(2013) 05 DEL CK 0434

Delhi High Court

Case No: Regular Second Appeal No. 24 of 2012 and C.M. No''s. 3254-3255 of 2012

Manju Sharma		APPELLANT
	Vs	
Delhi Development Authority		RESPONDENT

Date of Decision: May 21, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100
- Delhi Development Act, 1957 - Section 53B
- Evidence Act, 1872 - Section 101
- Land Acquisition Act, 1894 - Section 16

Hon'ble Judges: V.K. Shali, J

Bench: Single Bench

Advocate: B.B. Sawhney, Mr. Lakshay Sawhney and Mr. Sunil Kumar, for the Appellant; Pawan Mathur, for the Respondent

Final Decision: Dismissed

Judgement

V.K. Shali, J.

This is a regular second appeal filed by the appellant u/s 100 CPC against the order dated 3.12.2011 passed by the learned Additional District Judge dismissing the appeal filed by the appellant being R.C.A. No. 27/2011 titled Manju Sharma vs. DDA. Briefly stated the facts leading to the filing of the present appeal are that the plaintiff/appellant herein filed a suit bearing No. 244/2009 for declaration and permanent injunction claiming herself to be the owner and in possession of House No. 948/20, Gali No. 20, Block No. A, Circular Road, Ashram Area, Sonia Vihar, Delhi built up on a plot area of 300 sq. ft. on Khasra No. 334, situated at Village Sadat Pur Gujran in abadi of Sonia Vihar, Illaqa Shahdara, Delhi. The plaintiff/appellant had stated that the said house was purchased by her from one Abdul Razak and Chokhrat Khan by way of GPA, Agreement to Sell, Will, etc., all dated 28.5.2001 and since then, she has been in continuous possession of the said plot of land and the house built thereon. It has also been alleged that the aforesaid property falls in an

unauthorized residential colony known as Sonia Vihar and the name of the aforesaid colony is also appearing in the list of 1071 unauthorized colonies which have been recommended by the Government of Delhi to the Ministry of Urban Development, Government of India for the purpose of regularization. It was also alleged that the respondent/DDA had adopted a policy of pick and choose and partially demolished some portion of the suit property somewhere in the year 2006 as a consequence of which, the plaintiff was constrained to file the suit for declaration and permanent injunction. The respondent/DDA filed its written statement and contested the claim regarding ownership of the plaintiff/appellant in respect of the suit property. It was stated that the suit property was an acquired land as necessary process of acquisition of land had been completed. It was also stated that the structure which was in existence at the plot of the land in question was unauthorized and illegal and the same was also demolished by the officials of the DDA. With regard to the maintainability of the suit, a preliminary objection was also raised on the ground that no statutory notice u/s 53B of the DDA Act was ever served on the respondent/DDA and consequently, for want of notice, the suit was also bad in law.

2. On the pleadings of the parties, following three issues were framed:-

1. Whether the plaintiff is entitled for decree of declaration and permanent injunction as prayed in the suit? OPP

2. Whether the suit of the plaintiff is barred u/s 53-B of the DDA Act? OPD

3. Relief.

3. In support of her case, the plaintiff/appellant had examined herself as PW-1 and her husband (Narender Kumar Sharma) as PW-2. The defendant/respondent (DDA) examined one Mohd. Ishaq, Surveyor of the DDA as DW-1. After hearing the arguments, the learned trial court dismissed the suit on 28.10.2010 holding that the plaintiff/appellant has not been able to prove her ownership qua the land in question and consequently, she was not entitled to the prayer of injunction as well. So far as the acquisition of land by the DDA is concerned, the plaintiff/appellant had taken the plea that the respondent/DDA had neither acquired the land bearing Khasra No. 334 at Village Sadat Pur, Gujran nor any award in this regard was passed. DW-1, Mohd. Ishaq, had stated that notification, which was proved by him by virtue of which 350 acres of land was transferred to the DDA, could not reflect that the Khasra in question was one of the Khasras which were transferred to the DDA; however, the DDA was able to place on record the attested copy of the award No. 12/92-93 wherein Khasra No. 334 situated at Village Sadat Pur, Gujran had been reflected. In the light of this respective evidence adduced by the parties, the trial court held that the defendant/DDA was able to establish that the suit land was an acquired land.

4. So far as the second issue with regard to the service of mandatory notice u/s 53B of the DDA Act, 1957 is concerned, the trial court observed since the suit is for

declaration and injunction, therefore, the suit was not hit by Section 53B of the DDA Act.

5. In my considered opinion, this reasoning is bereft of any merit. When a suit is filed only for injunction, the observance to Section 53B of the DDA Act is not mandatory. But in the instant case, admittedly, the suit was for declaration and injunction, therefore, in my considered opinion, this ought to have acted as a bar to the very institution of the suit but nevertheless this point has no meaning now because the suit of the plaintiff/appellant was dismissed on merits by the trial court holding that the plaintiff was not able to establish herself as owner of the suit property, as claimed by her and consequently, she was denied the injunction as well.

6. The appellant feeling aggrieved, preferred the first appeal being R.C.A. No. 27/2011 titled Manju Sharma vs. DDA against the judgment and decree dated 28.10.2010 passed by the trial court. The learned appellate court upheld the judgment and decree passed by the trial court and dismissed the appeal on merits on 3.12.2011 holding that there was no illegality in the finding returned by the trial court on the main issue with regard to the ownership and permanent injunction to the plaintiff/appellant.

7. Still not feeling satisfied, the appellant had filed the present regular second appeal. Section 100 of the CPC clearly lays down that the second appeal is permissible only when a substantial question of law is involved in the appeal.

8. In the instant case, I have heard Mr. B.B. Sawhney, the learned senior counsel for the appellant with regard to the formulation of substantial question of law. According to him, six substantial questions of law are arising from the appeal which are phrased as under:-

(i) The trial court ought to have framed a specific issue with regard to the fact as to whether the suit property was part of the Nazul land property claimed by the DDA and handed over to it by L&DO in the year 1975?

(ii) Whether in the event of the answer to the proposed issue above being in the negative, it was open to the courts below to have returned the finding in the absence of a plea in this regard in the written statement as to whether the suit property had been acquired by the DDA under award No. 12/92-93?

(iii) If the answer to the immediate preceding issue is in affirmative, whether there was any relevant evidence on record to return to the finding that the suit property was covered by the award?

(iv) Whether pursuant to the said award if any, possession of the land including the suit property was ever taken over by the Government or the DDA u/s 16 of the Land Acquisition Act, 1894?

(v) If the plaintiff is unable to set up a case for declaration of ownership in her favour, she would be entitled to seek an injunction on the basis of settled possession or in light of the possession thereof, the NCT of Delhi Law (Special Provisions) Act, 2006 and its predecessor acts?

(vi) Whether the demolition carried out by the DDA on 24.3.2006 was total or partial and the fact thereof?

9. A perusal of these six questions would clearly show that none of them is a question of law much less ''substantial'' question of law, therefore, the appeal, in my considered opinion, cannot be entertained. To quickly go through the questions in order to see as to whether they are questions of fact or questions of law; the first question is that the trial court ought to have framed a specific issue with regard to the fact as to whether the suit property was a part of Nizul land property claimed by the DDA and handed over to it by the L&DO. This question was not required to be framed because the appellant was claiming herself to be the owner of the suit property on the basis of certain documents purported to have been executed by her previous owner. The basic dictum which is enshrined u/s 101 of the Indian Evidence Act, 1872 is that one who asserts, must prove. Therefore, it was only a defence of the respondent/DDA that the land in question was a Nazul land. In the instant case, the onus to show that the land in question belonged to the appellant was essentially on the appellant and it is only once, she was able to discharge the said onus, that the question of respondent/DDA being the owner of the land by virtue of being a Nazul land would have arisen. This was required to be done so by the respondent irrespective of the fact whether any issue in this regard is framed or not. Therefore, keeping in view the aforesaid facts, I feel that the first question which is sought to be raised by the appellant is essentially question of evidence.

10. Second and third questions are also dependent on the first question of law formulated and since I have already observed that the first question in itself was only a question of fact and not a question of law, therefore, question Nos. 2 and 3 are also of no consequence. The fourth question which has been formulated by the learned senior counsel is with regard to the award and the possession of the land. This will also come along with first three questions as what was to be proved by the appellant was her ownership and it was only that after the ownership of the appellant was established that the question of land being a Government land or an acquired land, would have come into picture. In any case, the attested copy of the award has already been placed on record and the trial court has accepted the same where the Khasra number in question has shown to be reflected in the award as the property which was acquired. The next question No. 5 which has been formulated by the appellant is whether she was entitled to an injunction on the basis of settled possession and in the light of the Delhi Law (Special Provisions) Act, 2006 which protected unauthorized construction from being demolished by the respondent or its predecessor. There is no doubt that the Delhi Law (Special Provisions) Act, 2006

prohibited carrying out of the demolition of unauthorized construction as it has given immunity for limited period to persons who were in occupation of unauthorized construction. This was not the case which was set up by the appellant before the trial court. The appellant had not sought the permanent injunction on account of the fact that she is in settled possession or that she is protected by the Delhi Law (Special Provisions) Act, 2006 having earned the immunity for a limited period. Therefore, this averment is neither made nor proved before the trial court. It is a common knowledge that the fact has to be first averred then proved in a civil case. In my considered opinion, this also does not give any relief to the appellant so far as formulation of a substantial question of law is concerned. The next and the last question which has been raised is as to whether demolition which was carried out by the respondent/DDA was partial or total. The question of demolition being partial or total is not a substantial question of law. It is only a question of law. In the totality of circumstances, I, therefore, feel that the learned counsel for the appellant has not been able to show from the record that any substantial question of law is involved in the appeal. Accordingly, the appeal is without any merits and the same is hereby dismissed.