

# THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 24.09.2013

+ **FAO(OS) 187/2012 & CM No. 7979/2012**

**K NATHAN**

..... Appellant

Versus

**PRAFULLA KUMAR BARIK**

..... Respondent

**Advocates who appeared in this case:**

For the Appellant : Mr K.K. Rohtagi

For the Respondent : Mr T.K. Ganju, Senior Advocate with  
Mr Rono Mohanty

**CORAM:-**

**HON'BLE MR JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**BADAR DURREZ AHMED, J (ORAL)**

1. This appeal has been filed against the order dated 16.03.2012 passed by a learned Single Judge of this Court in I.A No. 1300/2010. This application was filed under Order XXXIX Rules 1 and 2 CPC by the plaintiff / respondent for removal of the iron staircase, which, according to the respondent, was a security hazard. The respondent / plaintiff also prayed that the appellant / defendant be restrained from encroaching in any manner and from occupying or using the roof/ terrace on the first

floor above the ground floor of the respondent's / defendant's flat. The properties in question are DDA flats bearing Nos. 46-B and 46-D in Block H, Malviya Nagar Extension, Saket, New Delhi. The appellant / defendant is in occupation and is the owner of the ground floor being flat No. 46-B. The respondent / defendant is the owner of the first floor being flat No. 46-D. It may be relevant to note that the first floor flat is a duplex unit.

2. The appellant / defendant has covered the courtyards both at the front and at the rear of the property in question. The whole issue is as to whether the appellant / defendant can utilize the roof of the covered portions for his benefit. What has happened is that the appellant / defendant has placed water tanks as well as air conditioning units on the said roof above the covered courtyard. The respondent / plaintiff filed a suit seeking mandatory injunction for removal of the said water tanks and the air conditioning units as also the removal of the iron staircase which has been put up by the appellant / defendant to access the roof of the covered courtyard.

3. The learned Single Judge has examined the case *prima-facie* and while doing so also took note of the Policy and Procedure For Permission and Regularization of Additions / Alterations in DDA Flats. In particular, the learned Single Judge noted paragraph III of the said policy which is as under:-

**“III ADDITIONAL COVERAGE PERMITTED WITH  
PRIOR PERMISSION**

1. Covering of courtyard and floor level terraces is allowed subject to fulfilment of building byelaws and structural safety.
2. In three or four storeyed flats the owners at upper floor shall have the right to cover the area available as a result of coverage of courtyard / terrace of floor below. In such cases the residents of DDA flats in a vertical stack served by the same staircase should give their consent and jointly apply for permission.
3. In two storeyed flats the allottee at the first floor will have no right of construction above the courtyard built by ground floor allottee. The upper floor allottee of two storeyed flat can use the roof terrace for extra coverage as permissible.
4. A barsati on the roof terrace of the top floor in addition to mumty is allowed. This barasati should preferably be adjoining to the mumty and equivalent to the size of the room below so that construction of wall over wall is ensured at terrace level. This will be subject to the provision of access to the residents of the block for maintenance of water tanks, plumbing system, fixing of TV/Cable antennas etc.”

According to the appellant / defendant it is sub-paragraph 3 of the above extract which would be applicable because the structure in question is a two storeyed flat. According to the learned counsel for the appellant, the first floor allottee, namely, the respondent / plaintiff has no right of construction above the courtyard built by the ground floor allottee. However, the upper floor allottee is permitted to use the roof terrace for extra coverage as permissible.

4. The learned counsel for the appellant founded his case on the above mentioned sub-paragraph 3 to state that the plaintiff has no right of construction on the roof of the covered courtyard. The learned counsel for the appellant states that the respondent / plaintiff would also have no right to use the roof of the built up courtyard.

5. However, this does not improve the case of the appellant / defendant because the above policy does not show or indicate that the appellant / defendant has a right to construct or to use the roof of the covered courtyard. In fact, *prima-facie*, it appears as if neither the owner of the ground floor flat nor the owner of the first floor flat has any right to either construct on or to use the roof of the covered courtyard for any purpose whatsoever. It is in this backdrop that the learned Single Judge concluded as under:-

“11. The defendant has not only carried out unauthorized construction without the prior permission of the DDA/MCD but has also installed a stair case to gain access to the terrace over the area, which has been constructed without proper permission of the concerned authorities, on which *prima facie* the defendant has no right. Besides the stair case leading to the terrace is a security hazard to the plaintiff. The defendant *prima facie* has no right to use and utilize the terrace.

12. In my view, the plaintiff has been able to make out a strong *prima facie* case and the balance of convenience is also in his favour. In case defendant is allowed to use the stair case and terrace, the plaintiff will suffer irreparable loss. Accordingly, defendant is

restrained from (i) using the iron stair case; (ii) placing any material on the roof terrace of the first floor, which has been constructed by the defendant; and (iii) shall remove all the materials, which are lying on the roof terrace within four weeks from today. Having regard to the fact that the MCD is already contemplating action against the MCD, the MCD will also consider the request of the defendant for regularization in accordance with law and without being influenced by any observations made by this court in this order passed today. Application stands disposed of.”

6. We do not see any infirmity in the *prima-facie* view taken by the learned Single Judge as also the ultimate order passed in the said application under Order XXXIX Rules 1 and 2 CPC.

7. The learned counsel for the appellant submitted that since the appellant / defendant has been in possession and has placed the water tanks and air conditioning units on the roof of the covered courtyard as also the staircase, the same ought not to be interfered with till the decision in the suit. According to him, no mandatory injunction can be granted on an interim basis. We do not agree with the submission made by the learned counsel for the appellant / defendant inasmuch as this is a clear case where the appellant / defendant does not have any right either to construct or to use the roof of the covered courtyard. It clearly interferes with the right of enjoyment of the respondent / plaintiff, who is owner of the first floor. In case, the appellant / defendant is permitted to use the roof of the covered courtyard, then it would amount to his virtually looking into the

flat of the respondent / plaintiff inasmuch as the windows of the first floor are just about 4½ feet above the said roof of the covered courtyard. This would amount to unwarranted invasion of privacy of the respondent/ plaintiff by the appellant/ defendant.

8. We feel that the learned Single Judge has considered all the aspects and also the aspect of security of the first floor residents inasmuch as the iron staircase which has been constructed by the appellant / defendant is, *prima-facie*, a security hazard for residents and occupants of the first floor because anybody from the passage can straightway have access to the windows of the first floor.

9. In view of the foregoing there is no merit in this appeal, the appeal is dismissed. The interim orders stand vacated. There shall be no order as to costs. The appellant / defendant is given four weeks time from today to comply with the order of the learned Single Judge.

**BADAR DURREZ AHMED, J**

**VIBHU BAKHRU, J**

**SEPTEMBER 24, 2013**

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