

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

+ **RFA No. 236/2009;**
RFA No. 301/2009 and
RFA No. 358/2009

% **23rd February, 2012**

1. RFA 236/2009

MUKIT ABBASI & ANR. Appellants
Through : Mr. F. Hasan, Advocate.

versus

C.N. CHOUDHARY & ORS. Respondents
Through : Mr. N.K. Jha, Advocate for R-1
Mr. Anshu Mahajan, Advocate for
R-3/Bank.
Mr. Puneet Sharma and Mr. Ajay
Arora, Advocates for MCD-R-4.
Mr. K. Mohan, Advocate with Mr.
Venkitachalam P.S. R-6 in person.

WITH

2. RFA 301/2009

C.N. CHOUDHARY Appellant
Through : Mr. N.K. Jha, Advocate.

versus

MUKIT ABBASI & ORS. Respondents
Through : Mr. F. Hasan, Advocate for R-1&2.
Mr. Anshu Mahajan, Advocate for
R-4/Bank.
Mr. Puneet Sharma and Mr. Ajay
Arora, Advocates for MCD-R-5.
Mr. K. Mohan, Advocate with Mr.
Venkitachalam P.S. R-6 in person.

AND

3. RFA 358/2009

CORPORATION BANK Appellant

Through : Mr. Anshu Mahajan, Advocate for
Bank.

versus

C.N.CHOUDAHRY AND ORS Respondents

Through : Mr. N.K. Jha, Advocate for R-1
Mr. F. Hasan, Advocate for R-2&3.
Mr. Puneet Sharma and Mr. Ajay
Arora, Advocates for MCD-R-5.
Mr. K. Mohan, Advocate with Mr.
Venkitachalam P.S. R-6 in person.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J. (ORAL)

1. These three Regular First Appeals (RFAs) are filed against the same judgment and decree of the trial Court i.e. the judgment and decree dated 23.3.2009. RFA 301 of 2009 has been filed by the plaintiff in the suit. RFA 236 of 2009 has been filed by defendant Nos. 1 and 2 in the suit. RFA No. 358 of 2009 is filed by defendant No. 4 in the suit. Plaintiff in the suit was the purchaser of second floor with roof rights in the property No. B-43/S-1, Dilshad Colony, Delhi. The defendant Nos. 1 and 2 in the suit were the builders who along with defendant No. 3 sold the property,

being the second floor, with roof rights by means of a registered sale deed dated 25.5.2004 to the plaintiff. Defendant No.4 is a Bank which sanctioned the loan to the plaintiff against equitable mortgage of the property in question.

2. The disputes which have arisen in this case are on account of the peculiarity of builders in the state of New Delhi constructing a basement which is partly below the ground level and partly above the ground level. The peculiarity accentuated, inasmuch as, the basement which is partly below the ground level and partly above the ground level, is called as a lower ground floor instead of a basement, and the actual ground floor is called as an upper ground floor. The reason for this convenient description of the basement as the lower ground floor is because, at the relevant time when the building in question was constructed, in Delhi, only three floors could have been constructed on a plot of land, i.e. ground floor, first floor and second floor. In addition to the three floors, a basement could also be constructed, provided the same was duly sanctioned. In a way, therefore, four floors could be constructed, i.e. basement plus three floors. However, merely being entitled to construct a basement and three floors would not mean that the basement could be constructed without sanction of the plan for construction of the basement. In the facts of this case, the sanctioned

plan does not provide for construction of a basement, and therefore the lower ground floor which is constructed partly above the ground level and partly below the ground level can arguendo become the ground floor and the second floor which is described as second floor will be a legal construction, i.e. the second floor, but not the third floor which will be an illegal construction. It is also possible that since the basement is not sanctioned, then, the lower ground floor is actually a basement and since only two other floors would be capable of being constructed under the sanctioned plan and hence the third floor will be a legal construction becoming the second floor as the lower ground floor will be a basement constructed without sanction. I may note that in the present case, there is no dispute that the sanctioned plan for the building does not show existence of basement on the plot in question where the building had been constructed. I may reiterate that if the basement was not sanctioned, in view of the facts of the present case on the plot in question, then, so far as the lower ground floor is concerned, possibly the same could be said to be a basement and the second floor which was sold to the plaintiff would really become the second floor, and not the third floor, which could not have been demolished by the Municipal Corporation of Delhi (MCD). With this preface, let me turn to the pleadings of the parties in the present case, the

issues framed and the judgment of the trial Court.

3. The plaintiff had filed the suit in which, though, in the prayer clause relief was only claimed for specific performance, however, it is not disputed between the parties that in the cause of action stated in the plaint there was a claim which was laid out also with respect to damages. This claim for damages was on the basis that the plaintiff suffered on account of illegal acts of the defendants because the so called second floor which was sold to him, in fact, turned out to be third floor which was demolished by MCD and, therefore, the plaintiff lost the roof over his head, besides the harassment and inconvenience caused to him and his family members.

4. The suit was contested by defendant Nos. 1 and 2/builders by taking up a case that plaintiff with open eyes acted upon the sale deed in his favour by taking possession of a particular floor in the property and therefore it could not be argued on behalf of the plaintiff that he was entitled to damages or the plaintiff is entitled to the property being the second floor which was already sold to defendant No. 6, and which sale took place prior to the execution of the sale deed in favour of the plaintiff. The MCD was defendant No. 5 in the suit and the suit was also contested by it. There is no decree of damages which has been passed against defendant No.5/MCD. The defendant No.4/Bank, which gave the loan,

argued that there was no negligence on its part because the loan was given as per the sanctioned plan which showed the existence of the second floor and the loan was with respect to the second floor of the property. Defendant No. 3 remained ex-parte in the trial Court.

5. After hearing learned counsel for the parties and after perusing the records, it transpires that there is in fact a mistrial due to lack of appropriate pleadings in the case and the plaintiff ought to have laid out an additional/alternative cause of action and which is referred to hereinafter.

6. Before I proceed to state what alternatively ought to have been the cause of action of the plaintiff and what possibly would have been the defence of the defendants, the following admitted facts are to be noted:-

(i) The sanctioned plan for the building in question permits construction of a total of three floors, however, there were four floors which were constructed.

(ii) Since only three floors were sanctioned, either the lower ground floor can become the basement, and hence the illegal construction because the basement was not sanctioned, or if the lower ground floor is in fact the real ground floor, then the upper ground floor will become the first floor and, therefore, the so called second floor of which possession was given to the plaintiff would be

in fact an illegally constructed third floor.

(iii) The plaintiff has not laid out and proved the case that loss/damage has been caused to him because though he was sold the floor of the property which was actually a second floor and a duly sanctioned floor as per the sanctioned plan, but the legal second floor was already sold earlier. It was only pleaded that there was a fraud upon him because really the second floor was the third floor, i.e. though the contract as entered into between the plaintiff and defendant Nos. 1 to 3 was valid, inasmuch as, it was for the second floor as per the sanctioned plan and which second floor was the sanctioned floor, however, in reality this second floor was already transferred to defendant No.6.

(iv) Defendant No.4/Bank, admittedly, gave a loan for the second floor as per the sanctioned plan. This loan if given for the second floor which, admittedly, was the sanctioned floor then in such circumstances, defendant No.4 would not be liable at all.

(v) MCD demolished the floor of which possession was given to the plaintiff, describing the same as the third floor, however, it is possible that this floor may be a legal second floor and the lower ground floor can be a basement, but would be an illegal

basement because there is no basement sanctioned as per the plan for construction of the building.

7. In view of the above, it is agreed between learned counsel for the parties that in exercise of my powers under Order 41 Rule 23 CPC read with Order 41 Rule 33 CPC, the impugned judgment dated 23.3.2009 be set aside, subject however, to the observations made herein below:-

(a) Plaintiff will be entitled to amend the plaint to set up a case of the fact that what was demolished was, in fact, a legal second floor which MCD could not have demolished and, in fact, it is the lower ground floor which should have been sealed by MCD as it was in fact the basement which was illegally constructed beyond the sanctioned plan.

(b) The plaintiff can also in alternative take up a stand that he is entitled to damages being the market value of the property prevailing on the date of the illegal construction, less the price of ₹3,50,000/- paid to the builders on the cause of action that if the existing lower ground floor is taken as a real ground floor then the second floor which was to be sold to him (and for which the agreement to sell and sale deed was executed) however, when those contracts were executed in favour of the plaintiff, the builders/defendant Nos. 1 to 2

had no title, inasmuch as, the second floor which was constructed and proposed to be sold to the plaintiff was already sold to defendant No.6. The plaintiff can also claim additionally the refund of the price paid.

(c) The plaintiff will now file an amended plaint within a period of four weeks from the first date which will be fixed before the competent Court taking up his aforesaid alternative and additional pleas as stated above by adding the material particulars and facts with respect to the said causes of action. All the defendants can also file their written statements in response to the amended plaint taking all the defences permissible, both in facts and law.

(d) The trial Court, after the completion of pleadings will frame issues, will give parties opportunities to lead evidence as per the fresh pleadings and issues framed and will, thereafter, dispose of the suit in accordance with law. Since there is already a considerable lapse of time caused to the parties, the trial Court is directed to dispose of the suit expeditiously and to the extent possible within a period of not more than two years from the first date which will be fixed by the trial Court after the pleadings are completed.

8. The present appeal is disposed of in terms of the consent order,

remanding the suit by setting aside the impugned judgment and decree, however, nothing contained in today's order is a reflection on merits of the case of either of the parties or a reflection as to the legal position which would be applicable in the case, and the trial Court will, at the stage of final arguments, dispose of the suit in accordance with law as per the position which emerges on facts and law as applicable. Parties are left to bear their own costs. Appeal is disposed of accordingly.

9. Both the parties are directed to appear before the District and Sessions Judge, Tis Hazari Courts, Delhi on 27th March, 2012, and on which date the District and Sessions Judge will mark the suit for disposal to a competent Court in accordance with law. Trial Court record be sent back so as to be available to the District and Sessions Judge on the date fixed.

10. The plaintiff who has paid Court fees pursuant to the impugned judgment and decree, will be entitled to its adjustment thereof with respect to the amendment which the plaintiff is now permitted and the Court fees, which would therefore be payable for the amended plaint to be filed on the basis of additional causes of action, will be after adjusting the additional court fees paid pursuant to the impugned judgment.

VALMIKI J. MEHTA, J.

FEBRUARY 23, 2012/