

* **HIGH COURT OF DELHI: NEW DELHI**

+ **C.S.(OS) No.505/2006**

% Judgment Pronounced on: 21.10.2011

D.R.BATRA & ORS Plaintiffs
Through Ms. Anusuya Salwan, Adv. with
Mr. Kunal Kohli, Adv.

Versus

ARVINDER PAL SINGH MAKKAR & ANR Defendants
Through None

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

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

MANMOHAN SINGH, J.(Oral)

1. The plaintiffs have filed the present suit for declaration and permanent injunction seeking the following reliefs:-

“a) pass a decree of declaration declaring that the common areas in property bearing No.35, North Avenue Road, Punjabi Bagh, New Delhi vests in the owners of the apartments proportionately.

b) pass a decree of permanent injunction permanently restraining defendants No.1 to 3 from carrying out any construction in the open areas and common areas of the property in question.

c) costs be awarded in favour of the plaintiffs.”

2. The brief facts of the present case are that plaintiffs No.1 to 6 are the owners in occupation of property No.35, North Avenue Road, Punjabi Bagh, New Delhi-110026. The said property was constructed by M/s Santosh Builders through its proprietor Sh. Gurbachan Singh, and 7 apartments, independent units/flats were made in the said freehold property by virtue of the registered agreements, the details of which are given in para No.2 of the plaint.

3. As per the plaintiffs, the brochure for sale of the said apartments issued by M/s Santosh Builders through its sole proprietor Sh. Gurbachan Singh had indicated common areas and also indicated the front setback which was left open and a driveway. In front of the apartments, there was an open space which was to be maintained as green for the common use of all apartment owners.

4. It is the case of the plaintiffs that M/s Santosh Builders illegally constructed a room on the front lawn of the property in dispute on the premises that the same would be used by him to stack its materials and labour for construction purposes. However, the same was not demolished

and has been illegally handed over to one property dealer by the name of Punjabi Bagh Properties. M/s Santosh Builders has also constructed a Guard Room inside the boundary wall of the property.

5. The case of the plaintiffs against the defendants is that the defendants No.1 & 2 who are the son and widow of the above said Mr. Gurbachan Singh, have negotiated with some shop-keepers to demolish the said room and to re-built 2 to 3 rooms inside the boundary wall and in the common area of the property and to sell the said area to petty shop-keepers for opening shops of cigarette, pan, cold drinks and other general merchandise etc. On 14.03.2006 the defendants came with certain labour in order to demolish the said guard room and to re-construct 2-3 shops which was protested to by the plaintiffs. Their protest was that no construction could be undertaken in the common area of the property which was meant as open area.

6. Along with the present suit, the plaintiffs filed an application under Order XXXIX, Rules 1 & 2 read with Section 151 CPC being I.A. No.3357/2006. After hearing upon the same, the Court passed an *ex parte* injunction order restraining the defendants from carrying out any construction in front of the suit property or from selling, alienating or disposing of any part of the common area of open area in front of the property.

7. The defendants were duly served. They appeared and filed their written statement denying the contentions of the plaintiffs made in their plaint. It was stated that the defendants exclusively owned the room in question and it was never promised that the same would be demolished after handing over possession of the flats. Mr. Gurbachan Singh, father of defendant No.1 and husband of defendant No.2 had never assured that the green lawn would be restored.

8. From the pleadings, the following issues were framed vide order dated 09.05.2008:-

1. Whether the common areas of property No.35, North Avenue Road, Punjabi Bagh, Delhi belonged to the owners of the apartments and not to defendants No.1 & 2? OPP
2. Whether the defendants No.1 & 2 have no right to carry out any construction in common area/open area? OPP
3. Whether the suit of the plaintiffs is barred under the provisions of Section 41(1) of the Specific Relief Act? OPD
4. Whether the suit is bad for non-joinder of all necessary parties as M/s Punjab Bagh Properties is not made a party? OPD
5. Whether the suit is valued properly for the purposes of Court fee and jurisdiction? OPD
6. Relief.

9. The parties were given time to adduce their evidence by way of affidavit(s). The plaintiffs filed an affidavit of PW-1 Mr. Balbir Singh in

terms of their evidence. However, the defendants failed to appear before the Court to cross-examine the said witness. Ultimately, vide order dated 22.11.2010 the defendants were proceeded *ex parte*, as no one appeared on their behalf either before the Court or earlier before the Joint Registrar at the time of recording the evidence.

10. The plaintiffs in support of their case have examined witness, PW-1 Balbir Singh who tendered on record his affidavit Ex.PW1/A. The said Balbir Singh is one of the owners of the property in question. He has corroborated the averments as stated in the plaint and has also proved on record the following documents:-

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| Ex.PW1/1 | Agreement dated 01.06.1989 in between M/s Santosh Builders and plaintiff No.4 |
| Ex.PW1/2 | Agreement dated 03.05.1988 in between M/s Santosh Builders and one Nirmal Rawal, who further entered into an agreement with plaintiff No.5 |
| Ex.PW1/3 | Agreement dated 05.04.1988 in between M/s Santosh Builders and wife of plaintiff No.1 |
| Ex.PW1/4 | Agreement dated 28.02.1988 in between M/s Santosh Builders and one Veena Arora, who further entered into an agreement with plaintiff No.6 |
| Ex.PW1/5 | Agreement dated 05.04.1988 in between M/s Santosh Builders and plaintiff No.3 |
| Ex.PW1/6 | Agreement dated 15.03.1994 in between Nirmal Rawal and plaintiff No.5 |
| Ex.PW1/7 | Sale deed in favour of plaintiff No.1. |

Ex.PW1/8	Possession letter dated 05.04.1988 in favour of plaintiff No.3
Ex.PW1/9	Possession letter dated 05.04.1988 in favour of the wife of plaintiff No.1
Ex.PW1/10	Possession letter dated 01.06.1989 in favour of plaintiff No.4
Ex.PW1/11 & Ex.PW1/12	Receipts dated 27.02.1988 & 28.02.1988 issued by M/s Santosh Builders in favour of one Veena Arora
Ex.PW1/13	Layout plan of the suit property.
Ex.PW1/14	Site Plan

11. The learned counsel appearing on behalf of the plaintiffs has argued that under the agreement, the plaintiffs had made payment towards the super area of the flats including the common areas and the plaintiffs along with other owners have proportionate rights in the common areas and the front portion of the suit property. She further argued that even otherwise, the common areas are for the benefit of each of the flat owners and neither under the agreement to sell, nor in the documents of conveyance, the common areas could be vested with the defendants.

12. I have heard the learned counsel for the plaintiffs and have gone through the contents of the plaint along with the affidavit of the witness and the documents placed and proved on record. I am of the considered view that the plaintiffs have been able to prove their case on record. The evidence adduced on behalf of the plaintiffs has gone

unrebutted, as the defendants failed to cross-examine the witness. The defence raised in the written statement cannot be taken into consideration in the absence of any evidence/proof on record, as although the defendants were given opportunity to lead their evidence, but they even failed to appear before the Court and were proceeded *ex parte*. In these circumstances, the plaintiffs are entitled to a decree for declaration and permanent injunction as prayed for. I hold that the common areas in property bearing No.35, North Avenue Road, Punjabi Bagh, New Delhi vests in the owners of the apartments proportionately. The defendants are permanently restrained from carrying out any construction in the open areas and common areas of the property in question. The cost of the suit is awarded in favour of the plaintiffs. The suit of the plaintiffs is accordingly decreed. Decree be drawn accordingly. The suit and all pending applications are disposed of.

MANMOHAN SINGH, J.

OCTOBER 21, 2011
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