the findings of the learned Sub Judge and dismissed the appeal vide judgment and decree dated March 11, 1977. It was in the above circumstances that the appellant has approached this Court.

(6) Learned predecessor of this Court did not frame any substantial question of law. Consequently the same was framed by this Court on September 9, 1997 in

the following words:-

"Whether a show cause notice for demolition, within the meaning of Section 343 of the Dmc Act, has been served on the person at whose instance the alleged unauthorised construction was raised?"

Since the fate of the present appeal hinges on an interpretation of Section 343 of the Act it would be in the fitness of things to examine the provisions of the said Section before proceeding any further in the matter. It lays down "where the erection of any building or execution of any work has been commenced, or is being carried on, or has been completed without or contrary to the sanction referred to in Section 336 or in contravention of any condition subject to which such sanction has been accorded or in contravention of any provisions of this Act or bye-laws made thereunder, the Commissioner may, in addition to any other action that may be taken under this Act, make an order directing that such erection 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 within such period (not being less than five days and more than fifteen days from the date on which a copy of the order of demolition with a brief statement of the reasons Therefore has been delivered to that person), as may be, specified in the order of demolition: Provided that no order of demolition shall be made unless the person has been given by means of a notice served in such manner as the Commissioner may think fit, a reasonable opportunity of showing cause why such order shall not be made."

(7) A close scrutiny of the relevant provisions of law alluded to above, would reveal that (i) a show cause notice is a condition precedent before the passing of any demolition order of the alleged unauthorised construction; and (ii) the same is to be served either on the person who is raising the alleged unauthorised construction or at whose instance the same is being raised. Learned counsel thus drawing inspiration from the aforesaid provision of law has vehemently argued that it was the appellant who put the tin shed and raised the alleged unauthorised construction. Thus it was he who was required to have been served with the notice. The next limb of the argument of the learned counsel for the appellant is that admittedly the appellant is the owner. Hence even if the respondent were not in a position to find out as to who was the builder of the said alleged unauthorised construction, even in that eventuality they were under an obligation to serve the owner of the alleged unauthorised construction with the notice. The learned counsel in support of his argument cited the observations of a learned Single Judge of this Court before whom a case very much akin to the case in hand came up for hearing. The learned Single Judge while construing the provisions of Section 343 of the Act as *Ram Narain Vs. Municipal Corporation of Delhi*, was of the view "that under the provisions of Section 343 of the Act, it is only the person at whose instance the unauthorised construction is put up, who is entitled to notice of service of the order of demolition. The petitioner on his own showing not being such a person, was not prima facie entitled to insist

on service on him of either show cause notice or even that of demolition order"".

The above view was reiterated in a number of cases as reported in 1973 Municipalities & Corporation Cases 282, Mahinder Singh and Others Vs. Municipal Corporation of Delhi, , Mahinder Singh & Ors. vs. Municipal Corporation of Delhi, and 1995(34) Drj 493, Anz Grindlays Bank Plc vs. The Commissioner, Mcd & Ors.

(8) Learned counsel for the respondent on the other hand, has contended that since M/s Fritz & Singh were in occupation of the alleged unauthorised construction, hence the presumption was that it was raised by them or at their instance. Learned counsel thus contends that Therefore there should not be any quarrel with the service of the notice on them i.e. the tenant in occupation of the disputed property. The learned counsel further contends that there is an admission on the part of PW5 Manmohan Singh i.e. the appellant that he did not seek any permission to raise the said construction. Thus, the learned counsel has argued that the impugned construction is an unauthorised one and as the notice had already been served on the above named tenant, the appeal should be dismissed.

(9) It is crystal clear from above that this is not the case of the appellant that the alleged construction is a legal and valid one, having been raised after seeking the necessary permission. the appellant Shri Manmohan Singh has admitted the said fact during the course of his cross-examination. In view of the above the only question which arises for adjudication is as to whether the appellant was entitled to be served with the notice as required u/s 343 of the Act since no unauthorised construction can be demolished without the service of notice as contemplated u/s 343 of the Act. It is abundantly clear from the relevant provisions of law adverted to above, that notice is to be served on the person who has either raised the unauthorised construction or at whose instance the unauthorised construction has been raised. There is no evidence from the side of the respondent to prove as to who raised the construction. Learned counsel appearing on behalf of the respondent thus wants this Court to conclude from the factum of possession of the tenant over the disputed property that it wee they who raised the same. To my mind no such presumption can be drawn. On the other hand, there is a positive statement of PW5 Manmohan Singh that it was he who raised the unauthorised construction i.e. he put up the tin shed on the portion which was lying vacant. It is thus amply clear from above that it was the appellant who raised the unauthorised construction. Hence he should have been served with the notice.

(10) Learned counsel for the respondent has then contended that since an appeal was preferred against the demolition order before the District Judge which was got dismissed as withdrawn vide order dated May 13, 1969, hence the present suit was not maintainable. I am sorry I am unable to agree with the contention of the learned counsel.

(11) Admittedly as per the provisions of Section 343 of the Act it is the appellant who is to be served with the notice before any demolition can be made. The

appellant in the present case has not been served with the said notice. Hence the presentation of the appeal by M/s Fritz & Singh before the District Judge would not stand in the way of the appellant in filing the suit for injunction.

(12) In view of the above, the appellant is entitled to succeed. The appeal is allowed with costs. The impugned judgment and decree dated May 16, 1974 passed by the learned Sub Judge and the judgment and order dated August 11, 1977 passed by the learned 1st Appellate Court are hereby set aside. The suit of the appellant is hereby decreed. A decree for permanent injunction in favor of the appellant against the respondent is hereby passed restraining the respondent their servants and agents from demolishing the tin shed at the rear portion of the premises bearing No. B-29B, Kailash Colony, New Delhi, shown in red colour in the plan attached with the plaint. The respondent would, however, be free to take any action of demolition in accordance with law.