

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

Reserved on: 10.12.2013
Pronounced on: 15.01.2014

+ **RFA (OS) 14/2013**

CAP. VIJAY KUMAR TREHAN Appellant
Through: Sh. Anil Amrit with Mr. Anurag Abhishek,
Advocates

Versus

DR.SUSHIL KUMAR TREHAN AND ANR. Respondents
Through: Ms. Meenakshi Lekhi with Mr. Hemant
Malhotra and Mr. Jitendra Tripathi, Advocates
Ms. Eshita Baruah, for Mr. Gaurang Kanth, Advocate for
respondent.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. This is an appeal against an order of the learned Single Judge in CS(OS) No.901/2010, concerning the parties' shares and related rights to a property bearing number B-2, Defence Colony, New Delhi (hereafter "*the suit property*").
2. The facts leading to this dispute are as follows: the appellant was the plaintiff in the suit. The first two defendants were his brothers, and the third and fourth defendants, his sisters. It is undisputed that the suit property was owned by Dr. Capt. Bhagat Ram Trehan, the father of the parties, who bequeathed the property to the three sons (the plaintiff/Capt. VK Trehan, the first and second defendants). The case of the plaintiff was that under the terms of the registered will, which was undoubtedly admitted between the parties,

“he was given 1/3rd share comprising of entire ground floor except garage, lavatory and adjoining garage, defendant no. 2 was given 1/3rd share comprising entire first floor except annexe over the garage and defendant no. 1 was given his 1/3rd share comprising of entire second floor, garage on the ground floor, lavatory adjoining the garage and annexe over the garage, with permission to construct the second floor annexe. The third and subsequent floor could also be constructed by the plaintiff and defendants no. 1 and 2 with joint investment/contribution and in the event of such a construction, the advantage of the same was to be equally shared by all three brothers. The covered area bequeathed to the plaintiff, defendant no. 1 and defendant no. 2 is stated to be 1269.03 sq. ft., 1221.23 sq. ft. ad 1215.43 sq. ft. respectively.”

Subsequently, it is further undisputed, (and as the learned single judge recorded), that the first defendant sold the garage located on the ground floor, by a sale deed dated 14.10.2004, as also the lavatory adjoining garage and *annexe* over the garage to the plaintiff. Later, the second defendant sold the whole of his entire 1/3rd share in the suit property to the plaintiff by a sale deed dated 15.10.2004. The plaintiff's case in the suit was that in view of the will dated 16.4.1986 and the sale deeds dated 14.10.2004 and 15.10.2004 executed by the first two defendants in his favour, he was entitled to more than 2/3rd of the total (floor area ratio (FAR)) permissible in respect of the suit property. It is also his contention that the first defendant started illegal construction over the second floor thereby trying to go beyond the FAR area falling to his share and that he has illegally replaced *barsati* on the second floor by drawing cum dinning, a lounge *verandah*, two bedrooms, kitchen, store and an open “sit out” garden. It was further alleged that the first defendant also started illegal erection of a wall over the first floor annexe. The plaintiff therefore, sought the relief of permanent injunction against the first defendant from using and occupying the FAR area beyond his entitlement and from carrying on any further construction over suit property. Several consequential injunctive reliefs too were sought.

3. The first defendant's written statement argued that the construction which the plaintiff claims to be illegal was raised during the lifetime of the parties' father, Capt. Bhagat Ram Trehan. His will, dated 16.4.1986, as well as the sale deeds

executed by the first two defendants in favour of the plaintiff were admitted in the written statement. It is further claimed that the plaintiff is the co-owner in respect of 2/3rd share of the suit property comprising of ground floor and first floor whereas the first defendant was the co-owner to the extent of remaining 1/3rd undivided share comprising of second floor. It was also alleged that the rest of the property was meant for common usage including the lawn, front open space in the rear portion as also proportionate rights in the basement own floor and upper floor, as and when constructed in terms of the will. It was alleged that at the time of dividing the suit property amongst his three sons by the will, the late father had taken into consideration the comparative market value of each floor bequeathed to his sons and since there was only a limited construction on the second floor at that time, the first defendant was compensated by giving him additional space on the ground floor of the suit property as well as *annexe* over the said garage with permission to construct second *annexe*. The first defendant disputed the extent of the covered area alleged by the plaintiff in respect of various portions of the suit property.

4. The Municipal Corporation of Delhi (MCD), the fifth defendant, in its written statement stated that upon inspection of the property on 10.07.2010 certain existing deviations were found but they were compoundable in terms of existing norms. It was also averred that the owner of the second floor had applied for regularization of the existing constructions which were compoundable.

5. After considering the parties' submissions as well as the materials on the record, the learned single judge rejected the plaintiff's contentions, *inter alia*, holding as follows:

"It would not be correct to say that vide Will dated 16.4.1986, late Dr. Capt. Bhagat Ram Trehan had bequeathed 1/3rd undivided share each in the land underneath the property bearing number B-2, Defence Colony, New Delhi to his three sons. Late Dr. Capt. Bhagat Ram Trehan was a well-educated person as is evident from his being a doctor, holding the

position of a Captain. Had his intention been to bequeath 1/3rd undivided share each in the leasehold rights of the plot on which this building has been constructed to all the three sons, he would have stated so in the Will executed by him. The contention that since late Dr. Capt. Bhagat Ram Trehan referred to the ground floor except garage and lavatory adjoining garage as 1/3rd of the property, the first floor of the building as the other 1/3rd share and the second floor, garage, latrine adjoining garage and annexe over garage with permission to construct the second annexe as the remaining 1/3rd of the property, cannot be accepted at this calculation, does not take into account the terrace of the second floor and the construction which could be raised on the floors higher than the second floor. If the whole of the leasehold rights are deemed to be covered in the specific portions bequeathed to the plaintiff, defendants no.1 and 2, there is no explanation with respect to the leasehold rights proportionate to the terrace of the second floor and the construction which could be raised above the second floor. In my view, late Dr. Capt. Bhagat Ram Trehan loosely referred to the specific portions being bequeathed to his three sons and 1/3rd share each in the property whereas in fact he had bequeathed different specific portions of the constructions which already existed at the time of execution of the Will without any division of leasehold rights in the land.

8. It is contended by the learned counsel for the plaintiff that the covered area bequeathed to the plaintiff and defendants no.1 and 2 being almost equal, the intention of their father was to bequeath 1/3rd undivided share in the leasehold rights of the plot to all his three sons. This argument is fallacious for two reasons. Firstly, the covered area bequeathed to the plaintiff and defendant no.1 and 2 is not exactly equal even as per the calculation given by the plaintiff. Moreover, the value of the per sq. ft. area of the upper floor and annexe portion including garage cannot be equal to per sq. ft. value of the ground floor. The value per sq. ft. of the garage and the annexe would be comparatively less. The contention of the learned counsel for the defendant no.1 is that in fact late Dr. Capt. Bhagat Ram Trehan had done value-wise deviation of the property by way of his Will dated 16.4.1986 as would be evident from the fact that in addition to second floor which had lesser construction as compared to ground floor and first floor, garage on the ground floor as well as annexe portions were also given to defendant no.1. However, there is

absolutely no evidence to prove what was the value of the portions bequeathed to the plaintiff, defendants no.1 and 2 at the time of execution of the Will dated 16.4.1986. It is, therefore, difficult to accept even the contention raised by the learned counsel for the defendant no.1.

9. During the course of arguments, I specifically asked the learned counsel for the plaintiff as to what exactly the plaintiff would achieve if it is held that he is entitled to more than 2/3rd of the total FAR available for construction in this property. This becomes important considering the fact that since whole of the ground floor except garage and lavatory adjoining garage was given to the plaintiff, whole of the first floor with permission to construct a canopy was given to defendant no.2 and the entire second floor with garage, lavatory adjoining garage and annexe over garage with permission to construct second annexe was given to defendant no.1, coupled with the right to each of them to build more in their respective floors with the permission of MCD. No appropriate answer to this question was forthcoming from the learned counsel for the plaintiff, who submitted that in the event plaintiff wanted to sell his share, he could sell the same with more than 2/3rd share in the leasehold rights in the plot on which the building has been constructed. In my view, considering the stipulations contained in the Will dated 16.4.1986, there could be no controversy as regards the respective rights of the parties in the suit property. Admittedly, the ground floor of the main building having come to the share of the plaintiff, he can raise such further construction on the ground floor as is permitted by MCD under the relevant building byelaws. Since he has already purchased the first floor and first floor annexe from defendants no.2, he can also raise such construction as is permitted by MCD on the first floor or on first floor annexe. If any additional construction is raised by the plaintiff on the ground floor, with the permission of MCD, the right to raise construction on the first floor of that portion shall also be with him only. Since the second floor has been given to defendant no.1, he can raise such construction on that floor as is permitted by MCD. Defendant no.1 who has while selling the garage, lavatory adjoining garage and first floor annexe to the plaintiff specifically retained his right to build over the roof of the first floor annexe. Hence, any further construction on the roof of the first floor annexe, to the extent it is permitted by MCD, can be raised only by defendant no.1. The construction on the third floor including on the terrace of the second floor

annexe if constructed by defendant no.1, can be raised by the plaintiff and defendant no.1 jointly with joint funds in the ratio of 2/3rd and 1/3rd respectively and the 2/3rd of such construction would fall to the share of the plaintiff whereas remaining 1/3rd of such construction would come to the share of defendant no.1. This, in my view, is the correct interpretation of the Will executed by late Dr. Capt. Bhagat Ram Trehan. If the plaintiff wants to sell his share in the suit property, he would be at liberty to do so, in the aforesaid terms.

10. For the reasons stated hereinabove, the suit is disposed of in terms of following directions:

(i) The plaintiff can raise such construction on the ground floor and first floor, including first floor annexe of property bearing number B-2, Defence Colony, New Delhi as is permitted by MCD and defendant no.1 will have no right to object to the same.

(ii) Defendant No. 1 can raise such additional construction, on the second floor, as is permitted by MCD.

(iii) If any additional construction is raised by the plaintiff on the ground floor and/or first floor, defendant no.1 would be entitled to raise the construction at the second floor level of such construction, after obtaining permission of MCD.

(iv) Defendant no.1 would be entitled to construct the second floor annexe, if so permitted by MCD.

(v) The annexee on the third floor and higher level as well as the construction of the third floor and higher floors to the extent permitted by MCD can be carried jointly by plaintiff and defendant no.1. For such a construction, the plaintiff would contribute 2/3rd of the cost of construction whereas defendant no.1 would bear the remaining 1/3rd of the cost of construction. The area constructed on the third and higher floors whether in the main building or in the annexee, would be shared by the plaintiff and defendant no.1 in the ratio of 2/3rd and 1/3rd each."

6. The appellant urges, through his counsel as well as in the pleadings in this case, that the learned single judge fell into error while interpreting the will and the

registered sale deeds by which the plaintiff acquired rights over the suit property from his brothers. It was argued that whilst there is no controversy that one brother – i.e. the second defendant gave up all his rights, a look at the sale deed executed by the first defendant too would lead to the same conclusion. It was underlined here that the first defendant gave up his rights over the garage as well as the *annexe* over that structure. The purport of the father's will was that each brother was entitled to equal and proportionate share of the plot and the structure put up by him. The compensatory nature of the bequest by which the first defendant was "compensated" due to lack of any development on the second floor, was by giving exclusive title to the garage and *annexe* built over it and it did not undermine the intention of the testator that all his sons were to enjoy the plot in an equal 1/3rd measure. This in turn meant that if one of them parted with his rights, wholly or in part in favour of an outsider, the latter would have a right to insist upon his equal and proportionate share in respect of any future construction over the second floor. Thus, instead of the plaintiff, if the vendee of the garage and the *annexe* were to be an outsider, the latter would have the right to insist over a proportionate undivided share of the future construction of the third floor. Thus, learned counsel argued that by occupying the FAR area beyond the entitlement under the will, the first defendant had transgressed the bequest made by way of the will. Given the fact that neither the will nor the subsequent sale deeds have been denied, learned counsel urged that the correct interpretation of the will would indicate the appellant is entitled to a proportionate right to the FAR in the suit property *subsequent* to the transfers by the sale deeds, as the intention of father/testator would otherwise be contorted. It was urged that the appellant, after purchasing the share of the second defendant, became the owner of 66% of the suit property, and further, after purchasing a part of the share of the first defendant became the owner of 88.889% of the constructed approved suit property. Accordingly, learned counsel argued that this increased ownership (and possession) of the suit property also entitled the appellant to have an increased FAR proportionate to the increase in his ownership share. Although the exact calculation of the FAR, counsel

submitted, was a matter to be decided by the municipal authorities, the increased share percentage ownership by the appellant entitled him to an increase in the ratio of constructed area in the suit property as well.

7. The question arising in the present case concerns the interpretation of a registered will, and the nature of the bequests made to the parties. Accordingly, it is helpful at this juncture to quote the relevant extracts from the will in question: “... That after the demise of my wife this property should be shared between my sons as detailed below:

“That 1/3rd undivided share in this property will be owned by Capt. Vijay Kumar. comprising of ground floor except garage, small Indian Pattern Latrine adjoining garage, and Annexe. And other 1/3rd of undivided share in this property shall belong to my second son Ravinder Kumar comprising of first floor of this house and a permission of constructing a canopy in front as per M. C. Rules for which other sons will not object. And the balance 1/3rd should be owned by third and younger son Dr. Sushil Kumar comprising of entire second floor, garage, latrine adjoining garage, annexe over garage and permission of constructing second annexe as per M. C. Rules. All the three sons can build more in their respective floors with the permission of Municipal Corporation of Delhi. That all the shareholders above referred will respect each and other in regard to free usage of staircase, lawns and passages unrestrictedly. However, I except that none of them will park his car in front in the working hours of the clinic in the garage if made. That all the taxes of L&DO and MCD shall be borne and paid equally 1/3rd proportionately by each. However, to maintain the house and general supervision will be the duty of my eldest son Shri Vijay Kumar and expenses incurred will be borne equally. In future, if MCD allows to construct third and subsequent floors and third or subsequent annexes, shall be constructed with joint investments and share the advantages and benefits equally.”

8. Thus, the registered will in question clearly allocates rights over the suit property to the brothers, and foresees, to a certain extent, rights of the brothers as regards future construction in the property. While construing wills, the Court must

determine the true intention of the testator from the words employed in the will, and should not travel beyond. As the Supreme Court recognized in *Veerattalingam and Others v. Ramesh and Others*, AIR 1990 SC 2201,

“[i]t is well-settled that a court while construing a will should try to ascertain the intention of the testator to be gathered primarily from the language of the document; but while so doing the surrounding circumstances, the position of the testator, his family relationship and the probability that he used the words in a particular sense also must be taken into account. They lend a valuable aid in arriving at the correct construction of the will.”

The wording of the present will, and the allocation of rights amongst the brothers, is clear and unambiguous. The allocation in the will was with regard to rights over specific parts of the suit property, as opposed to a generalized FAR allocation. Indeed, the property rights were intricately divided between the parties, and specifics were mentioned in the Will itself. This militates against the conclusion that the intention of the testator to divide the *value* of the property, as opposed to specific portions of the property itself. Arguably the testator might have been motivated to provide his sons with equal value, the wording of the will is determinative. The appellant herein is undoubtedly the owner of the ground floor, and by virtue of the subsequent sale deeds, the first floor and the first floor *annexe*, and accordingly, may raise any construction on that portion of the property as is permitted by the MCD, just as the first defendant may do so with regard the portion of the suit property owned by him, i.e. the second floor. Whether this may *factually* amount to a certain percentage of the available FAR -as claimed by the appellant- is irrelevant, but rather, the rights associated with the property run with the portion of the property bequeathed to the parties, and thus, owned by them. Therefore, even as regards any subsequent construction of subsequent floors or *annexes*, the appellant, having acquired the entire $\frac{1}{3}$ rd share of the second defendant, would be entitled to $\frac{2}{3}$ rd of the benefit (along with payment of $\frac{2}{3}$ rd of funds). The plea that the rights in the property must be assessed from the prism or

perspective of available FAR, calculated proportionately to the percentage ownership of the property (which the appellant claims is approximately 89%), finds no nexus with the wording of the Will. This argument aims to impute an intention alien to the document which is the basis of the rights between the parties.

9. Accordingly, for the above reasons, the impugned judgment and order of the learned single judge does not warrant interference. The appeal fails and is thus consequently dismissed. No costs.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

JANUARY 15, 2014