

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

+ **RSA No.92/2012**

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March 4, 2014,

MOKUL INTERNATIONAL LTD. & ANR. Appellant

**Through: Mr. Arun Kumar Varma, Mr. Vikrant
Vasisth and Mr. Joydeep
Bhattacharya, Advs.**

VERSUS

VEENA PAINTAL Respondent

**Through: Mr. Naveen Kumar Chaudhary,
Mr. Shiv B.Chotry and Mr. Rajesh
Kumar, Advs.**

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal is filed against the concurrent judgments of the courts below; of the trial court dated 22.2.2010 and the first appellate court dated 31.01.2012; by which the suit filed by the respondent/ plaintiff for permanent and mandatory injunction and mesne profits was decreed by granting the following reliefs:-

“13. Relief

*In view of the findings given in the above issues,
the plaintiff is entitled to the following reliefs:*

1. *Plaintiff is entitled to the decree of mandatory injunction against the defendant in respect of unbuilt area of the suit property, as delineated and shaded in the red in the site plan and exhibited as Ex.PW1/4. The defendants are directed to remove their goods and material from the aforesaid unbuilt area of the suit property forthwith.*

2. *A decree of permanent injunction is hereby passed in favour of the plaintiff, thereby permanently restraining the defendants from using the unbuilt area of the suit property and for permanently restraining the defendants for using the built area of the suit property for any commercial purpose or for any purpose other than residential.*

3. *The plaintiff is entitled for recovery of mesne profits @ Rs.15,000/- per month since 10.11.01 till the vacation of the suit property. Further, plaintiff is also entitled to future interest @ 9% per annum on the principal amount that is calculated in respect of mesne profit till the passing of decree.*

Decree sheet be prepared accordingly after court fees in respect of the mense profit is deposited. Plaintiff is also entitled to cost. File be consigned to record room after due compliance.”

2. The issue in the present case is with respect to an open area of about 1140 sq. ft. adjoining the constructed area of about 1110 sq. ft. situated on the barsati floor/ third floor of the residential unit at 71, Paschimi Marg, Vasant Vihar, New Delhi-110057. There is no dispute that so far as the constructed area of the third floor admeasuring 1110 square ft. is concerned

and that the appellant/ defendant is the owner of the same, but, the dispute is with respect to the adjoining open space of approximately 1140 sq. ft. Appellant no.2 claims that this open space unbuilt area of 1140 sq. ft. forms part of the property which she had purchased from one Ms.Savita Narayan under an Agreement to Sell etc dated 28.01.1994. Ms. Savita Narayan had purchased the same from the original owner late Lieutenant General Rajender Singh Paintal, and whose widow Veena Paintal was the plaintiff in the suit. Smt. Veena Paintal, expired during the pendency of the suit and is now represented by her legal heirs.

3. The issue in this case is as to whether Lieutenant General Rajender Singh Paintal sold and transferred the open space of about 1140 square feet to Ms. Savita Narayan under the Agreement to Sell dated 25.03.1991, inasmuch as, only if Ms.Savita Narayan, the predecessor-in-interest of the appellant no.2 was given ownership rights of this open space of 1140 sq. ft. under the Agreement to Sell dated 25.3.1991, then the appellant no.2 could have purchased the same from Savita Narayan.

4. Both the courts below have referred to the Agreement to Sell dated 25.03.1991 executed between the predecessor-in-interest of the appellant no.2/Ms. Savita Narayan and late Lieutenant General Rajender Singh

Paintal, and have held that what is transferred under the Agreement dated 25.03.1991 is only the constructed area of 1110 sq. ft. of the third floor and not the additional adjoining open space of 1140 sq. ft. This Agreement to Sell has been proved and Exhibited as Ex.PW-1/3 in the trial court.

5. I have gone through the Agreement to Sell dated 25.03.1991 (Ex.PW-1/3), and found that the transfer of interest by the same was only in the constructed area/third floor/barsati floor comprising of 1110 sq. ft. and the agreement is not for the additional adjoining area of 1140 sq. ft. The relevant portion of this Agreement showing the transfer of interest which is the subject matter of the Agreement reads as under:-

“And whereas the First Party has agreed to Sell and the Second Party has agreed to purchase all of the constructed built up area measuring about 1110 sq. ft. on the barsati floor i.e. the third floor consisting of one residential unit, comprising of 3 bedrooms with attached batrooms, a drawing-cum-dining room, kitchen and lobby along with the proportionate rights in the plot of land situated at 71, Paschimi Marg, Vasant Vihar New Delhi (hereinafter referred to as Pent House) for a total consideration of Rs.8,00.00 (Rupees eight lakhs only) payable in the manner as hereinafter appearing.

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2. *That the sale as hereunder includes the sale/transfer by the First Party of all rights, title and interest, privileges, appurtenance, easements and ways as also right of existing support from the second floor with respect to PENT HOUSE to the Second Party, the right to use all common utilities such as lift, bore water pull system, municipal water storage and pumping system etc. The Second Party will bear pro-rata expenses of utilities and common staff such as lift operator, water pumps man etc.”*

6. A reference to the aforesaid paras make it more than abundantly clear that what is sold is only the constructed built up area of 1110 sq. ft. on the barsati floor. Therefore, the contention of the appellants that appellant no.2 herein and her predecessor-in-interest Savita Narayan also had purchased ownership rights in 1140 sq. ft. of open space adjoining the third floor/barsati floor is really misconceived and so rightly held against them by the Courts below.

7. Learned counsel for the appellants sought to argue before this Court that rights such as appurtenance/easements etc which are mentioned in para 2 of the Agreement Ex.PW-1/3 dated 25.03.1991 will include the adjoining open space of 1140 sq. ft., but, I cannot accept this Agreement inasmuch as neither the Agreement dated 25.03.1991 says so nor can I extinguish valuable rights in an immovable property of a value of at least Rs.10 crores of the respondents/plaintiffs by a strained reading of the agreement. I am

stating the value of Rs.10 crores as an approximation and it is possible that the value may be a few crores more or few crores less but the issue is not what is the exact value but the issue is surely of a property of many crores of rupees.

8. If there was any doubt that the open space of 1140 sq. ft. was not transferred to Savita Narayan and thereafter to the appellant no.2, the same becomes clear from the MOU (Ex.PW-1/5) executed between late Lt. Gen. Rajender Paintal and Ms. Savita Narayan which was proved before the trial court by the plaintiff. By this MOU, late Lt. General Rajender Singh Paintal gave rights to use the open space of 1140 sq. ft. to Ms. Savita Narayan only for a period of seven years. Therefore, once the entitlement to use the open space is given only for seven years, surely there was no permanent transfer of ownership rights of this open space to Savita Narayan, the predecessor-in-interest of the appellant no.2 (and therefore to the appellant no.2 from Savita Narayan) for her to transfer the same to the appellant no.2 by means of the Agreement to Sell etc dated 28.1.1994. I may note that the appellants have not proved before the trial court the documentation dated 28.01.1994 by which the appellant no.2 purchased rights of Ms. Savita Narayan, but in any case, appellant no.2 can only

purchase rights which Ms. Savita Narayan had no more. Since Ms. Savita Narayan had ownership rights only in the constructed area and not beyond seven years in the disputed open space, the appellant no.2 could not become owner of the open space of 1140 sq.ft.

9. Learned counsel for the appellants argued that courts below had wrongly given benefit of the MOU Ex.PW1/5 dated 25.03.1991 to the respondent/plaintiff inasmuch as the document was not proved and the appellants had only admitted to the signatures of Ms. Savita Narayan on this document but the signatures of Lieutenant General Rajender Singh Paintal have not been proved on this document by the plaintiff. It is also argued that the admission on the part of the appellants was only of the signatures of Ms. Savita Narayan on the MOU, and the document is not proved because Ms. Savita Narayan was not brought into the witness box by the plaintiff.

10. I cannot agree with the arguments urged on behalf of the appellants because the MOU was exhibited as Ex.PW1/5 without any objection by the appellants at the time of exhibition of the MOU. Once no objection is raised at the time of exhibition of the documents, the document is proved as held by the Supreme Court in the case of ***R.V.E Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P.Temple & Anr. 2003(8) SCC 752.***

Also, the MOU is of the same date by which Ms. Savita Narayan had purchased the constructed third floor barsati portion from Lieutenant General Rajender Singh Paintal. If appellants were of the view that the said MOU was not executed between Savita Narayan and late Lieutenant General Rajender Singh Paintal, it was upon the appellants and not the respondent/plaintiff to summon the said Savita Narayan, and which the appellants did not do. In any case, as already held in detail above, that the Agreement to Sell Ex.PW1/3 dated 25.3.1991 did not give any rights of the open space of 1140 sq. ft. to Ms. Savita Narayan, and who therefore could not transfer the rights of the open space to the appellant no.2 herein.

11. Learned counsel for the appellants finally argued that the suit as framed for mandatory injunction was not maintainable and that the respondent/plaintiff had to sue for declaration of title with possession, and for this purpose, reliance is placed upon the judgment of the Supreme Court in the case of *Anathula Sudhakar vs. P.Buchi Reddy (Dead) by LRs. and Ors., 2008 (4) SCC 594*. Reliance is placed upon following paragraph of the aforesaid judgment, which reads as under:-

“17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in *Annaimuthu Thevar* (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and

straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

12. Appellants placed reliance upon the judgment of Supreme Court in *Anathula Sudhakar*(supra) to argue that a suit for injunction was not maintainable in the present case as the plaintiff was not in possession of the open space and also that issues of title cannot be gone into in a suit for injunction.

13(i) In my opinion the paragraph of the judgment of the Supreme Court in the case of *Anathula Sudhakar*(supra) relied upon by the appellants in fact goes against the appellants because paragraph holds that it is perfectly possible in a suit for injunction, once there are sufficient pleadings, to go into the questions of title. So far as the aspect that the suit in question should have been a suit claiming possession and not mandatory injunction, when I asked the counsel for the appellants/ defendants to show me if any

such objection was raised in the written statement, there was no option to the counsel but to concede that no such objection was raised that the suit filed could not have a suit for mandatory injunction but had to be a suit for possession. Also, because of no such pleadings having been made by the appellants, no such issue has also been framed by the trial court.

(ii) In any case, the objection raised with respect to the suit being only a suit for mandatory injunction and not for possession has been rightly dealt with by the first appellate court and held against the appellants by referring to the judgment of the Supreme Court in the case of ***Sant Lal Jain Vs. Avtar Singh***, ***AIR 1985 Supreme Court 855***. The first appellate court has dealt with this aspect in paras 18 and 19 of the judgment and which read as under:-

*“18. Appellants have contended that the suit for injunction alone was not maintainable in view of law laid down in the matter of **Anathula Sudhakar vs. P.Buchi Reddy** (supra). In that matter, it was held that where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction is the remedy. Appellants have themselves admitted that Lt. Gen. Rajinder Singh Paintal acquired the plot of land bearing No.71, Paschimi Marg, Vasant Vihar, New Delhi, as sub-lessee on lease hold basis from DDA. The built up area of third floor has been agreed to be sold to the appellants herein. No dispute or*

cloud is raised with respect to title of the suit property as agreement to sell in itself is not a document of title. Further as observed earlier, the agreement to sell was not executed with respect to unbuilt area which is the subject matter of the present suit. The owner of unbuilt area indisputably in view of the observations made above is the respondent and hence there is no dispute of title at all with respect to unbuilt area. It was held in **Anathula Sudhakar vs. P. Buchi Reddy (supra)**, that where the plaintiff has clear title supported by documents, if a trespasser without any claim or title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. The respondent herein is the sole legal heir of Lt. General Rajinder Singh Paintal and in his favour perpetual lease deed in respect of property No.B-71, Paschimi Marg, Vasant Vihar, New Delhi, has been executed by President of India and accordingly, plaintiff has clear title supported by documents. Thus there was no need for plaintiff to claim the relief of declaration.

In Sant Lal Jain vs. Avtar Singh, AIR 1985 SC 855, it was held that "After the termination of licence, the licensee is under clear obligation to surrender his possession to the owner and if he fails to do so, we do not see any reason why the licensee cannot be compelled to discharge this obligation by way of mandatory injunction under Section 35 of Specific Relief Act.

19. As the licence in favour of appellants was terminated vide notice dated 10.11.2001, learned trial court has rightly passed the decree of mandatory injunction against the appellants in

respect of unbuilt area of the barsati/third floor and appellants were rightly directed to remove their goods and material from the aforesaid unbuilt area. Similarly, I find no infirmity in the decree of permanent injunction having been passed in afavour of the respondent thereby permanently restraining the appellants from using the unbuilt area of the suit property and permanently restraining the appellants from using the unbuilt area of the suit property for any commercial purpose or for any purpose other than residential.”

(iii) Actually, the issue of the suit ought to have been a suit for possession is really a case of much ado about nothing because what is to be seen is the substance of claim and the relief, and by the relief of mandatory injunction actually benefit of user is claimed because the space in question is an open space and not constructed space. Even if the suit had to be suit for possession, the issue will only be of court fees and the issue of court fees is really between the State and the private party. This issue would have arisen only if there were sufficient pleadings to buttress issue but as already stated, there are no pleadings with respect to non-maintainability of the suit on the ground that the suit filed should have been the suit for possession and if such issue had been raised the court could have always called upon the respondent/plaintiff to pay additional court fees.

14. In view of the above, no substantial question of law arises for this appeal to be maintainable under Section 100 of CPC, and the same is therefore dismissed leaving the parties to bear their own costs.

Any amount which has been deposited in this Court by the appellants towards mesne profits as decreed by the trial court, can be withdrawn by the respondents along with accrued interest thereon, in appropriate satisfaction of the money decree against the appellants.

MARCH 4, 2014
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VALMIKI J. MEHTA, J.