

UNREPORTABLE

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

% DATE OF RESERVE: May 05, 2010

DATE OF DECISION: July 30, 2010

+ **RFA 312/2009 and CM No.12465/2009**

SHRI VINAY KATHURIA & ORS. Appellants

Through: Mr. P.S. Bindra, Advocate

versus

CAPT. RAJESH KUMAR MEHTA & ORS. Respondents

Through: Mr. Kartickay Mathur, Advocate

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: REVA KHETRAPAL, J.

1. Appellants seek to assail the decree passed by the learned trial court in a suit for injunction, restraining the appellants from interfering in the possession and enjoyment of the terrace rights of the respondents over and above the second floor of the suit property No.E-220, Greater Kailash-I, New Delhi.

2. The facts as set out in the suit filed by the respondents which are material for deciding the present appeal are as follows. The father of the respondent Shri Tirath Ram Mehta, had purchased a plot bearing

No.E-220, Greater Kailash-I, New Delhi measuring 212 sq. yards for the sale consideration of Rs.3,392/- as far back as on 18th September, 1961 and was living there with his family. Shri Tirath Ram Mehta expired on 4th February, 2001 and was survived by his widow, four sons and a daughter. During his life time, Shri Tirath Ram Mehta had given a General Power of Attorney dated 14th September, 1992 to the appellant No.5, authorising him to sell the entire second floor of the suit property. There was no mention in the said General Power of Attorney that the appellant No.5 had the right to sell the terrace floor. On the basis of the aforesaid General Power of Attorney, the appellant No.5 sold the front and rear portions of the second floor of the suit property on 04.03.1993 to the appellants No.3 and 4. Separate Sale Deeds were executed in favour of the “Vendees” i.e. the appellants No.3 and 4, duly signed by Shri Tirath Ram Mehta as “Vendor” and by the appellant No.5 as the “Confirming Vendor” in respect of the front and rear portions of the second floor respectively. On 12.03.1993, that is, eight days after the execution of the aforesaid sale deeds dated 04.03.1993, late Shri Tirath Ram Mehta revoked the General Power of Attorney executed by him in favour of the appellant No.5, allegedly on the ground that the latter was trying to exceed the powers given to him, and

the appellant No.5 thereafter ceased to be the Power of Attorney holder of late Shri Tirath Ram Mehta.

3. According to the respondents-plaintiffs, a perusal of the documents executed by the appellant no.5, in favour of the appellants no.3 and 4, as a “Confirming Vendor” and by the predecessor-in-interest of the plaintiff as the “Vendor”, i.e., the Sale Deeds dated 4th March, 1993, clearly show that the “Vendees” were not entitled to any ownership right in respect of the common areas, stairs, terrace/roof or any other portion of the suit property, except the share purchased by them.

4. The appellants No.3 and 4, after having purchased the front portion and the rear portions of the second floor of the suit property, sold the same to the appellants No.1 and 2 vide Sale Deeds dated 17th July, 2001 for a sale consideration of Rs.4 lakhs. It is the case of the respondents that in both these sale documents dated 17.07.2001, it has been stated in Clause 3 thereof, that the appellants No.3 and 4 have agreed to sell the said flat with all the rights to use common passage and entrance, stairs or any other common facility and the right to use the terrace and the servant quarter built on the terrace. Thus, according to the respondents, the appellants No.3 and 4 have exceeded their powers

and tried to sell the terrace rights in respect of the suit property over and above the second floor in favour of the appellants No.1 and 2 although no such authority and power had been given to the appellant No.5, much less to the appellants No.3 and 4, who got their title through the appellant No.5. It is asserted that the respondents are in possession of the terrace floor of the suit property.

5. It is alleged by the respondents in the plaint that the appellants No.1 and 2, after purchase of their respective portions on the first and second floor, had been trying to break open the locks for taking physical possession of the terrace floor, which had been stoutly opposed by the respondents, who had lodged a report to the police regarding the attack made by the appellants No.1 and 2 in order to grab the terrace of the second floor.

6. In the written statement filed on behalf of the appellants No.1 and 2, apart from taking certain preliminary objections to the maintainability of the suit, the appellants No.1 and 2 have denied the allegations in the plaint and stated that the terrace rights were given to them by the appellants No.3 and 4 by executing the relevant documents, including the General Power of Attorney and Agreement to Sell. The learned trial court, on the pleadings of the parties, framed the following two issues

for adjudication:-

**“(i) Whether the plaintiff is entitled to the injunction as prayed in the plaint? OPP
(ii) Relief.”**

7. On the evidence adduced by the parties, as stated above, the learned trial court decided both the issues in favour of the plaintiff and decreed the suit for permanent injunction filed by the plaintiff, resulting in the filing of the present appeal.

8. Arguments in the appeal were advanced by Mr. P.S Bindra, Advocate on behalf of the appellants and Mr. Kartickay Mathur, Advocate on behalf of the respondents.

9. Mr. Bindra on behalf of the appellants contended that the admitted position was that the appellants had the right to use the servant quarter on the terrace which lawfully belonged to them, but on the basis of the judgment of the learned trial court the respondents No.1 to 3 have blocked the servant quarter used by the servants of the appellants No.1 and 2 as well as the toilet, and are preventing the appellants No.1 and 2 and/or their servants from using the servant quarter and the toilet on the terrace floor. Hitherto before, there was no dispute between the parties with respect to the appellants' entitlement to the servant quarter on the terrace, but after the passing of the judgment, the appellants and their

servants are being deprived of the use of the servant quarter and toilet on the terrace of the second floor by the respondents No.1 to 3.

10. Mr. Bindra emphatically urged that till date, the Sale Deeds dated 04.03.1993 executed in favour of the appellants No.3 and 4 have not been challenged nor any suit or proceeding initiated for cancellation of the aforesaid Sale Deeds. As regards the Sale Agreements dated 17.07.2001, whereunder the suit property was sold by the appellants No.3 and 4 to the appellants No.1 and 2 (which agreements have been held to be interpolated by the learned trial court), copies of the said Sale Agreements were filed by the respondents themselves on the record without any averment that the same were fabricated and, as a matter of fact, in paragraph 8 of the plaint, it was stated by the respondents as under:-

“8. That the defendant no.3 and 4 have after purchasing the front portion and the rear portion respectively of the aforesaid second floor of the suit property sold the same to defendant no.1 and 2 respectively separately by an agreement dated 17th July, 2001, for a consideration of Rs.4 lacs. Copies of which are placed on record. In both these documents executed between the Vendor namely Defendant no.3 & 4 and the Vendee namely the defendant no.1 & 2 giving the servant quarter only on the terrace floor over and above the second floor it has been stated in clause 3 of the agreement dated 17.7.2001 that the defendant no.3 and 4 have agreed to sell the said flat

alongwith all the rights to use common passage, stairs or any other common facilities and the right to use the terrace and the servant quarter built on the terrace. Thus the defendant no.3 and 4 have exceeded their powers and tried to sell the terrace rights over and above the second floor in respect of the suit property on the second floor in favour of defendant no.1 and 2 although no such authority and power had been given to the defendant no.5 much less to the defendant no.3 and 4 who got title through the defendant no.5. It may be pertinent here to mention plaintiffs are in possession of the terrace floor of the suit property.”

11. Thus, Mr. Bindra contended that the learned Additional District Judge had erroneously held the Agreements to Sell dated 17th July, 2001 to be “interpolated” documents on the ground that the following words at the end of Clause 3 in the said Agreements were in different ink and of different typewriter and not signed by the appellant No.2:-

“Clause 3. I have agreed to sell the said Flat with all the rights to use common passage and entrance, stairs or any other common facility and the right to use of terrace and the servant quarter built on the terrace.”

12. Mr. Bindra submitted that the falsity of the case of the respondents No.1 to 3 is clear from the fact that in the plaint no mention was made by the respondents to the Collaboration Agreement executed between the father of the respondents, namely, Shri Tirath Ram Mehta

and the appellant No.5, and it was left to the appellants No.1 and 2 to bring to the notice of the Court through the written statement filed by them, that during his lifetime, Shri Tirath Ram Mehta had entered into a Collaboration Agreement dated 10th August, 1992 with the appellant No.5.

13. The learned counsel for the appellants next contended that the dishonesty of the respondents was further borne out from the fact that they had belatedly filed a photostat copy of a Collaboration Agreement dated 01.09.1992 purportedly executed by Shri Tirath Ram Mehta, the predecessor-in-interest of the respondents No.1 to 3, which does not give the appellant no.5 (builder) any right to the servant quarter. He contended that clearly, the respondents had forged the said Collaboration Agreement dated 01.09.1992 as was evident from the fact that the original of the alleged Agreement dated 01.09.1992 has not seen the light of the day. The learned Additional District Judge, however, failed to consider the matter in its right perspective and held the Collaboration Agreement dated 10th August, 1992 filed by the appellants to be a forged Agreement on the ground that though the date on the document is mentioned as 10th August, 1992, the stamp paper on which the document is endorsed had been purchased on 24th August, 1992.

14. As regards the Collaboration Agreement dated 10th August, 1992, it is clarified by Mr. Bindra that the case of the appellants was that the terms of the Collaboration Agreement were agreed to between the parties i.e. Shri Tirath Ram Mehta and Shri R.S. Verma (the appellant no.5) on 10th August, 1992, but the stamp paper was purchased on 24th August, 1992, while the agreement itself was signed by Shri Tirath Ram Mehta much later, i.e., on 18.09.1992. As regards, the Collaboration Agreement dated 01.09.1992, Mr. Bindra contended that the photostat copy of the said document (which was filed by the respondents after the appellants had referred to the Collaboration Agreement dated 10.08.1992 in their written statement), was a forged one and this becomes clear if Clause 7 of the Collaboration Agreement dated 01.09.1992 filed by the respondents is read in juxtaposition to Clause 7 the Collaboration Agreement dated 10.08.1992 filed by the appellants. For the sake of ready reference, the relevant clauses are reproduced hereunder:-

Clause 7 of the Agreement dated 10.08.1992

“7. That it has been agreed the Second Floor of the property along with share in land underneath along with one servant room on the terrace and right to use 25% common terrace stair-case & passages shall fall in share of the builder or his nominee/nominees and the ground

and first floor along with proportionate share in land underneath, two servant room on the terrace and rights to use common terrace, stair-case and passages shall be the share of the owner. However the owner shall be free to construct another floor on the terrace of the Second floor with his own cost shall shift the servant room along with toilet on the terrace of the same provided he obtains necessary sanction from competent authorities.”

Clause 7 of the Agreement dated 01.09.1992

“7. That it has been agreed the Second Floor of the property along with share in land underneath and the right to use the staircase and common passages shall fall in the share of the BUILDER or his nominee/nominees and the ground and First floor along with proportionate share in land underneath and rights to use staircase and common passages shall be the share of the OWNER. The owner shall have exclusive rights to the terrace shall be free to construct another floor on the terrace of the second floor with his own cost provided he obtains necessary sanction from Competent Authorities.”

15. Mr. Bindra emphasized that a bare glance at the plaint was sufficient to show that the case of the respondents was that the appellants were not entitled to the ownership rights of the terrace floor as they were only given servant quarter on the terrace of the second floor. In the prayer made by the respondents in the plaint, no reference was made to the servant quarter on the terrace floor and the prayer was

confined to the grant of a decree of permanent injunction restraining the appellants from interfering in the possession and enjoyment of the terrace rights over and above the second floor of the suit property. The contention of Mr. Bindra on behalf of the appellants is that if the photostat copy of the Collaboration Agreement dated 01.09.1992 (relied upon by the respondents) is a genuine document then how could the respondents have conceivably given to the appellants a servant quarter on the terrace floor.

16. Mr. Bindra next pointed out that in the replication filed by the respondents No.1 to 3 to the written statements filed by the appellants No.1 and 2, the respondents No.1 to 3 denied the authenticity of the said Collaboration Agreement dated 10th August, 1992. They further took the plea that what was given to the appellant No.5 was the authority to sell the second floor of the property along with the servant quarter on the terrace without creating any right on the terrace or making the terrace a common terrace. The relevant extract of the replication is reproduced hereunder:-

*“5 (b) In reply to contents of para 5 (b) it is admitted that a general power of attorney was executed by the predecessor in interest of the Plaintiffs in favour of Defendant No.5 for the purpose of selling the **Second floor of the suit property along with a servant quarter only on***

the terrace without creating any right on the terrace or making the terrace as a common portion or even for the purpose of selling a toilet. What was given to the Defendant No.5 was only the attorney that he could sell the second floor with one servant quarter which actually has been sold by him to the defendant No.3 and 4 as per the sale deed and who further in turn have sold the same to Defendant No.1 and 2.”

17. Reliance was also placed by the learned counsel for the appellants on the order dated 19.10.2001 passed by a learned Single Judge of this Court (Hon'ble Mr. Justice A.K.Sikri) to contend that the respondents No.1 and 2 had themselves offered a servant quarter and toilet to the appellants No.1 and 2 as is clear from the aforesaid order.

The said order reads as follows:-

*“Present : Mr. V. K. Shali for the petitioner.
Mr. K.C. Dua for the defendants.*

CASE NUMBER: S.No. 1943/2001

The controversy which was discussed on the last date of hearing was regarding providing of toilet for servant of defendants on the terrace along with servant quarter which already exists. The learned counsel for the plaintiff mooted the suggestion, without prejudice to his rights and contentions, for providing of a toilet. However, learned counsel for the defendants submits that in addition to a toilet, as per the documents in favor of the defendants, he has right to use the terrace and common facilities also. In view thereof, since the parties are not at idem, list this case for arguments on 9th January, 2002. Parties

may file documents in original in their possession within two weeks. List before the Joint Registrar for admission/denial of documents on 4th December, 2001.

Interim order to continue.

October 19, 2001”

18. The learned counsel for the appellants pointed out that by a subsequent order dated 14.02.2003, this Court (Hon'ble Mr. Justice A.K. Sikri) after observing that the appellants No.1 and 2 had been using the common facilities for quite some time, held that keeping in view the admitted position and also the fact that the balance of convenience was in favour of the appellants whose servants cannot be denied the use of toilet/bathroom on terrace and the fact that before filing the suit, the servant of the appellants was in fact using the said toilet and with the intervention of the police they were in possession of common key to the door of the terrace, the restraint order of the nature claimed by the plaintiffs could not be granted. As such, the plaintiff's application was dismissed and the application of the appellants No.1 and 2 under Order XXXIX Rule 4 CPC praying for vacation of the ex parte injunction order dated 18th September, 2001 was allowed. In paragraphs 13 to 15 of its order, the Court took note of the admitted position as follows:-

“13. Before proceeding with the matter further, let us take note of admitted position.

- (i) *There are three servant quarters on the terrace; one of which belongs to defendants 1 and 2. It is not denied that defendants 1 and 2 have right to use this servant quarters.*
- (ii) *There is a toilet on the terrace which is primarily meant to be used by servants who are staying in the servant quarters.*
- (iii) *Defendants 1 and 2 and/or their servant were using the servant quarter by entering from the gate leading to the terrace. Their servant was even using the toilet as well which is on the terrace.*
- (iv) *As per the sale deed executed in favour of defendants 1 and 2, right to use terrace is given.*

14. *The position that emerges from the aforesaid facts is that defendants 1 and 2 and/or their servant have to use the servant quarter as they are entitled to use the same. Their servant cannot be denied use of toilet which is specifically meant for this purpose. Otherwise, their servant would be without any toilet and it would be too much for the plaintiffs to contend that servant of defendants 1 and 2 should use the toilet of defendants 1 and 2 on second floor.*

15. *No doubt in the sale deed executed by plaintiffs in favour of defendant No.3 word “terrace” is not specifically mentioned in Clause (8). However, clause (8) states that vendee shall have right to use common passage, entrance, stairs or any other common facility. Clause (9) cannot be read in the manner in which plaintiffs are trying to read. It only says that in all these common facilities as well as terrace/roof vendee shall not have any ownership right. Furthermore, as per Collaboration Agreement (which is although disputed by the plaintiffs),*

“25% common terrace” rights are given to defendants 1 and 2. Moreover, defendants 1 and 2 have been using the facilities in question for quite some time.”

19. Mr. Kartickay, the learned counsel for the respondents contended that by a subsequent order dated 11.07.2003 the learned Single Judge on a review application, being RA No.15/2003 filed by the respondents clarified his aforesaid order. For the sake of ready reference, the order dated July 11, 2003 relied upon by the learned counsel for the respondents, is reproduced hereunder:-

“Present: Mr. V.K. Shali for the plaintiff.

Mr. Sandeep Sethi for the respondent.

RA No.15/2003 in S. No.1943/2001

In this review application it is stated by the plaintiff/applicant that in para 13 of the judgment dated February 14, 2003 where “admitted position” of the case is noted some aspects mentioned therein were not admitted by the plaintiff and rather the plaintiff had disputed the same.

Mr. Shali submits that the observations made in sub-paras (2) and (3) of para 13 are not the “admitted position” of the case. On the other hand, learned counsel for the defendant has referred to para 5(e) of the written statement and reply to this para in the replication and on the basis of that he argued that although the plaintiff disputed legal possession of the defendant in respect of trial, but actual use thereof was not denied. Mr. Shali has tried to controvert this position. The matter is not to be heard de novo.

It may, however, be clarified that the

“admitted position” stated in para 13 is the inference drawn by this Court on the basis of pleadings of the parties.

With these observations, review application is disposed of.

S. No.1943/2001

List before the Regular Bench for direction on 7th August, 2001.

July 11, 2003”

20. After hearing the parties and going through the records, I am of the considered view that the findings arrived at by the learned Additional District Judge in the impugned judgment cannot stand scrutiny. It is not the case of the respondents in the plaint that the appellants are not entitled to the use of the servant quarter and toilet on the terrace floor over and above the second floor. It is also clear from the order dated 19.10.2003 passed by this Court that there is a toilet on the terrace which is primarily meant to be used by the servants who are staying in the servant quarters on the terrace, including the servant quarter earmarked for the use of the appellants No.1 and 2. In a subsequent order dated 27.09.2004 passed by the learned trial court, it is recorded that it is the admitted case of the parties that there are servant quarters and those servants are using the toilet on the terrace.

21. A look now at the relevant clauses of the sale deeds dated 4th March, 1993, which are admitted documents and which read as under:-

Clause 7

“That in case the Confirming Vendor constructs the terrace of the Second floor, then he will provide a Servant Quarter on the terrace of the third floor to the Vendee without any claim, demand and objection.”

Clause 8

“THAT the Vendee will have the right to use common passage, entrance, stairs or any other common facility and share the expenses, if any.”

Clause 9

“THAT the Vendee will not be entitled to make any ownership right in respect to common areas, stairs, terrace/roof or any other portion of said property except the share purchased by him.”

22. A conjoint reading of the aforesaid clauses makes it abundantly clear that the appellants No.3 and 4 have the right to use the common passage, entrance, stairs or any other common facility. Clause 9, however, stipulates that in all these common facilities as well as in the terrace/roof, the vendee shall not have any ownership rights. This clause, in my view, must be read as an adjunct to the previous clause, that is, Clause 8, which affords to the vendee the right to use all common facilities.

23. Moreover, it is clear from the record that the appellants No.3 and 4, and, after them the appellants No.1 and 2, have been using the aforesaid common facilities for a long period of time, even much prior to the filing of the suit, and this fact has been categorically admitted by

the respondents in the pleadings. Thus, for instance, in paragraph 5(b) of the replication, as noted above, there is a categorical admission that a General Power of Attorney was executed by the predecessor in interest of the respondents in favour of the respondent No.5 (builder) for the purpose of selling the second floor of the suit property **along with the servant quarter on the terrace**, and that the appellant No.5 had in fact sold the second floor with one servant quarter to the appellants No.3 and 4. It is also clear from the record that the aforesaid sale was not challenged during the lifetime of the predecessor in interest of the respondents, who died several years thereafter, in the year 2001. The subsequent sale made by the appellants No.3 and 4 to the appellants No.1 and 2 on 17th July, 2001, immediately after the death of late Shri Tirath Ram Mehta, too was not challenged by the respondents at any point of time in any Court of Law or otherwise, so much so that even in the suit filed by the respondents for permanent injunction against the appellants and specifically against the appellants No.1 and 2, the Agreements dated 17.07.2001, copies whereof were placed on record, were not challenged. The following extract from the cross-examination of PW-1 Shri Suman Mehta is apposite, which reads as under:-

“Q. If you were aggrieved by sale deed dt. 4.3.93 in favour of defendants 3 & 4, more

significantly clause 7, 8 & 9, why do you see cancellation of the same?

A. Had I got a copy of the sale deed prior to execution, we would have got the same cancelled. We have not taken any steps to get the said sale deed cancelled till date.

It is incorrect to suggest that my father accepted the said sale deed and therefore did not take any steps to cancel the same. It is incorrect to suggest that after the death of our father we had turned dishonest and filed the present suit to extort money from the defendant. It is incorrect to suggest that defdt. no.5 have every right to sold over and above the II Floor and he rightly sold the same to defdt. no. 3 and 4 and defdt. 1 and 2. It is incorrect to suggest that defendants are true owners of servant quarter over and above the II Floor and fully entitled to use the same. It is incorrect to suggest that the defendant was peacefully using II floor and 25% common terrace, toilet, staircase, and passage and other facilities.”

24. In paragraph 8 of the plaint, no doubt it was stated by the respondents that the appellants No.3 and 4 had exceeded their powers and “tried to sell the terrace rights over and above the second floor” in respect of the suit property on the second floor in favour of the appellants No.1 and 2, although no such authority and power had been given to the appellant No.5 much less to the appellants No.3 and 4, who derived their title from the appellant No.5. But there is not even a whisper that there was any interpolation made in the Agreements executed by the appellants No.3 and 4. All that was stated was that the

Appellants No.3 and 4 had no authority and power to sell the terrace rights to the appellants No.1 and 2 as the title to the terrace rights did not vest in them nor any authority had been given to the appellant No.5 to sell the same. No doubt, PW-1 Suman Mehta in his affidavit by way of evidence for the first time stated that it appeared that “the defendants No.3 and 4 after making alterations and additions to the Sale Deed have further sold their rights to defendants No.1 and 2 and the said transfer is also illegal.” However, the witness did not even care to state in his said affidavit as to what alterations and additions had been made by the defendants No.3 and 4 in the aforesaid Sale Deed. And apart from a bald suggestion put to DW-1 Shri Vinay Kathuria (the appellant herein) that documents Exhibit DW-1/1 GPA, Exhibit DW-1/2 Sale Deeds, Exhibit DW-1/3 and Exhibit DW-1/4 were forged and fabricated, no other question was put to the witness as to the nature of the forgery and fabrication. In such circumstances, when it was not even the case of the respondents that the Agreements dated 17.07.2001 were interpolated documents, it was not open to the learned Additional District Judge to hold that certain portions of the documents were in different ink and of different typewriter and, therefore, interpolated. Even otherwise, it is trite law that evidence beyond the pleadings cannot be taken into

account while adjudicating upon the respective rights of the parties.

25. The further finding of the learned Additional District Judge that the Collaboration Agreement filed by the appellant No.5 *per se* seemed to be a forged agreement, is also without any basis whatsoever, more so, in view of the fact that there is on record the affidavit of the appellant No.5, namely, the builder, affirming that he had sold the second floor flat to the appellants No.3 and 4 as per Paragraph 7 of the Collaboration Agreement dated 10.08.1992, copy whereof was on record, and that the appellants No.3 and 4 had subsequently sold the same to the appellants No.1 and 2. In such circumstances, it was not open to the learned Additional District Judge to hold that the Collaboration Agreement dated 10th August, 1992 was forged and that too without an iota of evidence in this regard. The reliance placed by the learned Additional District Judge on the Collaboration Agreement dated 01.09.1992 (subsequently filed by the respondents) was also misplaced, as only a photocopy of the said agreement was produced which was not even proved on record by the respondents.

26. In view of the aforesaid, the appellants No.1 and 2 must be held entitled to the use of the servant quarter along with the toilet on the terrace, which was hithertobefore being used by them, and for the

aforesaid purpose the appellants shall have the right to use common passage and entrance, stairs, or any other common facility. The judgment and decree of the learned Additional District Judge stands modified to the aforesaid extent.

With the aforesaid modification, the appeal stands disposed of.

REVA KHETRAPAL, J

JULY 30, 2010
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