

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

Date of decision: 5th September, 2013.

+ **RFA 438/2008 & CM No.11661/2009 (for amendment of plaint)**

DR. A.P. SINGH

..... Appellant

Through: Mr. Jayant Bhushan, Sr. Adv. with
Mr. Anup Kumar Sinha, Advocate.

Versus

VIPUL JAIN & ORS.

..... Respondents

Through: Mr. Rajesh Yadav and Mr. Dhananjay
Mehlawat, Advocates for R-1 to 3.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree dated 2nd July, 2008 of the Additional District Judge (ADJ), Fast Track Court, Delhi in Suit No.266/2006 (Old No.1130/2003) preferred by the appellant/plaintiff and also in the counter-claim filed by the respondents/defendants No.1 to 3.

2. Notice of the appeal was issued and vide *ex-parte* ad-interim order dated 11th November, 2008 the operation of the impugned judgment and decree stayed. The appeal was on 24th July, 2009 admitted for hearing and the Trial Court record requisitioned.

3. CM No.11661/2009 has been filed by the appellant/plaintiff for amendment of the plaint and is still pending consideration. The appellant/plaintiff moved another application for interim relief restraining the respondents/defendants No.1 to 3 from selling, transferring or creating

any third party interest with respect to the roof rights above the second floor of suit property being No.B-1/118, Paschim Vihar, New Delhi, on which the counsel for the respondents/defendants No.1 to 3 made a statement on 4th April, 2011 that the respondents/defendants No.1 to 3 had no intention to do so and the said respondents were bound by the said statement; vide the same order, it was further clarified that the interim orders in this appeal would not preclude the respondent No.4 Municipal Corporation of Delhi (MCD) from taking action in accordance with law with regard to unauthorized construction in the property. The appellant/plaintiff filed yet another application for several interim reliefs, which was dismissed vide detailed and reasoned order dated 2nd February, 2012. The counsel for the respondents/defendants No.1 to 3 informs that SLP (Civil) No.16913/2012 preferred by the appellant/plaintiff thereagainst was dismissed on 4th July, 2012. Vide order dated 11th April, 2013, the hearing of the appeal was expedited and the appeal directed to be listed in the Regular Matters of Senior Citizens. The senior counsel for the appellant/plaintiff and the counsel for the respondents/defendants No.1 to 3 have been heard.

4. The appellant/plaintiff filed the suit from which this appeal arises pleading:

- (i) that the appellant/plaintiff was the owner of property No.B-1/118, Paschim Vihar, New Delhi constructed over land admeasuring 300 sq. yds.;
- (ii) that the appellant/plaintiff entered into Collaboration Agreements dated 16th December, 2000 and as modified on 5th March, 2001 with a builder Sh. Praveen Kumar Grover (not party to the

suit/appeal) for re-building the suit property by constructing ground, first and second floors thereon with three mezzanine rooms;

(iii) that in the Collaboration Agreement, it was clearly stated that a toilet would be made on the roof of the second floor for keeping the plastic water tanks on the roof of the toilet. The toilet was made, to be used by the people of all the floors;

(iv) that an Indemnity Bond dated 6th May, 2001 was also signed by the appellant/plaintiff and the builder Sh. Praveen Kumar Grover;

(v) that the appellant/plaintiff later sold and transferred the entire second floor with top mezzanine room (with roof right) vide Sale Deed dated 6th May, 2002 to the builder Sh. Praveen Kumar Grover as per the Collaboration Agreements dated 16th December, 2000 and 5th March, 2001;

(vi) that the builder Sh. Praveen Kumar Grover in turn sold the entire second floor with top mezzanine room (with roof right) to the respondents/defendants No.1 to 3 who occupied the same on 7th May, 2002;

(vii) that the respondents/defendants No.1 to 3 locked the entry to the terrace depriving the appellant/plaintiff from free access to the terrace to the second floor including the toilet built on the terrace and his two water tanks put on the top of the terrace for cleaning, repair etc.;

(viii) that the respondents/defendants No.1 to 3 had also illegally made unauthorized construction on the terrace above the second floor,

though they had no right, title and interest in respect of the said terrace as the appellant/plaintiff had transferred and conveyed only second floor with top mezzanine room (with roof right) to the builder Sh. Praveen Kumar Grover;

(ix) that the respondents/defendants No.1 to 3 were trying to construct a third floor on the terrace which was not permitted by any law and without any approval from the respondent No.4 MCD;

The appellant/plaintiff thus sought the reliefs of, (a) permanent injunction restraining the respondents/defendants No.1 to 3 from interfering in the use by the appellant/plaintiff of common facilities on roof; (b) injunction restraining the respondents/defendants No.1 to 3 from raising unauthorized construction on the terrace of the house; (c) mandatory injunction directing the respondent No.4 MCD to demolish unauthorized construction on the terrace; and, (d) mandatory injunction directing the respondents/defendants No.1 to 3 to unlock the staircase leading to the terrace thereby enabling the appellant/plaintiff to have free access to his rightful terrace and toilet on the roof of the second floor.

I may state that though the appellant/plaintiff had made certain other grievances also with respect to the use/dealing with certain other portions of the property but the senior counsel for the appellant/plaintiff having confined the arguments on the aspect of whether the terrace above the second floor stands conveyed/transferred to the respondents/defendants No.1 to 3 or not, need is not felt to burden this judgment with those details.

5. The respondents/defendants No.1 to 3 contested the suit by filing a written statement and in which with respect to the rights on the terrace, it was stated:

- (a) that there was no clause in the Collaboration Agreement that a toilet would be made on the roof of the second floor for keeping the plastic water tanks on the roof of the toilet and there was no agreement that the toilet will be used by people of all the floors;
- (b) that the appellant/plaintiff was wanting to encroach the terrace on the second floor which exclusively belonged to the respondents/defendants No.1 & 2;
- (c) that the appellant/plaintiff had vide Sale Deed conveyed/transferred the entire second floor with top mezzanine room with roof rights of the property and no rights in respect of the said portion remained with the appellant/plaintiff;
- (d) that the respondents/defendants No.1 to 3 had never obstructed the appellant/plaintiff from going to the terrace for cleaning and repairing of water tanks; so far as the toilet on the roof was concerned, the appellant/plaintiff had no right thereto having already sold the entire second floor with roof rights;
- (e) that the door to the terrace cannot be kept open all the times for security reasons;
- (f) that electricity connection to the roof of the entire second floor is from the electricity meter of the respondents/defendants No.1 & 2; similarly, the water connection to the toilet on the roof of the second

floor is also from the overhead tank of the respondents/defendants No.1 & 2;

(g) that the possession of the entire second floor with roof and top mezzanine room was given by the builder to the respondents/defendants No.1 & 2 on 8th May, 2002 and has throughout remained with the respondents/defendants No.1 & 2;

(h) that the appellant/plaintiff is the owner only of the ground and the first floors with two mezzanine rooms and open spaces on the ground floor.

The respondents/defendants No.1 to 3 in their written statement also made a counter-claim against the plaintiff and which counter-claim, it is informed, has been partly allowed, but the senior counsel for the appellant/plaintiff and the counsel for the respondents/defendants No.1 to 3 state that no grievance is made by either of them with respect to the decision/judgment on the said counter-claim. Again, for this reason, it is not deemed necessary to burden this judgment with details thereof.

6. The respondent/defendant No.4 MCD also filed a written statement pleading that the property had been inspected on 1st July, 2003 and no work of on going construction was found, though on an earlier occasion unauthorized construction on the ground, first and second floors had been noticed and order for demolition thereof had been passed.

7. The appellant/plaintiff filed replication denying that the terrace above the second floor belonged to the respondents/defendants No.1 & 2 and claiming that the same belonged to him and denying that no obstruction had

been caused to him in accessing the terrace for the purposes of cleaning and repairing the water tanks and pleading that there was no electricity connection on the roof of the second floor or in the toilet thereon and that the water connection to the toilet originally was from the overhead water tank meant for the ground floor and the respondents/defendants No.1 to 3 appeared to have tinkered therewith.

8. On the pleadings aforesaid of the parties, the following issues were framed on 9th February, 2005 in the suit and the counter-claim:

“(i) Whether plaintiff is entitled to declaration to the effect that defendant No.1 has no right, title or interest in the common areas of the suit property? OPP

(ii) Whether plaintiff is entitled to a relief of perpetual injunction restraining defendant No.1 to 3 from interfering in the movement of plaintiff regarding use of common facilities on roof? OPP

(iii) Whether plaintiff is entitled to the relief of mandatory injunction restraining defendant No.1 from raising unauthorized construction on the terrace of house in question? OPP

(iv) Whether plaintiff is entitled to decree of mandatory injunction against defendants No.1 to 3 to demolish the illegal and unauthorized construction raised on the second floor of premises bearing No.B-1/118 Paschim Vihar, New Delhi as shown in blue in the site plan? OPD

(v) Whether plaintiff is entitled to decree of mandatory injunction in his favour and against defendants No.1 to 3 directing to unlock the stair case leading to the terrace/roof of 2nd floor and thereby enabling the plaintiff to have free excess to his rights of terrace, toilet on the roof of 2nd floor and also direct defendants No.1 to 3 to stop commercial activities in the house in question?

(vi) Whether plaintiff is entitled to decree of mandatory injunction against defendants No.1 to 3 to remove unauthorized covering of the open spaces so that plaintiff may get proper

light and ventilation? OPP

(vii) Whether the suit is bad for not stating the value of suit for the purpose of court fee and jurisdiction as required under Order VII Rule 1(i) of CPC? OPD

(viii) Whether the suit is bad for not giving the date when the cause of action arose as per Order VII Rule 1(3) CPC? OPD

(ix) Whether plaintiff has no right, title or interest in the portion sold to defendants No.1 to 3? OPD

(x) Whether plaintiff has made encroachment/unauthorized construction as alleged by defendants No.1 to 3? OPD

(xi) Whether suit of the plaintiff is not maintainable for want of notice under Sections 477 & 478 of DMC Act? OPD-4

(xii) Whether plaintiff has no right to alter any of the common facilities like jet pump etc.? OPD”

9. The appellant/plaintiff examined only himself. The respondents/defendants No.1 to 3 besides examining respondent/defendant No.3, also examined four other witnesses including the builder Sh. Praveen Kumar Grover.

10. The learned ADJ in the impugned judgment, on the aspect of ownership/rights of the terrace to which aspect alone the hearing of the appeal is confined, has found/observed/held:

(A) that under the Collaboration Agreement, the builder Sh. Praveen Kumar Grover paid Rs.3.25 lakhs to the appellant/plaintiff and also bore all the expenses of reconstruction of the ground, first and second floors with mezzanine on each floor of the property and in consideration thereof, the appellant/plaintiff had agreed to transfer second floor with roof right and one mezzanine room to the builder Sh. Praveen Kumar Grover;

(B) that the description in the subsequent Sale Deed dated 6th May,

2002 executed by the appellant/plaintiff in favour of the builder Sh. Praveen Kumar Grover of the property conveyed as “entire second floor with top mezzanine room (with roof right)” was to be read in terms of the Collaboration Agreement;

(C) that under the Collaboration Agreement, the appellant/plaintiff was to remain the owner of the ground and first floors along with two mezzanine rooms;

(D) that the contention of the appellant/plaintiff, that deviation in the description of the property to fall to the share of the builder Sh. Praveen Kumar Grover from that in the Collaboration Agreement as of “second floor with roof right” to “second floor with top mezzanine (with roof right)” was intentional because the builder Sh. Praveen Kumar Grover had not raised the construction in terms of the Collaboration Agreement and for this reason it was agreed that the appellant/plaintiff would transfer the roof right of the mezzanine room instead of roof right of the second floor in favour of the builder Sh. Praveen Kumar Grover was not only without any pleading but the appellant/plaintiff had also not disclosed as to in what manner the builder Sh. Praveen Kumar Grover had not completed the construction in accordance with the Collaboration Agreement and no such suggestion was given to the builder Sh. Praveen Kumar Grover in cross-examination also;

(E) that on an analysis of the Collaboration Agreement and the Sale Deed, there was no ambiguity about the rights of the appellant/plaintiff and the builder Sh. Praveen Kumar Grover and the

words 'with roof right' in brackets in the Sale Deed were for second floor as well as the top mezzanine room;

(F) that had the appellant/plaintiff had no intention to transfer the roof right of the second floor to the builder Sh. Praveen Kumar Grover, the appellant/plaintiff would have certainly mentioned so in the Sale Deed by reciting that the appellant/plaintiff would keep the roof right of the second floor and which had not been done;

(G) that the appellant/plaintiff had sold/transferred the entire second floor including the roof right of the second floor in favour of the builder Sh. Praveen Kumar Grover and was left with no right therein;

(H) that the appellant/plaintiff only had a right to maintain his water tanks and T.V. antenna installed at the roof of the second floor and the respondents/defendants No.1 to 3 were directed to provide access to the appellant/plaintiff for the said purpose on advance intimation being given by the appellant/plaintiff;

(I) that directions were issued to the respondent/defendant No.4 to, take action with respect to the unauthorized construction, if any raised or to be raised on the roof of the second floor.

11. The senior counsel for the appellant/plaintiff has argued:

(I) that the question for determination is, whether the rights with respect to the roof above the second floor were transferred/sold/conveyed by the appellant/plaintiff to the builder Sh. Praveen Kumar Grover;

(II) that according to the appellant/plaintiff, what was sold/conveyed to the builder Sh. Praveen Kumar Grover was only the roof rights over the top mezzanine room and roof whereof is higher by 7-8 feet from the roof over the remaining property;

(III) that though under the Collaboration Agreement, the appellant/plaintiff had agreed to convey/transfer the roof above the second floor to the builder Sh. Praveen Kumar Grover, retaining the roof above the top mezzanine room with himself but since the builder Sh. Praveen Kumar Grover did not perform his obligations under the Collaboration Agreement in entirety, disputes and differences arose between the appellant/plaintiff and the builder Sh. Praveen Kumar Grover and which were resolved by providing that only the roof above the top mezzanine room would be sold to the builder Sh. Praveen Kumar Grover and the remaining roof above the second floor shall remain with the appellant/plaintiff.

12. It was at this stage enquired from the senior counsel for the appellant/plaintiff whether there was any evidence led of such dispute which according to the appellant/plaintiff was resolved by 'switching' the roof which was to belong to the appellant/plaintiff and to the builder Sh. Praveen Kumar Grover.

13. The senior counsel for the appellant/plaintiff contended that a Supplementary Agreement dated 5th March, 2001 at page 326 of the paper book was executed in this regard. However, upon being asked to show where such Supplementary Agreement recorded so, the senior counsel for the appellant/plaintiff states that it is not so recorded in the Supplementary

Agreement dated 5th March, 2001.

14. It has next been enquired from the senior counsel for the appellant/plaintiff whether any date of such dispute or of resolution thereof has been deposed of by the appellant/plaintiff.

15. The senior counsel for the appellant/plaintiff again fairly states that it is not so.

16. The counsel for respondents/defendants No.1 to 3 interjects at this stage and states that it was never the case of the appellant/plaintiff (and as would be apparent from the narration of the contents of the plaint as recorded above) that there were any dispute in implementation of the Collaboration Agreement or which were resolved by 'switching' of the roof/terraces as is being argued now.

17. The senior counsel for the appellant/plaintiff responds by contending that it was not required to be so pleaded and the pleading of the appellant/plaintiff that the appellant/plaintiff was the owner of the terrace above the second floor was enough. He however states that the appellant/plaintiff in the application for amendment of plaint filed in this appeal has sought amendment of the plaint to claim the declaration of rights of the appellant/plaintiff to the said terrace above the second floor.

18. The counsel for the respondents/defendants No.1 to 3 relies on ***Bachhaj Nahar Vs. Nilima Mandal*** (2008) 17 SCC 491 to contend that no amount of evidence can be looked into, upon a plea which was never put forward in the pleadings and a question which did not arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the Court and that in civil suits, the Courts cannot on

examination of facts grant a relief which is not sought. He also opposes the application for amendment of the plaint including by relying upon *Vasudev Vs. Rupkumari @ Banarso Devi* (2007) 94 DRJ 398 (DB) laying down that an amendment cannot be allowed to claim a relief which would be barred by time and that a relief which the appellant/plaintiff has had sufficient opportunity to claim and which has not been claimed inspite of amendment of the plaint, cannot be allowed to be added by way of amendment. It is argued that the appellant/plaintiff in the present case also had amended the plaint but still did not claim the relief as is now being sought by way of amendment.

19. The senior counsel for the appellant/plaintiff refers to the observations in para 9 of the judgment in *Vasudev* (supra) of the Division Bench of this Court to the effect that entire or substantial change in the basic cause of action cannot be permitted by way of amendment, to contend that the amendment sought in the present case is not substantial as the rights to the terrace is already in issue in the suit.

20. Coming back to the contentions of the senior counsel for the appellant/plaintiff, he further contends that the learned ADJ erred in relying upon the Collaboration Agreement and the same was barred by Section 91 & 92 of the Indian Evidence Act, 1872 and only the Sale Deed executed by the appellant/plaintiff in favour of the builder Sh. Praveen Kumar Grover is to be seen to determine whether thereunder the roof save for the roof above the mezzanine room has been conveyed or not and nothing else is to be seen. It is argued that nothing prevented the appellant/plaintiff and builder Sh. Praveen Kumar Grover from, in the Sale Deed changing what was

earlier agreed in the Collaboration Agreement.

21. It was enquired from the senior counsel for the appellant/plaintiff whether Sections 91 & 92 of the Evidence Act prohibit the use of, say an Agreement to Sell, as an aid in interpretation of the terms of Sale Deed executed in pursuance thereto.

22. It was further enquired from the senior counsel for the appellant/plaintiff as to how the appellant/plaintiff could urge that the Collaboration Agreement could not be looked into when the argument of the appellant/plaintiff himself as is being made today is that though under the Collaboration Agreement the roof above the mezzanine was to belong to the appellant/plaintiff and the remaining roof to the builder Sh. Praveen Kumar Grover, by a subsequent Agreement, they had agreed to switch the two roofs.

23. The only response is that the Collaboration Agreement cannot be looked into.

24. It is also enquired from the senior counsel for the appellant/plaintiff whether not the Collaboration Agreement has been incorporated by reference in the Sale Deed.

25. The senior counsel for the appellant/plaintiff responds that mere reference to a document in another document would not amount to incorporation thereof in the latter, unless the parties have expressly stipulated that the contents thereof would be read as part of the latter.

26. The counsel for the respondents/defendants No.1 to 3 has argued:

- (i) that the argument raised is contrary to the pleaded case;

- (ii) that the Sale Deed executed by the appellant/plaintiff itself records the same to be in pursuance of the Collaboration Agreement;
- (iii) that the Collaboration Agreement besides describing the portion of the property agreed to be sold to the builder Sh. Praveen Kumar Grover also describes the portion of the built up property which was to remain in the ownership of the appellant/plaintiff and which did not include reference to any terrace;
- (iv) that the appellant/plaintiff in the plaint had not claimed any relief to the effect that the respondents/defendants No.1 to 3 had no right to raise construction above the second floor and the only relief claimed was to injunct them from raising unauthorized construction;
- (v) that no relief of possession of the terrace has been claimed.

27. The senior counsel for the appellant/plaintiff in rejoinder has contended that the appellant/plaintiff in the amended plaint in para 16(a) has expressly pleaded that the terrace had not been sold; that the relief of restraining the respondents/defendants No.1 to 3 from locking the terrace was sought and there was no need to claim the relief of possession; that the Trial Court has in the impugned judgment not held that the appellant/plaintiff had not pleaded rights with respect to the terrace; that the issue to the said effect was also raised and has been answered; that the respondents/defendants No.1 to 3 had not responded to the argument of difference in the description of the property to be conveyed, between the Collaboration Agreement and the Sale Deed.

28. Since neither counsel during the hearing has referred to the oral evidence led and have argued their respective cases on the basis of contents

of the documents, need is not felt to discuss the plethora of testimonies of witnesses recorded by the Trial Court.

29. It is deemed appropriate to set out various relevant clauses of the undisputed documents in writing between the parties.

30. The relevant clauses of the Collaboration Agreement dated 16th December, 2000 in which the appellant/plaintiff is described as the owner, are as under:

“.....

6. *The builder would get Second floor (top floor) with roof right and one mezzanine while the owner would get Ground floor and first floor with two mezzanines and other open spaces.*

.....

8. *The General Power of Attorney/Sale Deed for the Second Floor with roof rights and with one mezzanine would be given to the builder after 60% completion of the three floors of the house in all respects or after six months from the date of commencement of the building construction whichever is earlier. This Power of Attorney/Sale Deed would be given to the builder with reference to the Collaboration Agreement signed between him and the owner of the plot. This could help the builder in booking the second floor and accepting its part payment.*

8(a). *Possession of the second floor with roof right and mezzanine would be given to the builder after fully completion of the three floors of the house in all respects. While getting the Power of Attorney for the second floor, the builder would give an undertaking to this effect separately – that he (the builder) would hand over the possession of the Second Floor to the prospective Buyer only after fully completion of the three floors of the house in all respects and after handing over the possession of the Ground Floor and First Floor to the Owner in writing.*

.....

18(d). Water tanks and Antinae for the Ground Floor, First Floor and Second Floor would be put on the top roof of the building and the occupants would have rights to go and check, repair and replace the same.

.....

20. Freehold of the property made by the owner to be done between 3-4 months. In case the freehold of the property is not done before the time of giving the General Power of Attorney, the owner would give Sale Deed Registry of the Second Floor with one mezzanine and roof right to the Builder at the time of getting the possession of the Ground Floor and First Floor from him (the Builder). This Sale Deed Registry would cancel the General Power of Attorney given earlier.”

31. The Supplementary Agreement dated 5th March, 2001 has no relevance in the present context. The Indemnity Bond dated 6th May, 2002 executed by the builder Sh. Praveen Kumar Grover in favour of the appellant/plaintiff *inter alia* records:

“AND WHEREAS as per their agreement, Builder Shri Praveen Kumar Grover, son of late Shri S.N. Grover, resident of House No.128, Block A-2, Paschim Vihar, New Delhi-110063 has handed over the physical possession of built in three floors with three mezzanine rooms to Dr. A.P. Singh and Dr. A.P. Singh in his turn has handed over the physical possession of entire Second Floor with top mezzanine room (with roof right) to Shri Praveen Kumar Grover on dated 6th May, 2002;”

and that the appellant/plaintiff after completion of 60% of the construction had in terms of the Collaboration Agreement granted a General Power of Attorney, Special Power of Attorney, Will, all registered and unregistered papers like Agreement to Sell and purchase receipt, Indemnity Bond, Agreement to appoint Arbitrator and affidavit but on conversion of the freehold rights in the land underneath the property and on execution of

the Sale Deed of the same day i.e. 6th May, 2002 executed by the appellant/plaintiff in favour of the builder Sh. Praveen Kumar Grover, all the said documents earlier executed had been cancelled and that the builder Sh. Praveen Kumar Grover will not make use of the same “with respect to entire second floor with top mezzanine room (with roof right)”. There is no mention of any dispute in implementation of the Collaboration Agreement or the settlement thereof by switching of terraces in this document also.

32. The relevant clauses of the Sale Deed dated 6th May, 2002 executed by the appellant/plaintiff in favour of the builder Sh. Praveen Kumar Grover are as under:

“WHEREAS both Dr. A.P. Singh and Shri Praveen Kumar Grover agreed as per the Collaboration Agreement that Shri Praveen Kumar Grover would pay a further sum of Rs.3,25,000/- (Rupees Three Lacs Twenty Five Thousand) only to Dr. A.P. Singh and Dr. A.P. Singh would hand over the entire second floor with top mezzanine room (with roof right) of the house built at B1/118, Paschim Vihar, New Delhi – 110063 to Shri Praveen Kumar Grover in lieu of constructing the three floors at B-1/118, Paschim Vihar, New Delhi – 110063 as per the Collaboration Agreement.

Further they agreed that once the plot is converted into freehold property, Dr. A.P. Singh, the absolute owner of the house at Plot No. B-1/118, Paschim Vihar, New Delhi – 110063, would transfer the entire second floor with top mezzanine room (with roof right) as per the clause 20 of the Collaboration Agreement signed on 16.12.2000 and 5.3.2001 to Shri Praveen Kumar Grover through Sale Deed registry.

AND WHEREAS in pursuance of the above mentioned Collaboration Agreement, the Vendor has agreed to sell and transfer the entire SECOND FLOOR with top mezzanine room (with roof right) of the above mentioned property at B-1/118,

Paschim Vihar, New Delhi – 110063, along with common rights to use common entrance, passage, staircase UNTO the Vendee (Builder-purchaser) Shri Praveen Kumar Grover, as per the conditions written hereinafter:

.....

2. That in consideration of the above said amount of Rs.3,25,000/- (Rupees Three Lacs Twenty Five Thousand) only as per the said Collaboration Agreement, the Vendor hereby sells, transfers and conveys the entire SECOND FLOOR with top mezzanine room (with roof right) of the freehold property built on residential plot of land bearing No.118, In Block No.B-1, measuring 300 sq. yds., situated in the colony known as Paschim Vihar, New Delhi – 110063, in lieu of above amount and construction of three floors, along with common rights to use common entrance, passage, staircase UNTO the Vendee, who shall hereafter be the absolute owner of the Second Floor with top mezzanine room (with roof right) and HOLD, USE AND ENJOY the same on permanent basis.

3. That the Vendee who happens to be the Builder of the three floors at Plot No.B-1/118, Paschim Vihar, New Delhi – 110063 has delivered the physical possession of the three floors with three mezzanine rooms to the Vendor (Owner), and the Vendor in his turn has handed over the physical possession of the entire Second Floor with top mezzanine room (with roof right) to the Vendee. That the Vendor is the absolute owner of the Ground Floor and First Floor along with two mezzanine rooms of the said property at B-1/118, Paschim Vihar, New Delhi – 110063 and the Vendee (Builder) has no claim of any kind over him or his property.

.....

10. That three water tanks (one each for the three floors) have been put on the top of the toilet (this is the single only construction done on the top of the second floor of the house at B-1/118, Paschim Vihar, New Delhi – 110063), T.V. Antennae, etc. would be installed on the top of the second floor, with right of maintenance of three items (water tanks etc.).

11. That in time of need, telephone, water and electricity connections could pass through terrace and shaft to the three floors of the house.

.....

16. That the entire second floor with top mezzanine room (with roof right) would be utilized only for residential purposes.”

33. I have considered the rival submissions and find that the appellant/plaintiff in the plaint did not carve out a distinction between the terrace above the mezzanine room and the terrace above the rest of the second floor. Rather, the site plan filed by the appellant/plaintiff and proved as Ex.PW-1/9 and to which attention of the senior counsel for the appellant/plaintiff, during the hearing, was drawn shows only one terrace and no two terraces. Though, I have hereinabove observed that there is no need to refer to the depositions recorded but I have perused the affidavit dated 23rd March, 2005 by way of examination-in-chief of the appellant/plaintiff to find out whether the appellant/plaintiff therein, though not in the plaint, has made out any case of switching of the two terraces as appears to have been argued before the learned ADJ and has been argued today on behalf of the appellant/plaintiff. I find absolutely nothing of the sort to have been even deposed by the appellant/plaintiff in his affidavit by way of examination-in-chief. However, I find that the appellant/plaintiff on the date fixed for his cross-examination filed another affidavit dated 28th July, 2005 by way of examination-in-chief along with additional documents and which was permitted to be taken on record and the appellant/plaintiff was cross-examined on the same day and closed his evidence. However, in the said additional affidavit also, it was merely deposed that owing to the

builder Sh. Praveen Kumar Grover not conforming to the technical/material standards of Collaboration Agreements dated 16th December, 2000 and 5th March, 2001, it was agreed that the builder Sh. Praveen Kumar Grover will get the second floor with top mezzanine room (with roof right) only instead of second floor with roof right and one mezzanine room as agreed earlier. There is no deposition therein also of there being two terraces or of, under the Collaboration Agreement, the terrace above the mezzanine room belonging to the appellant/plaintiff or of the subsequent Agreement being of terrace above the mezzanine room belonging to the builder Sh. Praveen Kumar Grover and the remaining terrace remaining with the appellant/plaintiff. The said argument as has been raised, appears to be an afterthought and the ingenuity of the counsel.

34. I have also perused the cross-examination by the appellant/plaintiff of the respondent/defendant No.1 Sh. Vipul Jain as well as of the builder Sh. Praveen Kumar Grover examined as DW-5 and do not find the appellant/plaintiff to have put to either of them also that under the Collaboration Agreement the terrace above the mezzanine room was to belong to the appellant/plaintiff and the remaining terrace to the builder Sh. Praveen Kumar Grover or that they had subsequently agreed to switching of the two terraces amongst themselves.

35. The plea of there being two terraces i.e. one above the mezzanine room and the other above the remaining construction portion is a material plea and which cannot be allowed to be urged without any foundation being laid therefor in the pleadings and having been proved in evidence. Not only has the appellant/plaintiff not pleaded the case which has been argued today

but there is no evidence also to the said effect. The counsel for the respondents/defendants No.1 to 3 is correct in placing reliance on ***Bachhaj Nahar*** (supra).

36. It cannot be lost sight of, that the appellant/plaintiff under the Collaboration Agreement had empowered the builder Shri Praveen Kumar Grover to book/agree to sell the portion of the property to fall to the share of the builder under the Collaboration Agreement and which admittedly included the terrace above the second floor. The said portion could not be changed without the consent of the person who had so booked or to whom the builder had agreed to so sell the second floor with terrace above. The appellant/plaintiff though was cautious enough to, at the time of executing the Sale Deed obtain the Indemnity Bond aforesaid from the builder, did not obtain any confirmation from the builder that the builder had not so booked/agreed to sell the second floor with terrace above or to obtain the signature of the purchaser from the builder agreeing to give up the terrace above the second floor and which the appellant/defendant would have done had there been any 'switching' of the terraces as is argued.

37. Though the aforesaid is sufficient to dismiss the appeal but I also proceed to interpret the admitted documents.

38. As far as, the contention of the senior counsel for the appellant/plaintiff, of the bar of Sections 91 and 92 of the Evidence Act is concerned, though the settled principle of law is that when the parties have entered into a formal contract, the contract must be construed according to its own terms and not be explained or interpreted by antecedent communications which led up to it, but in ***Tilakdhari Singh Vs. Maharaja***

Kesho Prasad Singh AIR 1925 PC 22, the Privy Council approved of the antecedent documents being taken into view for the purposes of identifying the thing demised and in ***Joseph Darmanin Vs. Carmer Micallef*** AIR 1946 PC 50 the Privy Council held resort to evidence as to previous negotiation to be impermissible to the extent the contract was unambiguous. Similarly the Halsbury's Laws of England, 5th Edition, Vol.32 in para 387 while also opining the law to be that where an executory contract has been carried out by deed, the contract is merged in deed in so far as deed covers the subject matter of the contract and cannot be used to vary the deed, nevertheless refers to ***Salaman Vs. Glover*** (1875) LR 20 Eq 444 where, upon a lease being granted pursuant to an agreement and in accordance with the schedule form, a proviso in the agreement excluding certain rights of land and air was read as if inserted in the lease. Reference in this regard may also be made to ***Investors Compensation Scheme Ltd. Vs. West Bromwich Building Society*** [1998] 1 All ER 98 hailed in para 364 of Halsbury's Laws supra as making a fundamental change in the principles by which contractual documents are construed, where the House of Lords held that interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract; though the principle of previous negotiation being excluded from the admissible background was also reiterated but with the observation that the boundaries of this exception were in some respects unclear.

39. Applying the said principles, I am of the view that where there is any

ambiguity in the conveyance, without varying the conveyance, the antecedent document can be used to determine the intention of the parties.

40. Reference in this regard can be made to ***U.P. Government Vs. Church Missionary Trust Association*** AIR 1948 Oudh 54 and ***Bepin Krishna Roy Vs. Priya Brata Bose*** 26 CWN 36. Mention may also be made to provisos V and VI to Section 92 of the Evidence Act which permit proof of usage or custom by which incidents not expressly mentioned in the contract are usually annexed to contracts of that description to the extent not repugnant to or inconsistent with the expressed terms of the contract and permitting proof of facts which show in what manner the language of a document is related to existing facts. Interestingly proviso VI to Section 92 in the words of Macleod CJ in ***Ganpathrao Vs. Babu Tukaram*** AIR 1920 Bombay 143 is one of the provisos which is the despair of judges and the joy of lawyers.

41. Though in my view, there is really speaking no ambiguity in the description in the Sale Deed of the property conveyed thereunder but since the said description is at variance with the description in the Collaboration Agreement and a case of ambiguity is so made out by the appellant/plaintiff, to remove the said ambiguity, the Collaboration Agreement can certainly be looked into, particularly when there is nothing in the Sale Deed to suggest that the same is not to be looked into or that there was any variation in the understanding/contract than as contained in the Collaboration Agreement.

42. The Supreme Court also in ***Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani*** (1991) 2 SCC 18 observed that while interpreting the agreement, the Court has to see what transpired before and after the

agreement and the intention of the parties can be gathered from antecedent circumstances. Similarly in ***Raj Kumar Rajinder Singh Vs. State of Himachal Pradesh*** (1990) 4 SCC 320 it was held that if the terms of the document are clear and unambiguous extrinsic evidence to ascertain the true intention of the parties is inadmissible because Section 92 of the Evidence Act mandates the intent to be gathered from the language in the document; but if the language employed is ambiguous and admits of a variety of meanings, the VIth proviso to the Section can be invoked which permits tendering of extrinsic evidence as to acts, conduct and surrounding circumstances to enable to Court to ascertain the real intention of the parties and to unravel the true intention. To the same effect is ***Godhra Electricity Co. Vs. State of Gujarat*** (1975) 1 SCC 199 where it was further laid down that it is only when the ambiguity is latent that extrinsic evidence is admissible.

43. The Supreme Court in ***Workmen of M/s Bata Shoe Co. (P) Ltd. Vs. M/s Bata Shoe Co. (P) Ltd.*** (1972) 3 SCC 627 also approved of the reference to the various previous settlements and discussions which took place between the workmen and the employers for the purpose of ascertaining the nature and character of the general bonus payable under a subsequent settlement between the parties.

44. Closer to the facts in hand is the judgment of the Supreme Court in ***Duncans Industries Ltd. Vs. Sate of U.P.*** (2000) 1 SCC 633 where to adjudicate, whether by the conveyance deed the plant and machinery was also transferred, it was held that it is imperative to ascertain the intention of the parties from the material available on record and that while ascertaining

the intention of the parties the contents of the agreement pursuant to which the conveyance deed had come into existence could not be precluded. The earlier judgment in *Himalaya House Co. Ltd. Vs. Chief Controlling Revenue Authority* (1972) 1 SCC 726 was held to be not laying down that a Court cannot look into prior agreements while considering the intention of the parties for finding out what actually is the property that is conveyed under the deed under consideration.

45. The Division Bench of this Court also in *Mercury Travels (India) Ltd. Vs. Shri Mahabir Prasad* 89 (2001) DLT 440 relied on the letters written prior to execution of two lease deeds with respect to the premises to determine whether the intention of the parties was to create two or a singular tenancy though observing that the letters were being seen not to interpret any clause of the lease deed in question but to ascertain the intention of the parties.

46. I am also unable to agree with the senior counsel for the appellant/plaintiff that the present is not a case of incorporation of the Collaboration Agreement in the Sale Deed. The recitals of the Sale Deed clearly record that the same was “in pursuance of the above mentioned Collaboration Agreement” and “in consideration.....as per the said Collaboration Agreement”. When a document describes itself as being made in culmination of obligations undertaken under an earlier agreement and for consideration as per the earlier agreement, the earlier agreement, in my view stands incorporated in the document and the document for its interpretation has to be read along with the earlier agreement save that in the event of an irreconcilable contradiction the latter document is to prevail. In

M.R. Engineers & Contractors Pvt. Ltd. Vs. Som Datt Builders Ltd. (2009)

7 SCC 696 it was held, (a) that there is a difference between reference to another document in a contract and incorporation of another document in a contract by reference; (b) that while in the first case the parties intend to adopt only specific portions or parts of the referred document for the purpose of the contract, in the second case the parties intend to incorporate the referred document in entirety into the contract; and, (c) that thus the Court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract or with intention of adopting or borrowing specific portions of the document for application to the contract.

47. Applying the said tests also, the Collaboration Agreement admittedly referred to in the Sale Deed, definitely stands incorporated in the Sale Deed to the extent of the consideration for which each party had executed the Sale Deed and which consideration as far as the builder Shri Praveen Kumar Grover was concerned, was acquisition of title to the second floor with terrace and the top mezzanine room.

48. Reference in this regard may also be made to ***Tariq Iftikhar Vs. Charanjit Lal*** 98 (2002) DLT 620 where the terms and conditions of the agreement to sell for specific performance of which the suit was filed were held to be part of the compromise deed entered into between the parties in the suit as the compromise deed referred to the terms and conditions of the agreement to sell and it was held that the said reference to the agreement to sell in the compromise deed proved and established that the parties intended to incorporate the terms of the agreement to sell in the compromise deed. It

was yet further held that those terms and conditions of the agreement to sell which are not inconsistent with the recitals in the compromise deed got incorporated in the compromise deed by the principle of incorporation.

49. Not only is there no contradiction between the Collaboration Agreement and the Sale Deed but in my view, the description in the Sale Deed of the property conveyed is itself clearly in harmony with that of the Collaboration Agreement.

50. I have during the hearing also enquired from the senior counsel for the appellant/plaintiff as to what are principles of interpretation of deeds in the context of the description in the Sale Deed of the property conveyed as “second floor with top mezzanine room (with roof right)” —whether the words ‘with roof right’ in brackets are to be read along with the words “top mezzanine room” only or with the words ‘second floor’ as well.

52. The senior counsel for the appellant/plaintiff fairly admits that he has not examined the said aspect.

53. My research in this respect also has not yielded any judgment qua interpretation of deeds. However as far as interpretation of statutes is concerned, though the matter has come up in *Sadhu Gangaram Bhagade Vs. Special Deputy Collector, Ahmednagar* 1970 (1) SCC 685, *Orient Traders Vs. Commercial Tax Officer, Tirupati* (2008) 12 SCC 440, *Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Ltd.* (2010) 9 SCC 536 and *Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.* (2011) 8 SCC 333 but no hard and fast rule has emerged. Rather the interpretation has been contextual, with *Sadhu Gangaram Bhagade* supra holding that the bracketed portion attaches itself only to the

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immediate preceding word and *Orient Traders* and *Nahalchand Laloochand Pvt. Ltd.* supra holding the bracketed portion to attach to the entire phrase.

54. The plot on which construction has been raised is 300 sq. yds. only. The records are totally bereft of what is the size of the terrace above the mezzanine room and that of the remaining terrace. Ordinarily, terrace above the mezzanine room would be incapable of any independent use. Rather, from the site plan filed showing the staircase from the ground floor to the upper floors at the other end, it appears that there is no independent access even to the terrace above the mezzanine room. When for the consideration agreed under the Collaboration Agreement, the terrace above the second floor was admittedly to belong to the builder Sh. Praveen Kumar Grover, it seems highly unlikely that the builder Sh. Praveen Kumar Grover would agree to switch over the said terrace which commands high commercial value with the terrace above the mezzanine room which independently has no commercial value, if at all the two are to be considered as separate.

55. A perusal of the various documents executed between the parties shows that the appellant/plaintiff whom the senior counsel for the appellant/plaintiff has repeatedly described as a retired scientist from the Indian Agricultural Research Institute was a very careful owner of the property having taken care to protect the minutest of his rights and having recorded each and every aspect agreed with the builder Sh. Praveen Kumar Grover. I find it beyond the preponderance of probability that such a careful person would upon such an important switch over of terraces being agreed, not only not reproduce the same into writing but not make any reference

thereto in the Sale Deed executed. The argument being now raised is clearly a dishonest attempt by the appellant/plaintiff to, after the commercial value of the terrace and the possibility of construction of a whole floor thereon with the increase by the governmental agencies of the FAR having dawned on him to usurp the same.

56. The counsel for the respondents/defendants No.1 to 3 is also correct in, in this respect, relying on the terms of the Collaboration Agreement describing the portion of the construction to be raised to fall to the share of the appellant/plaintiff. Had the Agreement between the appellant/plaintiff and the builder Sh. Praveen Kumar Grover then been of the terrace over the mezzanine room belonging to the appellant/plaintiff, the same would have been mentioned in the description of the portion of the new construction, possession whereof was to be delivered to the appellant/plaintiff. It is not so. The parties always treated the terrace as one i.e. over the entire property and never fathomed the terrace above the mezzanine room and the remaining terrace to be different or separate.

57. Similarly, had there been any switch over as has been argued, in the Sale Deed and the Indemnity Bond while describing the built up property, possession of which had been handed over by the builder Sh. Praveen Kumar Grover to the appellant/plaintiff and of which the appellant/plaintiff was described as the absolute owner, would have included the terrace.

58. Yet further, had the remaining terrace not been conveyed under the Sale Deed to the builder Sh. Praveen Kumar Grover and the reference to the terrace in the Sale Deed been to the terrace above the mezzanine floor only, the Sale Deed would have mentioned that the builder Sh. Praveen Kumar

Grover would have access to the terrace above the mezzanine from the remaining terrace. Yet further, had the terrace except for the terrace above the mezzanine room under the Sale Deed belonged to the appellant/plaintiff, there would have been no need for the said Sale Deed to provide that the water tanks of the ground and the first floors which belonged to the appellant/plaintiff would be installed thereon inasmuch as the appellant/plaintiff as owner of the terrace would in any case have been entitled to install his water tanks thereon.

59. Mention in this regard may also be made of Clause 18 of the Sale Deed, which is as under:

“18. That, in case the building collapses totally due to any calamity such as earth-quake, flood, fire, etc., the owners of the three floors would pool their resources equally and construct the three floors together and finally occupy their respective floors as they did before the calamity occurred. In case of collapse of top two floors, the owners of the top two floors would join hands to construct the top two floors. In case of collapse of only one floor, the concerned owner would build his floor on his own. In case of partial damage, the owners would repair their respective floors individually and separately. In case the occupants of lower floors i.e. Ground Floor and First Floor show their reluctance for constructing their floors, then they would bear the cost of beams/columns to enable the owner of second floor to carry out his construction as per the previous design of the house done in 2001-2002.”

60. Had the terrace above the second floor belonged to the appellant/plaintiff as owner of ground and first floors, the aforesaid clause would have provided either for the appellant/plaintiff joining in the reconstruction upon demolition of the second floor or for delivery thereafter

of the terrace above to the appellant/plaintiff.

61. Thus, whichever way one looks at, I am unable to find any merit in the case of the appellant/plaintiff, of the appellant/plaintiff having not conveyed the entire terrace of the property i.e. of including over the mezzanine room to the builder Sh. Praveen Kumar Grover under the Collaboration Agreement and the Sale Deed and the respondents/defendants No.1 & 2 as successors in interest of the builder Sh. Praveen Kumar Grover being not entitled thereto.

62. There is thus no merit in the appeal, which is dismissed. Though the present is a case calling for imposition of heavy costs on the appellant/plaintiff for having indulged in false litigation but considering the age of the appellant/plaintiff and his antecedents as retired scientist from the Indian Agricultural Research Institute and in the hope that at least now better sense would prevail over the appellant/plaintiff and he would not indulge in any further litigation, I refrain from doing so.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 05, 2013

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