

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

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Judgment reserved on: 27.08.2012

Judgment pronounced on: 30.08.2012

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CS(OS) 901/2010

VIJAY KUMAR TREHAN

..... Plaintiff

versus

SUSHIL KUMAR TREHAN & ORS.

..... Defendants

Advocates who appeared in this case:

For the Plaintiff : Mr. Subodh Kumar Pathak

For the defendant no.1 : Mr. Hemant Malhotra

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

V.K. JAIN, J.

1. The property bearing number B-2, Defence Colony, New Delhi was owned by late Dr. Capt. Bhagat Ram Trehan, father of plaintiff and defendants no.1 and 2. Defendants no.3 and 4 are their sisters. Vide Will dated 16.04.1986, the above referred property as bequeathed by Dr. Capt. Bhagat Ram Trehan to the plaintiff and defendants no.1 and 2. The case of the plaintiff is that he was given 1/3rd share comprising of entire ground floor except garage, lavatory and adjoining garage, defendant no.2 was given 1/3rd share comprising entire first floor except annexe over the garage and defendant no.1 was given his 1/3rd share comprising of entire second floor, garage on the ground floor, lavatory adjoining the garage and annexee over the garage, with permission to construct the second floor annexe. The third and subsequent floor could also be constructed by the plaintiff and defendants no.1 and 2 with joint investment/ contribution and in the event of such a construction, the advantage of the same was to be equally shared by all the three brothers. The covered area bequeathed to the plaintiff, defendant no.1 and

defendant no.2 is stated to be 1269.03 sq ft., 1221.23 sq. ft. and 1215.43 sq. ft respectively.

Defendant no.1, vide sale deed dated 14.10.2004, sold the garage located on the ground floor, lavatory adjoining garage and annexe over the garage to the plaintiff. Subsequently, defendant no.2 sold the whole his entire 1/3rd share in the suit property in favour of the plaintiff vide sale deed dated 15.10.2004. The case of the plaintiff is that in view of the Will dated 16.4.1986 and the sale deeds dated 14.10.2004 and 15.10.2004 executed by the defendants no.1 and 2 in his favour, he is entitled to more than 2/3rd of the total FAR permissible in respect of the suit property. It is also his contention that defendant no.1 started illegal construction over the second floor thereby trying to go beyond the FAR area allocated to his share and that he has illegally replaced Barsati on the second floor by drawing cum dinning, a lounge Varandah, 2 bedrooms, kitchen store and an open sit out garden. It is further alleged that defendant no.1 also started illegal erection of a wall over the first floor annexe. The plaintiff has, therefore, sought the following reliefs in the present suit:

- (i) *A decree of permanent injunction, in favour of the plaintiff and against defendant no.1 his legal heirs, agents, assignees, attorney or any other third person acting for and on behalf of defendant no.1 restraining him from creating any third party right and interest in any manner with regard to suit property B-2, Defence Colony, New Delhi.*
- (ii) *A decree of perpetual injunction in favour of the plaintiff and against defendant no.1, restraining defendant no.1,*

his legal heirs, agents, assignees, attorney or any other third person acting for and on behalf of defendant no.1 from using and occupying the FAR area beyond his entitlement and from carrying any further construction over suit property being B-2, Defence Colony, New Delhi.

- (iii) A decree of mandatory injunction in faovur of the plaintiff and against defendant no.5 directing removal of illegal and unauthorized construction carried out by defendant no.1 on the suit property being B-2, Defence Colony, New Delhi without obtaining the requisite permission and sanctioned plan beyond the entitled FAR.*
- (iv) A decree, directing defendant no.5 to determine the actual FAR of the parties as per their entitlement in respect of the suit property i.e. B-2, Defence Colony, New Delhi.*

2. Defendant no.1 filed written statement contesting the suit. It is alleged in the written statement that the construction which the plaintiff claims to be illegal, was raised during the lifetime of Dr. Capt. Bhagat Ram Trehan. The Will executed by late Dr. Cap. Bhagat Ram Trehan on 16.4.1986 as well as sale deeds executed by defendants no.1 and 2 in favour of the plaintiff have, however, been admitted in the written statement. It is further claimed that plaintiff is the co-owner in respect of 2/3rd share of the suit property comprising of ground floor and first floor whereas defendant no.1 is the co-owner to the extent of remaining 1/3rd undivided share comprising of second floor. It is further alleged that rest of the property is meant for common usage including the lawn, front open space in the rear portion as also

proportionate rights in the basement own floor and upper floor, as and when constructed in terms of the Will dated 16.4.1986. It is further alleged that at the time of dividing the suit property amongst his three sons by way of a Will dated 16.4.1986 by late Dr. Capt. Bhagat Ram Trehan, had taken into consideration the comparative market value of each floor being given to his sons and since there was only a limited construction on the second floor at that time, defendant no.1 was compensated by giving him the additional space on the ground floor of the suit property as well as annexe over the said garage with permission to construct second annexe. Defendant no.1 has also disputed the extent of the covered area given in the plaint in respect of various portions, which their father is alleged to have bequeathed to his sons.

3. Defendant no.5 MCD filed written statement stating therein that on inspection of the property in question on 10.07.2010 certain existing deviation were found but those deviations are compoundable as per prevalent norms. It is further stated in the written statement filed by MCD that the owner of the second floor had applied for regularization of the existing construction which is compoundable as per the prevalent norms. According to MCD, following is the position with respect to different floors in the suit property:

Status report of property No.B-2, Defence Colony

Plot Size: 271.73

Floor	Sanctioned Area In Sq. mt.	Existing Area in sq. mt.	Permissible Area as per MPD-2021 In sq. mt.	Compoundable Area in Sq. Mt.	Non-Compoundable Area in Sq. Mt.
Ground Floor	135.77	178.34	203.60	42.57	Nil
First Floor	108.36	142.55	203.80	34.19	Nil
Second Floor	33.81	126.96	203.80	93.15	Nil

4. On 24.07.2012, the learned counsel for the parties had agreed that no evidence would be required in this matter since the whole controversy revolves around the interpretation of the Will executed by late Dr. Bhagat Ram Trehan. The Executive Engineer of MCD, Central Zone was directed to inspect the suit premises and evaluate the same from the point of view of the safety of the structure and inhabitants of the building and report as to whether the building can bear the load of additional construction and if so, to what extent and subject to what conditions.

Accordingly, inspection was carried out by the Executive Engineer of MCD and it was reported that considering the age of the structure, there is all probability that further addition of any structure shall affect the structural safety of the building. It was further stated that precise details of structural safety can only be assessed and worked out only by the Structural Engineer being an expertise task, requiring the technical knowhow.

5. The Will executed by Dr. Capt. Bhagat Ram Trehan dated 16.4.1986, which is otherwise an admitted document, *inter alia*, reads as under:

“.....That after the demise of my wife this property should be shared between my sons only as detailed below:-

That 1/3rd undivided share in this property will be owned by Capt. Vijay Kumar, comprising of ground floor except garage, small Indian Pattern Latrine adjoining garage, and Annexe.

And other 1/3rd of undivided share in this property shall belong to my second son Ravinder Kumar, comprising of first floor of this house and a permission of constructing a canopy in front as per M.C. Rules for which other sons will not object.

And the balance 1/3rd should be owned by my third and younger son Dr. Sushil Kumar, comprising of entire second floor, garage, latrine adjoining garage, annexe over garage, and permission of constructing second annexe as per M.C. Rules. All the three sons can build more in their respective floors with the permission of Municipal Corporation of Delhi.

That all the shareholders above referred will respect each and other in regard to free usage of staircase, lawns and passages unrestrictedly. However, I except, that none of them will park his car in front in the working hours of the clinic in the garage if made.

That all the taxes of L&DO and MCD shall be borne and paid equally. 1/3rd proportionately by each. However, to maintain the house and general supervision will be the duty of my eldest son Shri Vijay Kumar and expenses incurred will be borne equally.

In future, if MCD allows to construct third and subsequent floors and third or subsequent annexes, shall be constructed with joint investments and share the advantages and benefits equally.”

6. Relying upon the use of the expression ‘1/3rd’ undivided share in this property used in the Will, it was contended by the learned counsel for the plaintiff that all the three brothers were given 1/3rd undivided share in the land underneath the building and since the defendant no.2 sold his entire share in the suit property to the plaintiff, he became the owner of 2/3rd of the leasehold rights in the land

underneath the building and since he also purchased the garage portion and first floor portion annexe from defendant no.1, the plaintiff became entitled to much more than $2/3^{\text{rd}}$ share in the leasehold rights of the plot on which this building has been constructed. The learned counsel for defendant no.1 on the other hand contended that late Dr. Capt. Bhagat Ram Trehan had in fact given $1/3^{\text{rd}}$ share each of the property, by valuation, to each of his three sons as would be evident from the fact that instead of bequeathing second floor which has lesser construction, late Dr. Capt. Bhagat Ram Trehan bequeathed the garage as well as the annexe with the garage to defendant no.1 and it was further stipulated in the Will that if construction on the second floor is allowed, that could be done only with joint investment and was to be shared equally amongst the three brothers.

7. In my view, it would not be correct to say that vide Will dated 16.4.1986, late Dr. Capt. Bhagat Ram Trehan had bequeathed $1/3^{\text{rd}}$ undivided share each in the land underneath the property bearing number B-2, Defence Colony, New Delhi to his three sons. Late Dr. Capt. Bhagat Ram Trehan was a well-educated person as is evident from his being a doctor, holding a position of a Captain. Had his intention been to bequeath $1/3^{\text{rd}}$ undivided share each in the leasehold rights of the plot on which this building has been constructed to all the three sons, he would have stated so in the Will executed by him. The contention that since late Dr. Capt. Bhagat Ram Trehan referred to the ground floor except garage and lavatory adjoining garage as $1/3^{\text{rd}}$ of the property, the first floor of the building as the other $1/3^{\text{rd}}$ share and the second floor, garage, latrine adjoining garage and annexe over garage with permission to construct the second annexe as the remaining $1/3^{\text{rd}}$ of the property, cannot be accepted at this calculation, does not take into account the terrace of the second floor and the construction which could be raised on the floors higher than the second floor. If the whole of the leasehold rights are deemed to be covered in

the specific portions bequeathed to the plaintiff, defendants no.1 and 2, there is no explanation with respect to the leasehold rights proportionate to the terrace of the second floor and the construction which could be raised above the second floor.

In my view, late Dr. Capt. Bhagat Ram Trehan loosely referred to the specific portions being bequeathed to his three sons and $1/3^{\text{rd}}$ share each in the property whereas in fact he had bequeathed different specific portions of the constructions which already existed at the time of execution of the Will without any division of leasehold rights in the land.

8. It is contended by the learned counsel for the plaintiff that the covered area bequeathed to the plaintiff and defendants no.1 and 2 being almost equal, the intention of their father was to bequeath $1/3^{\text{rd}}$ undivided share in the leasehold rights of the plot to all his three sons. This argument is fallacious for two reasons. Firstly, the covered area bequeathed to the plaintiff and defendant no.1 and 2 is not exactly equal even as per the calculation given by the plaintiff. Moreover, the value of the per sq. ft. area of the upper floor and annexe portion including garage cannot be equal to per sq. ft. value of the ground floor. The value per sq. ft. of the garage and the annexe would be comparatively less. The contention of the learned counsel for the defendant no.1 is that in fact late Dr. Capt. Bhagat Ram Trehan had done value-wise deviation of the property by way of his Will dated 16.4.1986 as would be evident from the fact that in addition to second floor which had lesser construction as compared to ground floor and first floor, garage on the ground floor as well as annexe portions were also given to defendant no.1. However, there is absolutely no evidence to prove what was the value of the portions bequeathed to the plaintiff, defendants no.1 and 2 at the time of execution of the Will dated 16.4.1986. It is, therefore, difficult to accept even the contention raised by the learned counsel for the defendant no.1.

9. During the course of arguments, I specifically asked the learned counsel for the plaintiff as to what exactly the plaintiff would achieve if it is held that he is entitled to more than $2/3^{\text{rd}}$ of the total FAR available for construction in this property. This becomes important considering the fact that since whole of the ground floor except garage and lavatory adjoining garage was given to the plaintiff, whole of the first floor with permission to construct a canopy was given to defendant no.2 and the entire second floor with garage, lavatory adjoining garage and annexe over garage with permission to construct second annexe was given to defendant no.1, coupled with the right to each of them to build more in their respective floors with the permission of MCD. No appropriate answer to this question was forthcoming from the learned counsel for the plaintiff, who submitted that in the event plaintiff wanted to sell his share, he could sell the same with more than $2/3^{\text{rd}}$ share in the leasehold rights in the plot on which the building has been constructed. In my view, considering the stipulations contained in the Will dated 16.4.1986, there could be no controversy as regards the respective rights of the parties in the suit property. Admittedly, the ground floor of the main building having come to the share of the plaintiff, he can raise such further construction on the ground floor as is permitted by MCD under the relevant building byelaws. Since he has already purchased the first floor and first floor annexe from defendants no.2, he can also raise such construction as is permitted by MCD on the first floor or on first floor annexe. If any additional construction is raised by the plaintiff on the ground floor, with the permission of MCD, the right to raise construction on the first floor of that portion shall also be with him only. Since the second floor has been given to defendant no.1, he can raise such construction on that floor as is permitted by MCD. Defendant no.1 who has while selling the garage, lavatory adjoining garage and first floor annexe to the plaintiff specifically

retained his right to build over the roof of the first floor annexe. Hence, any further construction on the roof of the first floor annexe, to the extent it is permitted by MCD, can be raised only by defendant no.1. The construction on the third floor including on the terrace of the second floor annexe if constructed by defendant no.1, can be raised by the plaintiff and defendant no.1 jointly with joint funds in the ratio of $\frac{2}{3}^{\text{rd}}$ and $\frac{1}{3}^{\text{rd}}$ respectively and the $\frac{2}{3}^{\text{rd}}$ of such construction would fall to the share of the plaintiff whereas remaining $\frac{1}{3}^{\text{rd}}$ of such construction would come to the share of defendant no.1. This, in my view, is the correct interpretation of the Will executed by late Dr. Capt. Bhagat Ram Trehan. If the plaintiff wants to sell his share in the suit property, he would be at liberty to do so, in the aforesaid terms.

10. For the reasons stated hereinabove, the suit is disposed of in terms of following directions:

- (i) The plaintiff can raise such construction on the ground floor and first floor, including first floor annexe of property bearing number B-2, Defence Colony, New Delhi as is permitted by MCD and defendant no.1 will have no right to object to the same.
- (ii) Defendant No. 1 can raise such additional construction, on the second floor, as is permitted by MCD.
- (iii) If any additional construction is raised by the plaintiff on the ground floor and/or first floor, defendant no.1 would be entitled to raise the construction at the second floor level of such construction, after obtaining permission of MCD.
- (iv) Defendant no.1 would be entitled to construct the second floor annexe, if so permitted by MCD.
- (v) The annexe on the third floor and higher level as well as the construction of the third floor and higher floors to the extent permitted

by MCD can be carried jointly by plaintiff and defendant no.1. For such a construction, the plaintiff would contribute $\frac{2}{3}$ rd of the cost of construction whereas defendant no.1 would bear the remaining $\frac{1}{3}$ rd of the cost of construction. The area constructed on the third and higher floors whether in the main building or in the annexee, would be shared by the plaintiff and defendant no.1 in the ratio of $\frac{2}{3}$ rd and $\frac{1}{3}$ rd each.

11. As regards the construction alleged to have been made unauthorizedly on the second floor, by defendant no.1, it has come in the written statement filed by MCD that the same is compoundable. Therefore, no order is required to be passed for demolition of the aforesaid construction. The MCD would be at liberty to take appropriate action in accordance with law with respect to such unauthorized construction which it does not regularize/ compound.

12. This order would not come in the way of MCD taking such action as is open to it in law, on account of existing construction or any part thereof being in a dilapidated or unsafe condition. In the facts and circumstances of the case, there shall be no orders as to costs. Decree sheet be drawn accordingly.

V.K.JAIN, J

AUGUST 30, 2012

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