

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 1889/2008

SAI SAMARPAN TRADERS P. LTD. Petitioner
Through : Mr. Valmika Mehta, Sr. Adv. with Mr. P K
Mishra and Mr. Takeshwar Nath, Advocates

versus

M.C.D. & ANR. Respondents
Through : Mr. Kapil Dutta, Advocate for MCD
Mr. Rakesh Makhija, Advocate for respondent no.2

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

% **ORDER**
11.03.2008

1. The petitioner M/s Sai Samarpan Traders Pvt. Ltd., has filed the present writ petition impugning the order dated 5th March, 2008 passed by the Appellate Tribunal, MCD dismissing application for interim stay of construction. The petitioner has filed an appeal before the Appellate Tribunal challenging grant of sanction for construction of first floor and second floor in property bearing no.T-11, Green Park Extension, New Delhi. The sanction has been granted on an application filed by Ms. Shobhna Bhargava (respondent no.2 herein).
2. The petitioner had earlier filed a civil suit against respondent no.2 which was dismissed as withdrawn in October, 2007 after recording the statement of respondent no.2 that he shall construct after obtaining

sanction of building plans from MCD.

3. Thereafter respondent no.2 applied for sanction of building plans and MCD has sanctioned building plans for construction of unconstructed portion on the first floor and the second floor. The petitioner has filed an appeal before the Appellate Tribunal challenging the action of MCD sanctioning the building plans for construction of balance portion of the first floor and the second floor.
4. Two main contentions are raised by the petitioner. Firstly, it is submitted that the respondent no.2 is not the owner of the second floor and cannot be permitted to construct on the second floor. Secondly, it is submitted that MCD was wrong in granting sanction as foundations do not permit construction of the second floor and MCD has not examined the question of structural safety.
5. Both aspects were examined by the Appellate Tribunal, while passing an interim order dated 5th March, 2008. Tentative and prima facie findings have been recorded by the Appellate Tribunal on both aspects. My attention is drawn to the Sale Deed dated 12th July, 1988 which was executed by Smt. Satya Sondhi, the admitted owner, in favour of the respondent no.2. Clause 3 of the said Sale Deed reads as under :

“The vendee shall have the exclusive right and power to construct, built and erect on the said floor of the property in accordance with Municipal by-laws in addition to the

structure and building existing thereon. Vendee shall have the right to construct any buildings or structures over and above the said floor in accordance with the Municipal by-laws and shall have right to sell, convey, transfer and assign any structure so built to any person or persons as the case may be. The vendor shall sign and provide all relevant documents which the vendee may require and need for the purpose of carrying out building and construction activities as mentioned hereinabove.”

6. A bare perusal of the above clause shows that what was transferred and sold to respondent no.2 was the first floor and exclusive right and power to construct, build and erect on the said floor of the property. The respondent no.2 was also given right to construct any building and structures over and above the said floor i.e. the second floor.

7. Learned counsel for the petitioner, however, relies upon clause 6 of the Sale Deed which reads as under :

“The vendee’s undivided interest in the soil as more fully described in Schedule-I hereunder written shall remain joint for all times with the vendor and/or other co-owners who may hereafter or hereto have acquired right, title and interest in the land and in any building or structure constructed over and above on the second floor in the said property, it being hereby declared that the interest in the soil is impartible.”

8. The aforesaid clause states that respondent no.2 will have undivided interest in the soil or land which shall remain joint for all times to come. The said clause also mentions that any building or structure constructed on or above the second floor of the property will be jointly held by the

vendor or co-owners.

9. I need not examine the two clauses in depth and detail and give any final decision on this aspect. It is stated by counsel for respondent no.2 that they are constructing over first floor and second floor and no construction above or on third floor is to be made. If required, the petitioner may file a civil suit for adjudication of the rights of the parties. I may mention here that the Sale Deed dated 4th August, 2004 in favour of the petitioner is only in respect of the ground floor portion of the property including front lawn, rear courtyard, entire driveway along with 50% undivided, indivisible and impartible ownership rights in the land beneath ground floor. Clauses 12 and 13 of the Sale Deed dated 4th August, 2004, I do not prima facie think assist the petitioner. Clause 12 will come into operation in the event the building is damaged or does not remain in existence. The said situation has not arisen. Clause 13 confirms that after the transaction the seller will not have any claim or right, title, interest on the portion of property or part thereof which has been sold to the petitioner. I may, however, note here that the Sale Deed in favour of the respondent no.2 is earlier in point of time and was executed on 12th July, 1988. What was sold and transferred to respondent no.2, could not have been sold and transferred to the petitioner in the Sale Deed executed on 4th August, 2004 and 11th April, 2005.
10. I may mention here that Single Judge of Delhi High Court in the case of Kuldeep Mehta Vs. Jagdeep Mehta bearing CS(OS) No.1963/1997 has held that a party having terrace right has the right to construct on floors above the terrace. Similarly, a party having rights on

ground floor, has right to construct on the ground floor and below.

11. On the question of structural safety the respondent no.2 has also filed papers with MCD and it is claimed that the foundation of building/property can take structural load of the first floor and the second floor. MCD has examined the matter of structural safety including the structural safety certificate furnished by respondent no.2. MCD is satisfied. Tribunal will examine this aspect on merits while deciding the appeal.
12. It is possible that the petitioner is raising this objection only to stall construction. I feel the Appellate Tribunal was justified in rejecting the application for interim relief. The Tribunal has also gone into the question of balance of convenience and irreparable loss which may be caused to respondent no.2, in case the construction is stopped.
13. In view of the above I do not find any merit in the writ petition and the same is dismissed. However, it is recorded that the findings given above are tentative and not final. The observations made above will not be binding on the Appellate Tribunal or on the Civil Court in case the petitioner decides to file a civil suit. The Appellate Tribunal as well as Civil Court will go into all aspects including the rights of the petitioner and respondent no.2 independently without being influenced by any observations.

14. It is also recorded that above observations are made because learned counsel for the petitioner wanted to press his case on merits. Otherwise this court was not inclined to go into these aspects. Keeping in view the nature of controversy between the parties, the Appellate Tribunal can consider request of the petitioner for expeditious disposal of the appeal.

SANJIV KHANNA,J

MARCH 11, 2008 (vld)