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

+ **CS(OS) 930/2011**

% ***Judgment dated 28.02.2014***

ASHA JOHRI

..... Plaintiff

Through : Mr.Sukumar Pattjoshi, Sr. Adv. with
Mr.Sunil Mund, Mr.Manoj Kumar and
Ms.Bedashree, Advs.

versus

NEERJA MEHTA & ORS

..... Defendants

Through : Mr.S.K. Sharma, Mr.Rahul Sharma and
Mr.Prayas Aneja, Advs. for defendants
no.3 to 6.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Plaintiff has filed the present suit seeking a declaration in her favour that she is the lawful owner of the terrace floor/third floor of the property situated at L-18, Kailash Colony, New Delhi, (hereinafter referred to as 'the suit property'). The plaintiff also seeks permanent injunction restraining defendants from constructing any building till the plaintiff's right to the terrace floor (third floor) in the suit property is acknowledged and reserved.
2. Summons in the suit and notice in the application filed under Order XXXIX Rules 1 and 2 CPC were issued on 25.4.2011. On 25.5.2011, counsel for defendants no.3 and 4 had made a statement that defendants no.3 and 4 would not raise construction beyond second floor without prior permission of the Court. The Court had observed that the above statement

made by counsel for defendants no.3 and 4 would not come in the way of the building plan of the suit property, being sanctioned by the competent authority, subject to the plan otherwise being in order.

3. On 9.9.2013, following issues were framed in this matter:

“8. After hearing learned counsel for the parties, the following issues are framed:

(i) Is the plaintiff entitled to a declaration that she is the lawful owner of the terrace floor/3rd floor of the property L-18, Kailash Colony, New Delhi-48 as per the sale deed of 2006? **OPP**

(ii) Is the plaintiff entitled to permanent injunction against the Defendants restraining them from interfering with the lawful right of the Plaintiff in the terrace floor/3rd floor of L-18, Kailash Colony, New Delhi-48? **OPP**

(iii) Is the Plaintiff entitled to a declaration that the Will dated 14th May 2002 is illegal? **OPP**

(iv) Is the suit for declaration not maintainable under the provisions of the Specific Relief Act, 1963? **OPD**

(v) Is the suit bad for mis-joinder and non-joinder of necessary parties? **OPD**

(vi) Relief.

4. On the same date i.e. 9.9.2013, both the parties had agreed that issues no.1 and 2 can be decided without evidence being led as the documents, relied upon by the parties in relation thereto, were not in dispute. Arguments have been addressed by learned counsel for the parties on both the above issues.

5. Before the matter can be decided issue-wise, the brief facts and averments made in the plaint, are being noticed.
6. According to the plaint, the plaintiff sold the barsati floor and first floor of the suit property to one Mrs.Neerja Mehta and Mrs.Promilla Gulati, defendants no.1 and 2, respectively, in the year 2006, reserving her rights in the terrace. Mrs.Neerja Mehta and Mrs.Promilla Gulati thereafter sold the suit property to Smt.Neerja Rajput. Subsequently, defendants no.1 and 2 were deleted from the array of parties and Mrs.Neerja Rajput was arrayed as defendant no.1 and Mr.Dushyant Ajwani was arrayed as defendant no.2. At the stage, when the suit was filed the plaintiff was apprehensive that the present defendants i.e. defendants no.1 and 2 were planning to re-construct the building as the entire building stood demolished and the rights of the plaintiff in the terrace floor i.e. the third floor were not being respected. The plaintiff has sought a decree of declaration that the plaintiff is entitled to be declared the lawful owner of the terrace floor i.e. the third floor of the suit property. An injunction has also been prayed, restraining defendants from constructing any building till the rights of the plaintiff are decided.
7. As per the plaint, the plaintiff had purchased the first floor and barsati floor along with the terrace rights of the suit property, in the year 1975 from one, Mr.Bhagwanani. A copy of the said sale deed executed by Mr.Bhagwanani in favour of the plaintiff has been placed on record. Mr.Bhagwanani had purchased the suit property from Mrs.Mira Ajwani in the year 1963. A copy of the said sale deed executed by Mrs.Mira Ajwani in favour of Mr.Bhagwanani has also been placed on record. The sale deed by which the plaintiff sold the first floor to Mrs.Promilla Gulati has also been placed on record and so has the Sale Deed by which the plaintiff sold the barsati floor to Mrs.Neerja Mehta. Subsequently, the sale deeds,

by which Mrs.Neerja Mehta and Mrs.Promilla Gulati sold the property to Mrs.Neerja Rajput, have also been placed on record. The owner of the ground floor of this property is defendant no.2, Mr.Dushyant Ajwani, who is claiming the ownership rights on the basis of a Will dated 14.5.2002 of his late grand-mother, Mrs.Mira Ajwani.

8. For the purpose of deciding issue no.1, the aforesaid documents, which have been noticed by this Court, would be relevant. On careful examination of the documents and upon hearing the arguments of learned counsel for the parties issue no.1 is decided against the plaintiff and in favour of defendants. The basic reason for deciding issue no.1 against the plaintiff is that the series of documents referred to hereinabove do not show that the terrace i.e. the third floor of the suit property was ever sold to the predecessor in interest of the plaintiff by the owner and in case the terrace was not sold and the same was retained by the original owner, the plaintiff could not have reserved her right with respect to terrace (third floor) of the suit property while executing the two sale deeds in favour of Mrs.Promilla Gulati and Mrs.Neerja Mehta.
9. Admittedly, Mrs.Mira Ajwani was the owner of the entire suit property. By a Sale Deed dated 21.6.1963 Mrs.Mira Ajwani sold the first floor of the building including barsati with all fittings and fixtures. On the first page of the sale deed dated 21.6.1963 entered between Mrs.Mira Ajwani and Sh.Bhagwanani, it is stated as under:

“And whereas the Vendor has agreed to sell the first floor building including Barsati complete with all fittings and fixtures to the party of the second part for a sum of Rs.17,000/- (Rs.Seventeen thousand).”

10. Page 3 of the said sale deed again describes that the vendor has agreed to sell, convey, transfer and assign by way of absolute sale the said first floor

flat including Barsati with fittings and fixtures and with all rights, title, interests, access, easements, privileges and appurtenances thereto unto the vendee.

11. The purchaser of this property subsequently entered into a sale deed on 5.5.1975 wherein Mr.Bhagwanani sold the property to Mrs.Asha Johri, the plaintiff herein. Page 3 of the said sale deed also describes as to what was purchased by the plaintiff. Paragraph two of the sale deed also shows that the vacant possession of barsati consisting of one bed room, one store-cum-kitchen, one bath room and water closet on the second floor had been delivered to the vendee. Interestingly, the said sale deed has a detailed schedule of the property giving the floor-wise carpet area of the property. The schedule reads as under:

“SCHEDULE OF PROPERTY SOLD CARPET AREA OF THE PROPERTY

FIRST FLOOR

- | | | |
|----|-------------------------|---|
| a) | Drawing cum dining room | $19'-1\frac{1}{2}'' \times 10'-11'' = 210$ sq. feet. |
| b) | Bed Room | $9'-5\frac{1}{4}'' \times 12'-1'' = 114.41$ sq. feet. |
| c) | Bed Room | -do- |
| d) | Kitchen | $8'-7\frac{1}{2}'' \times 7' = 60.33$ sq. feet. |
| e) | Bath Room | $4'-0'' \times 6' = 24$ sq. feet. |
| f) | Water closet | $3'-6'' \times 6' = 21$ sq. feet. |

g) Front Varandah $8'-0'' \times 10'-11'' = 87.33$ sq. feet.

h) Back Varandah $8'-0'' \times 8' = 64$ sq. feet.

Total : 695.48 sq. feet.

Or Say 695.5 sq. feet.

Stair case Area $9'-5 \frac{1}{4}'' \times 12'-1'' = 114.41$ sq. feet.

BARSATI

a) Room $11'8'' \times 12' = 140$ sq. feet.

b) Store room cum kitchen $(73'' \times 59'')$
 $(42'' \times 39'')$

c) Bath $47'' \times 76''$ (AC sheet roof cover)

d) W.C. $76'' \times 44''$ (" ")

12. The aforesaid documents, in my view, would squarely answer issue no.1 as there is no dispute that Mrs.Mira Ajwani was the owner of the suit property. By the sale deed dated 21.6.1963 she sold the first floor and barsati to Mr.Bhagwanani. In the sale deed there is no mention of the terrace. Mr.Bhagwanani in turn sold the same to the plaintiff by sale deed dated 5.5.1975. While the Sale Deed gives a complete description of the portion sold, as detailed above, again there is no mention of the terrace. No doubt in the Sale deed executed by the plaintiff in favour of Mrs.Gulati and Mrs.Mehta, she has reserved her right with regard to the

terrace. In my view, this is a self-serving document executed by the plaintiff and reserving a right, which did not belong to her, cannot be of any benefit to her. Another aspect in the matter is the registered Will of Smt.Mira Ajwani, the original owner. The Will of Meera Ajwani reads as under:

“I, Mira Ajwani aged about 81 years, wife of late Shri Lachhman Das, Ajwani resident of L-18, Kailash Colony, New Delhi-110048, do hereby execute this my last WILL in a sound disposing state of mind and hereby revoke and cancel all testamentary dispositions made by me hereto before.

I hereby appoint Sh.Krishan Kumar Arora, S/o Sh Hari Dev Arora R/o C-85, Greater Kailash – I, New Delhi-110049 as executor of my will.

I am the absolute owner of immovable property bearing House No.L-18, Kailash Colony, New Delhi-110048 Ground Floor and 2nd floor terrace rights other than area under barsati and access thereto which I have already sold.

Whereas I am fully competent to dispose of the aforesaid property in any manner I like.

AND WHEREAS with a view to avoid any possible dispute amongst my legal heirs.

NOW, THEREFORE, of my own free will and without any pressure whatsoever from any quarter.

I hereby bequeath the aforementioned share in the property viz L-18 Kailash Colony, New Delhi-110048 as detailed above to my grandson Sh. Dushyant Ajwani S/o Sh Rajan Ajwani.

IN WITNESS WHEREOF I have signed this WILL of my own free will on 14th day of May, 2002 in the presence of the witnesses whose signatures appear hereunder

(MIRA AJWANI)
TESTATOR”

13. Mrs.Mira Ajwani in her Will dated 14.5.2002 has clearly bequeathed the ground floor and the second floor terrace rights, other than the area under barsati and access thereto, which she had already sold. Reading of the Will dated 14.5.2002 shows that the testator was aware that she had sold a part of the property and she very well knew what she had sold and what remained with her. She had clearly stated in the Will that she bequeathed to her grand-son, defendant no.2 herein, the ground floor and the second floor terrace other than the area under barsati.
14. Learned senior counsel appearing for the plaintiff has laboured hard to show that the sale deed of the year 1975 would indicate that the first floor and barsati was sold and therefore the floor above the barsati floor would be deemed to be a part of the barsati floor. It is further submitted by the senior counsel that in the schedule of the property even the staircase has been mentioned and in case the seller did not intend to sell the first floor, barsati and above, there was no reason for her to sell the staircase which would have all along remained a common area.
15. Another argument, which has been raised by learned senior counsel for the plaintiff is that in the sale deed the word ‘building’ has been used and therefore it would include the rest of the building. Both the submissions so made are without any force in view of the fact that in the two Sale Deeds and the Will the specific area sold has been mentioned. It has also been argued before this Court that a reading of the Collaboration Agreement would indicate the fact that the plaintiff had sold the barsati to

Mrs.Gulati, with terrace rights. This submission is also without any force as this fact, which has been noticed in the Collaboration Agreement, does not synchronise with the Will of Mrs.Ajwani.

16. It is also contended that the original seller had described the property as the ground floor, first floor and barsati and since she retained the ground floor, thus, it can be said that she sold the rest of the property to the plaintiff herein.
17. Reliance is placed on the communication addressed by the owner to the Assessor and Collector on 3.8.1968 by which she informed the Assessor and Collector that she had sold the first floor and barsati floor of the suit property and, therefore, separate house tax bills should be issued.
18. The submissions made by learned senior counsel for the plaintiff are without any force, on the ground that the original owner had written a letter to the Assessor and Collector that she should not be sent a bill for the entire property as she had sold the first floor and barsati of the suit property which cannot change the factual position as obviously the only other constructed portion was the ground floor and she was entitled to pay house tax only for the said floor. The reading of the relevant portions of the sale deed, which have been extracted hereinabove, would clearly show that the original seller merely sold the first floor and barsati floor in the year 1963 to Mr.Bhagwnani who in turn sold it to the plaintiff in the year 1975. In both the sale deeds there is no mention of the floor above the second floor. Further a bare reading of the Will along with the Sale Deeds of 1963 and 1975 and comparison of the same with the subsequent Sale Deeds executed by the plaintiff in favour of Mrs.Gulati and Mrs.Mehra would show that the plaintiff has made a unilateral improvement on the area by including the terrace floor which was never a subject matter of the previous two Sale Deeds of 1963 and 1975.

19. Since issue no.1 is decided in favour of defendants and against the plaintiff and the issue no.2 is interlinked to issue no.1 upon which Court has come to a finding that the plaintiff has no right, title or interest on the terrace above the second floor, the defendants cannot be restrained from carrying out any construction over the property. Accordingly the plaintiff is not entitled to any injunction restraining defendants for the same.
20. As far as issue no.3 is concerned, it may be noticed that defendants have filed a petition for grant of probate, in which the objections have been filed by the plaintiff. It may also be noticed that in the plaint although it has been stated that the Will is illegal but there is no challenge either to the signature of the testator nor it is said that the Will is executed in suspicious circumstances and, thus, the authenticity of the Will is not in challenge. Thus, issue no.3 would have no bearing to the present case, as in case the Will is not proved by the defendants in probate then it would have a different bearing on the entire matter. As far as, issues nos.4 and 5 are concerned, counsel for the defendants submits that he does not wish to press them.
21. Accordingly, suit stands dismissed.

G.S.SISTANI, J

FEBRUARY 28, 2014

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