

HIGH COURT OF JUDICATURE AT MADRAS

A.S. No. 73 of 2012 & M.P. Nos. 1 & 2 of 2012. 2012 (7) MLJ 375: CDJ 2012 MHC 4468.

Judgment dated 11th September, 2012

THE HONOURABLE MR. JUSTICE G. RAJASURIA

Quibus Resources India Private Limited rep.by its Director Vs Dr. R. Tharani & Another

JUDGMENT

(Prayer: Appeal against the judgment and decree dated 06.06.2011 passed by the learned Additional District and Sessions Judge (Fast Track Court No.III), City Civil Court, Chennai in O.S.No.6713 of 2010.)

1. Animadverting upon the judgment and decree dated 06.06.2011 passed by the learned Additional District and Sessions Judge (Fast Track Court No.III), City Civil Court, Chennai in O.S.No.6713 of 2010, this appeal is focussed.

2. The parties, for convenience sake, are referred to here under according to their litigative status and ranking before the trial court.

3. Compendiously and concisely, the germane facts absolutely necessary for the disposal of this appeal, would run thus:

a] The appellant herein/the plaintiff filed the suit seeking the following reliefs:

To pass a judgment and decree in favour of the plaintiff as follows:

- directing the defendants to jointly and severally pay a sum of Rs.11,00,000/- (Rupees eleven lakhs only) towards loss and damages, together with future interest at the rate of 18% per annum from the date of suit till date of realisation in full;

- granting a permanent mandatory injunction restraining and forbearing the defendants their men servants or agents or any other person claiming through or under them from interfering with the operation of the generator installed by the plaintiff in the suit premises and thereby interfering and obstructing the day today functioning of the plaintiff and for costs of the suit.

(extracted as such)

b) The defendants filed the written statement with counter claim seeking the following reliefs:

- To grant judgment and decree

a. dismissing the suit filed by the plaintiff in O.S.No.6713 of 2010 with exemplary cost.

b. mandatory injunction directing the plaintiff to remove the generator installed at the present place of suit property and shift the same to place provided as per approved plan

c. pass such other order in favour of the defendants as deemed fit and proper in the facts and circumstances of the case.

(extracted as such)

c) Whereupon issues were framed.

d) During trial, on the side of the plaintiffs, P.Ws.1 and were examined and Exs.A1 to A20 were marked. The second defendant examined himself as DW1 and marked Exs.B1 to B6.

e) Ultimately the trial Court dismissed the suit of the plaintiff and allowed the counter claim as under:

1. that the suit be and the same is hereby dismissed.

2. that the plaintiff be and is hereby directed to remove the generator within 30 days and he can place it in any place provided as per the sketch.

3. that the plaintiff do pay defendant Rs.2000/- (Rupees two thousand only) towards the exemplary cost.

(extracted as such)

4. Challenging and impugning the judgment and decree of the trial court, this appeal is focussed by the plaintiff on various grounds.

5. Heard both sides.

6. Tersely and briefly, pithily and precisely, the germane facts can be encapsulated thus:

The suit property as found described in the schedule of the plaint is as under:

"All that piece and parcel of land and building comprised in Door No.4/1, 4/2, Ground Floor, Indra Foundations Building, Krishnama Road, Nungambakkam, Chennai 600 034 together with the undivided share and the functioning of the 40 KVA Generator situated on the southern side on the rear of the premises."

7. The learned counsel for the plaintiff/appellant would portray the facts thus:

The building is comprised of ground floor and four more floors. The ground floor is being used for car parking. The plaintiff- company, which was a lessee under the original landlord, is at Door No.4/1, 4/2 Ground Floor, Indra Foundations building, Krishnama Road, Nungambakkam, Chennai 600 034. Under the lease deed dated 11.11.2005, the plaintiff's landlord agreed for installation of a generator and that after the plaintiff coming in as a tenant in the said premises, it installed a 40 KVA Diesel Generator in the suit premises as permitted by the landlord and they are running business in the field of Business Process Outsourcing (BPO), for which maintaining of a generator was absolutely necessary. Subsequently, the plaintiff purchased that demised premises from the owner/lessor concerned and it continued to have that generator in the said common area available on ground. While so, the defendants without any manner of right, was interfering with the running of the generator by the plaintiff and causing hindrance. Because of the interference of the defendants, the plaintiff incurred loss also. Hence the suit.

8. Per contra, the learned counsel for the defendants would put forth and set forth the case of the defendants to the effect that her clients are occupying the second floor of the same building and they are the owners of it also. As per the approved plan of the Chennai Metropolitan Development Authority, the generator concerned should be installed only at the basement of the building and not in the common area wherein now the plaintiff is retaining the generator for its exclusive business purpose. It is also emitting sound and smoke and in fact the authority under the Tamil Nadu Pollution Control Board took steps as against such violation. The claim for damages is imaginary.

Accordingly, she would pray for the dismissal of the suit. In fact in their counter claim they prayed for mandatory injunction for the removal of the generator installed by the plaintiff in the present location and shift it to a different place as per the approved plan.

9. The points for consideration are as under:

1. Whether the lower court adhering to Order 14 Rule 1 of the Code of Civil Procedure framed the relevant issues?

2. Whether the plaintiff on whom the burden of proof lies, established before the court that the installation of the generator in the common area as of now, is having the backup of the approval of the Chennai Metropolitan Development Authority and whether it is function in accordance with the norms prescribed by the Tamil Nadu Pollution Control Board and the mandates of law?

3. Whether the trial court was justified in accepting the counter claim of the defendants, in mandating the plaintiff to install the generator in the place specified in the approved plan, when in fact, admittedly, as transpired from the evidence so far adduced that there was deviation in the plan and that there is no basement at all in existence wherein the generator ought to have been installed as per the approved plan?

4. Whether there is any perversity or illegality in the judgment and decree of the trial court?

10. All these points are taken together for discussion as they are inter-linked and inter-woven, inter-connected and entwined with one another.

11. Pellucidly and palpably, obviously and axiomatically, it is clear that as per the approved plan, Ex.A2 the generator concerned was expected to be installed in the basement. There is no gain saying or denying of the fact that as on this date, there is no basement as per the approved plan.

12. The core question arises as to how then the decree passed by the trial court in favour of the defendants accepting the counter claim could be enforced.

13. The court cannot turn its face away from the reality. At this juncture, I recollect the popular adage that every trial is a voyage of discovery, in which truth is the quest as found highlighted in the following precedents of the Hon'ble Apex Court:

(i) 2012(1) MWN (Civil) 840 (S.C.) [Maria Margarida Sequeria Fernandes and others vs. Erasmo Jack de Sequeria (dead) through L.Rs.] Certain excerpts from it would run thus:

"36. In Ritesh Tiwari and another vs. State of Uttar Pradesh and others, 2010(10) SCC 677, this court reproduced often quoted quotation which reads as under:

"Every trial is voyage of discovery in which truth is the quest".

37. This court observed that the power is to be exercised with an object to sub-serve the cause of justice and public interest and for getting the evidence in aid of a just decision and to uphold the truth.

38. Lord Denning, in the case of *Jones v. National Coal Board*, 1957 (2) QB 55 has observed that:

"In the system of trial that we evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe, in some foreign countries."

39. Certainly, the above, is not true of the Indian Judicial System. A judge in the Indian System has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest." In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.

51. In the administration of justice, judges and lawyers play equal roles. Like Judges, lawyers also must ensure that truth triumphs in the administration of justice.

52. Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth."

(ii) 2010(10) SCC 677 [*Ritesh Tiwari and another vs. State of Uttar Pradesh and others*]. Certain excerpts from it would run thus:

"37. Section 165 of the Evidence Act, 1872 empowers the court to ask questions relevant, irrelevant, related or unrelated to the case to the party to ascertain the true facts. The party may not answer the question but it is not permitted to tell the court that the question put to him is irrelevant or the facts the court wants to ascertain are not in issue. Exercise of such a power is necessary for the reason that the judgment of the court is to be based on relevant facts which have been duly proved. A court in any case cannot admit illegal or inadmissible evidence for basing its decision. It is an extraordinary power conferred upon the court to elicit the truth and to act in the interest of justice. A wide discretion has been conferred on the court to act as the

exigencies of justice require. Thus, in order to discover or obtain proper proof of the relevant facts, the court can ask the question to the parties concerned at any time and in any form. "Every trial is voyage of discovery in which truth is the quest". Therefore, power is to be exercised with an object to subserve the cause of justice and public interest, and for getting the evidence in aid of a just decision and to uphold the truth. The purpose being to secure justice by full discovery of truth and an accurate knowledge of facts, the court can put questions to the parties, except those which fall within exceptions contained in the said provision itself (vide *Jamatraj Kewalji Govani v. State of Maharashtra and Zahira Habibulla H. Sheikh vs. State of Gujarat*).

However, throwing to winds the dictum as found enunciated and envisaged in the aforesaid Hon'ble Apex Court's precedents, the trial court proceeded to simply close its eyes to the reality and passed such a judgment.

14. My mind is reminiscent and redolent of the following maxims:

(i) *Affirmantis est probare*[He who affirms must prove]

(ii) *Affirmanti non neganti incumbit probatio*: The burden of proof lies upon him who asserts and not upon him who denies.

No doubt, the plaintiff being the *dominus litis*, is entitled to frame the suit in accordance with law. But, it is the bounden duty of the plaintiff to prove its case. The second prayer in the plaint as extracted supra would be for the purpose of getting the civil court's support and seal relating to its running of the generator by keeping it in a place other than the place contemplated in the approved plan.

15. The pertinent question would arise as to how far the plaintiff was justified in seeking such a relief when obviously and axiomatically as on date that generator is not in the place as found envisaged in the approved plan.

16. In this connection I would like to recollect the following decision of the first Bench of this court reported in 2006 (4) CTC 483 (*Consumer Action Group vs. The State of Tamil Nadu*). An excerpt of it would run thus:

"30. Both the C.M.D.A and Corporation have submitted elaborate charts to show that the provisions of the Act and the Rules have been grossly violated by the builders and buildings have been constructed in total violation of the Rules. Buildings have been either constructed

without any permission or additional floors have been raised in violation of the FSI Regulations. In none of these buildings, the mandatory safeguards relating to the car-parking area and fire safety measures have been observed. On the other hand, the basement and stilt portions, which are exclusively made for car parking, have been illegally converted into shops for commercial use. It appears that in some cases the authorities have taken action and demolition notices have been issued. However, the builders have obtained stay on the ground that their Applications for regularisation are pending before the competent authority. It is also seen that some of the violators have encroached upon the roads by constructing steps, platforms, etc. right on the pavements or on the roads. It is brought to our notice that there are encroachments on busy streets like Ranganathan Street, Natesan Street, Madley Road, etc. It is necessary to direct the municipal authorities to clear the encroachments in order to ensure smooth flow of traffic on these streets and roads. It is needless to say that there is no necessity of issuing notice for the removal and demolition of the encroachment in public streets and roads, as such encroachment shall be liable to be removed forthwith. So also the electricity connection or sewerage connection facilities shall be liable to be disconnected forthwith.

32.

(xiv) The Corporation is directed to forthwith take steps to remove the encroachments on all busy streets like Ranganathan Street, Natesan Street, Madley Road, etc and the Commissioner of Police is directed to provide adequate police force at the disposal of the Corporation for the purpose of carrying out work of removal of encroachments.

(xv) No Civil Court shall entertain any suit or proceedings or Application in respect of the action taken by the CMDA or Corporation in respect of the illegal construction and encroachments on roads and pavements. All pending and future petitions filed/to be filed against CMDA and the Corporation relating to the illegal and unauthorised construction of buildings and or encroachment, and the demolition notice shall be placed before the special bench to be nominated by the Chief Justice."

(emphasis supplied)

A mere running of the eye over the aforesaid precedent would unambiguously and unequivocally highlight and spotlight the fact that the civil court cannot interfere so as to undo render otiose the mandates as contained in the laws and rules relating to building regulations and also the norms relating to air pollution and noise pollution. It is the bounden duty of the plaintiff to satisfy that its prayer is in accordance with the norms prescribed by Development Control Rules of Chennai Metropolitan Area, 2003 as well as the authority under the Air (Prevention and Control of

Pollution) Act and Rules, 1981 and 1982.

17. The learned counsel for the appellant/plaintiff would precisely point out that his client is only the purchaser of the property and its vendor was actually running that generator in the very same place where his client has been running it now; there was no objection from any quarters except the defendants.

18. Had really there been any violation of Development Control Rules of Chennai Metropolitan Area, the authority itself would have suo motu taken action; but such a course was not resorted to by it and that itself would exemplify and demonstrate that the plaintiff is entitled to retain the said generator in the place where it is now found installed. Over and above that the authority under the Air (Prevention and Control of Pollution) Act and Rules, 1981 and 1982 concerned also in no way mandated that the generator run by the plaintiff is not in commensurate with the standard prescribed by law. Evidence has already been produced before the lower court that the generator under use of the plaintiff, is a certified one and it is not a fake or sub-standard generator causing noise pollution and air pollution.

19. Accordingly, he would pray for setting aside the judgment and decree of the trial court and for decreeing the suit in toto.

20. Whereas by way of torpedoing and pulverising the arguments as put forth and set forth on the side of the plaintiff, the learned counsel for the defendants would submit that ex facie and prima facie, it is clear that the plaintiff has no right to retain the said generator in the common area meant for car parking and for the free movement of the owners of the premises concerned and in such a common area, the plaintiff cannot occupy exclusively any portion and that too by causing noise and air pollution to the annoyance of the occupants of the premises.

21. I recollect the maxim – ubi jus ibi remedium – Where there is a right, there is a remedy. The plaintiff as a sine qua non for getting the relief as contemplated in the plaint should necessarily establish before the court that its prayer is in commensurate with the law.

22. It would not be out of place to refer to the following maxims:

(i) Ex turpi causa non oritur actio – (Out of a base (illegal or immoral) consideration, an action does (can) not arise.

(ii) Ex dolo malo non oritur actio - (Out of fraud no action arises; fraud never gives a right of action. No court will lend its aid to a man who founds his cause of action upon an immoral or

illegal act.

Accordingly if viewed, a person, who carries on anything in violation of the law cannot have any vested right to continue such act in violation of law.

23. The trial court in its judgment referred to the Advocate commissioner's report marked as Ex.B4, which would highlight the exact location of the generator and the physical features of the building concerned. The trial court observed that there is no document filed by the plaintiff to establish that it is entitled to install the generator in the place where at present, it is found located; However, there is no specific issue framed in that regard and the learned counsel for the plaintiff would submit that liberty has to be given to his client to substantiate its assertion in the plaint.

24. The learned counsel for the plaintiff would try to explain and expound by pointing out that the lower court has not viewed the matter in that manner by framing proper issues. Had there been an issue to that effect, the plaintiff would have very well summoned the concerned authorities and also produced relevant records so as to highlight and spotlight the fact that the running of the generator in that area, was not in violation of law at all.

25. Whereas the learned counsel for the defendants would try to justify her clients' stand by pointing out that such installation was quite antithetical to the specification found in Ex.A2 the approved plan. The learned counsel for the defendants would vociferously and enthusiastically defend the case of her clients', but the relief her clients got before the lower court, is not an executable one.

26. The decree in favour of the defendants would precisely contemplate that the plaintiff should install the generator in the place meant for installing the same as per Ex.A2 the approved plan.

27. To the risk of repetition and pleonasm, but without being tautologous, I would like to point out that as per Ex.A2 the generator is expected to be installed in the basement; however, there is no such basement at all as of now.

28. I recollect the maxim *lex non cogit ad impossibilia* – The law does not compel to impossible ends. The court cannot grant a decree, which cannot be implemented as per law. If at all, the plan itself is modified with the approval of the authority concerned, the question of implementing the decree would not arise. No court is expected to pass such a decree leaving people to fight further for nothing.

29. I would like to refer to the following maxims:

1. *Boni iudicis est ampliari jurisdictionem* – It is the part of a good judge to enlarge (or use liberally) his remedial authority or jurisdiction.

2. *Boni iudicis est ampliari justitiam* - It is the duty of a good judge to enlarge or extend justice.

3. *Boni iudicis est lites diremere, ne lis ex lite oritur, et interest reipublicae ut sint fines litium* – It is the duty of a good judge to prevent litigations, that suit may not grow out of suit, and it concerns the welfare of a state that an end be put to litigation.

The duty of the Judge is to see that further litigation is prevented and the decree itself should not pave the way for further litigation.

30. Precisely, the proceedings of lower court and the decree passed by it, turned out to be an ill-will that blew no one any good.

31. The learned counsel for the appellant/plaintiff would pray for further opportunity so that his client would be able to justify its case before the trial court.

32. The fact remains that the defendant had not preferred any cross-appeal believing that the decree is an executable one, but as on date, it cannot be executed as such. Hence, I am of the considered view that the matter has to be remitted back to the trial court after framing appropriate issues. Accordingly, the appropriate issues are as under:

1. Whether the installation of the generator concerned by the plaintiff at the place wherein presently it is found installed is having the back up of the Development Control Rules of Chennai Metropolitan Area, 2003 concerning building regulations as well as the law and rules relating to the Air (Prevention and Control of Pollution) Act and Rules?

2. Whether the mere non-adherence to the specification as contained in Ex.A2 approved plan in installing the generator itself is sufficient to reject the prayer of the plaintiff for permanent mandatory injunction?

3. Whether, the defendants caused obstruction to the running of the generator by the plaintiff, if so, whether such obstruction was unjustified?

4. Whether the plaintiff sustained any loss because of the alleged illegal intervention of the

defendants and if so, whether the plaintiff incurred loss to the tune of Rs.11 lakhs?

5. Whether the plaintiff is entitled to claim damages in a sum of Rs.11 lakhs with 18% interest from the date of the suit till realisation?

6. Whether the plaintiff is entitled to permanent mandatory injunction so as to restrain and forbear the defendants, their men servants or agents or any other person claiming through or under them from interfering with the operation of the generator installed by the plaintiff in the suit premises?

and 7. To what relief?

33. The lower court is expected to adhere to the aforesaid issues and entertain additional oral and documentary evidence. Either of the parties is at liberty to get issued summons to the official or officials of Chennai Metropolitan Development Authority and the Tamil Nadu Pollution Control Board who are competent to speak about the relevant facts in this case for the purpose of arriving at a just conclusion in this matter.

34. Accordingly,

(i) Point No.1 is decided to the effect that the lower court had not framed the relevant issues as per law.

(ii) Point No.2 is decided to the effect that plaintiff on whom the burden of proof lies did not establish before the court that the installation of the generator in the common area as of now, is having the backup of the approval of the Development Control Rules of Chennai Metropolitan Area, 2003 and that it is in accordance with the norms prescribed by the Air (Prevention and Control of Pollution) Act and Rules, 1981 and 1982 and the mandates of law.

(iii) Point No.3 is decided to the effect that the trial court was not justified in simply accepting the counter claim of the defendants in mandating that the plaintiff has to install the generator in the place specified in the approved plan when in fact, admittedly, as transpired from the evidence so far adduced that there was deviation in the plan and there is no basement at all in existence wherein the generator ought to have been installed as per the approved plan.

(iv) Point No.4: In view of the ratiocination adhered to in deciding the aforesaid points, the judgment and decree of the trial court is set aside and the matter is remanded back to the trial court for the aforesaid purpose and the trial court shall do well to see that the matter is disposed

of within a period of four months from the date of receipt of a copy of this order.

35. On hearing the judgment, both sides Advocates in unison would make a prayer to the effect that the matter may be remitted back to any other District Court other than the Fast Track Court because of certain practical difficulties that they might face in this case.

36. Wherefore, in the interest of justice, I would like to remand the matter to the IV Additional District Judge, City Civil Court, Chennai for disposing of the matter as mandated supra. Both sides shall appear before the court on 26.09.2012. Registry is directed to send the records concerned immediately to the learned IV Additional District Judge, City Civil Court, Chennai.

37. The learned counsel for the plaintiff would submit that all along, the plaintiff has been enjoying the interim order of this court and by that they are running the generator subject to the conditions imposed by this court and the same may be extended pending disposal of the case.

38. In view of the singularly singular circumstances highlighted supra, I am of the view that in pari materia with the interim order already passed by this court, I would like to observe such similar order is deemed to have been passed by this court, which shall be in force till 26.09.2012. It is open for the parties to appear before the court concerned to seek for similar order at the discretion of the lower court.

39. In the result, this appeal is allowed and remitted back to the trial court. However, there shall be no order as to costs. Consequently, the connected miscellaneous petitions are closed.