

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

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Date of decision: 19th April, 2016

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RFA 579/2006

RAM RANI DHINGRA

..... Appellant

Through: Mr. Rakesh Dhingra, Adv.

Versus

VIRENDER BHATIA & ORS

..... Respondents

Through: Mr. Sameer Nandwani, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 19th May, 2006 of the Court of Additional District Judge (ADJ), Delhi of dismissal of Suit No.445/2003 for recovery of Rs.3,60,000/- as compensation for damage caused to the immovable property.

2. The appeal was accompanied with an application for condonation of 23 days delay in filing thereof. Notice of the application for condonation of delay was issued and vide order dated 6th August, 2007, the delay in filing the appeal was condoned and the appeal admitted for hearing. The counsels were heard on 26th August, 2015 and judgment reserved. The trial court record

requisitioned has been perused. The counsel for the appellant / plaintiff has also filed written submissions.

3. The appellant on 1st July, 2003 instituted the suit from which this appeal arises pleading i) that the appellant / plaintiff is the owner in occupation of house No.324, Tarun Enclave, Pitampura, New Delhi; ii) that at the time the appellant / plaintiff constructed her house in or about the year 1988-89, the adjoining plots No.323 and 325 were lying vacant; iii) that subsequently in the year 1994, a house was constructed on plot No.325 by one Mr. R.K. Jhanji; iv) subsequently in the year 1996-97, the owner of plot No.323 constructed a *kachcha* house; v) thereafter the three respondents / defendants viz. Mr. Virender Bhatia, Mr. Vijay Bhatia and M/s Bhatia Estates Pvt. Ltd. purchased property No.323 and in or about the year 1998-99, demolished the *kachcha* construction and commenced digging for laying 'DPC'; vi) that the respondents / defendants left the digging open for a long time which resulted in sliding of soil from the adjoining dug up plot No.323 to beneath the foundation of the house of the appellant / plaintiff; vii) that the respondents / defendants in the year 2000 raised a three storied house on plot No.323; viii) that during the construction by the respondents / defendants of the first floor of property No.323, because of the improper and illegal methods adopted by the

respondents / defendants, severe damage was caused to house No.324 of the appellant / plaintiff; ix) that initially some repairs were got done by the respondents / defendants in the property of the appellant / plaintiff but thereafter subsequent cracks appeared; x) that the respondents / defendants carried out the construction at property No.323 without following the sanctioned plans; xi) that because of the improper and illegal methods adopted by the respondents / defendants during construction of their property, severe damage has been caused to the property of the appellant / plaintiff; xii) that though the respondents / defendants initially promised that they will get the needful repairs carried out but sold the property No.323 without rectifying the damage caused to property No.324 of the appellant / plaintiff; xiii) that over a period of time, more deepening cracks in the walls and ceiling of the property of the appellant / plaintiff have appeared because of continued pressure of building on plot No.323 and adjusting of soil underneath, all because of malpractices committed by the respondents / defendants while constructing on plot No.323; xiv) that the experts engaged by the appellant / plaintiff have also opined that the damage to the property of the appellant / plaintiff is due to the negligent and careless construction by the respondents / defendants on the adjoining property; xv) that as per the report of the Architect / Civil Engineer,

the damage to the property of the appellant / plaintiff is of Rs.3,00,000/- besides loss on account of shifting from the house by the appellant / plaintiff in a rented house amounting to approximately Rs.60,000/-; and, xvi) that the cause of action for the suit accrued in July, 2000 when the cracks first appeared in the property of the appellant / plaintiff, in October, 2000 when further cracks developed and finally in December, 2002 when the respondents / defendants refused to carry out repairs as earlier promised by them.

4. The respondents / defendants contested the suit by filing a joint written statement pleading i) that the suit claim was barred by time; ii) that construction at property No.323 was commenced in the month of January, 2000 on the basis of the site plan got sanctioned and was carried out in April, 2000 and stopped temporarily and thereafter the property was sold in an unfinished condition to one Mr. Surrender Kumar Bansal on 5th June, 2000 vide an Agreement to Sell and Mr. Surrender Kumar Bansal after completing the construction has sold the property to Mrs. Priya Mittal vide Agreement to Sell dated 16th December, 2000; iii) that there was no construction by the respondent / defendant no.1 at the site after April, 2000; iv) that the respondents / defendants no.2&3 have nothing to do with the suit property which belonged exclusively to the respondent / defendant no.1; v) that the

respondents / defendants are in the business of construction for 35 years and have earned a reputation for their honesty, *bona fides* and best quality of construction and material used by them; vi) that the suit is a device on the part of the appellant / plaintiff to save her house from being sealed and demolished for the reason of unauthorized construction therein; vii) that the appellant / plaintiff has covered 100% of the plot area instead of 60% as permitted under the law; viii) that the appellant / plaintiff has constructed a canopy of 10 feet instead of 8 feet; ix) that the appellant / plaintiff had covered the rear set back and front set back on the first floor; x) that the appellant / plaintiff had constructed a room on the top floor without any sanction from municipal authorities; xi) that no damage attributable to the respondent / defendant no.1 has been caused to the property of the appellant / plaintiff; xii) that the respondent / defendant no.1 had not kept any excavated portion open for a long time; xiii) that the respondent / defendant no.1 had not carried out any repair work in the property of the appellant / plaintiff at any time; and, xiv) that no reports of the experts if any hired by the appellant / plaintiff has been furnished.

5. Though the appellant / plaintiff is found to have filed a replication but need to refer thereto is not felt.

6. On the pleadings of the parties, the learned ADJ on 11th August, 2003 framed the following Issues in the suit:

“(1) Whether the suit is barred by limitation as claimed in P.O.

No.2 in the written statement? OPD

(2) Whether the suit is bad for misjoinder of parties? OPD

(3) Whether the property of the plaintiff has suffered damages due to acts or omission or negligence on the part of defendants as alleged in the plaint? OPD

(4) Whether the plaintiff is entitled to recover the damages, if so, to what amount the plaintiff is entitled? OPD.

(5) Relief.”

7. The appellant / plaintiff besides examining her son as her attorney, examined one government approved contractor and registered valuer as an expert and one neighbour. The respondents / defendants besides examining the respondent / defendant no.2 Sh. Vijay Bhatia, examined one building contractor.

8. The learned ADJ has vide the impugned judgment and decree dismissed the suit finding/observing/holding:

- (i) that the appellant / plaintiff had not given any specific date when the cracks appeared in her property and the son and attorney of the

appellant /plaintiff in his cross-examination stated that he did not remember the exact date, month and year when the cracks first appeared in the property; all that he stated was that cracks occurred when the construction was going on and before Mrs. Priya Mittal shifted to the house;

- (ii) however the attorney of the appellant / plaintiff in his cross-examination further stated that the construction on plot No.323 was initially done in the year 1998-99 when the first 'DPC' was laid;
- (iii) that from the evidence of the appellant / plaintiff, it is clear that construction work was carried out in property No.323 in 1999-2000;
- (iv) that the respondents / defendants had proved the Agreement dated 10th January, 2000 vide which they purchased the property and the Agreement dated 5th June, 2000 vide which they sold the property to Sh. Surrender Kumar Bansal;
- (v) that the objection of the appellant / plaintiff of admission into evidence of the said Agreements to Sell on the ground of the same

being not registered was of no avail since at that time the Agreement to Sell was not required to be registered;

- (vi) that thus the respondents / defendants remained owner in possession of plot No. 323 from 10th January, 2000 to 5th June, 2000;
- (vii) that the appellant / plaintiff had not proved in which month of the year 2000 digging in property No.323 had taken place though the attorney of the appellant / plaintiff stated that second digging took place during the year 1999-2000;
- (viii) that on the basis of the evidence led by the appellant / plaintiff, it was proved that cracks had developed in the property of the appellant / plaintiff between January, 2000 till June, 2000;
- (ix) that under Article 113 of the Limitation Act, 1963 the period of limitation to file a suit to recover damages is three years;
- (x) that no explanation had been given as to why the appellant / plaintiff kept on silently watching the cracks till 31st January, 2003 when notice was issued;
- (xi) that the suit filed in July, 2003 was thus barred by time;

- (xii) that since the damage claimed by the appellant / plaintiff was attributed to respondents / defendants, non-impleadment of the owners from whom the respondents / defendants has purchased the property or the person to whom the respondents / defendants had sold the property was of no consequence; hence Issue No.2 was decided in favour of the appellant / plaintiff and against the respondents / defendants;
- (xiii) that the respondents / defendants had failed to prove any sanctioned plan but the same would not necessarily connote damage to the property of the appellant / plaintiff;
- (xiv) that the expert examined by the appellant / plaintiff was the son-in-law of the appellant / plaintiff;
- (xv) that though on account of relationship alone the testimony of the expert could not be discarded but his testimony otherwise does not inspire confidence and unequivocally conveys bias towards the appellant / plaintiff;
- (xvi) that the expert had even otherwise not given any conclusive finding and had only guessed the reasons for damage to the property of the appellant / plaintiff without carrying out any tests;

- (xvii) that there was inconsistency in the case of the appellant / plaintiff in the notice preceding the suit and in the evidence and an attempt to improve the case was evident;
- (xviii) That the photographs proved by the appellant / plaintiff showed cracks only on the upper portion of the walls; if the cracks had occurred due to caving in of the soil beneath the foundation walls of the house of the appellant / plaintiff, certainly cracks would have appeared on the floor or the lower portions of the walls; absence of such cracks showed that the cracks on the upper portions of the wall did not develop due to seepage of water from the adjoining property;
- (xix) that the appellant / plaintiff though was required to prove the probable cause of cracks but had not done so;
- (xx) though the appellant / plaintiff had instituted the suit herself and not through her attorney but shied away from appearing in the witness box;
- (xxi) that the doctrine of *res ipsa loquitur* invoked by the counsel for the appellant / plaintiff was not applicable because the cause of the cracks had not been established;

(xxii) that though the appellant / plaintiff had also claimed that the damage to her property was owing to sub-standard material used by the respondents / defendants but the appellant / plaintiff had failed to prove that also; and,

(xxiii) that when the appellant / plaintiff had failed to prove negligence on failure of duty on the part of the respondents / defendants, the question of award of damages did not arise.

9. The counsel for the appellant / plaintiff *inter alia* argued i) that the learned ADJ erred in holding the suit claim to be barred by time; that the suit was filed on 1st July, 2003 i.e. on the first day of opening of the Courts after summer vacations; ii) that the respondent no.2, as a counterblast to the suit from which this appeal arises, had also filed a suit for recovery of damages for defamation against the appellant / plaintiff and which suit was also tried along with the suit from which this appeal arises and was dismissed; iii) that the learned ADJ has not considered the evidence led by PW3 Mr. Jayant Gandhi in the suit for defamation; iv) that the question of the suit being barred by time did not arise also because the damage to the property of the appellant / plaintiff is of a continuous nature and covered by Section 22 of the Limitation Act and extends the period of limitation of three years under Article 113 of the

Limitation Act; and, v) that the learned ADJ has not correctly appreciated the evidence.

10. The counsel for the respondents / defendants merely supported the judgment of the trial Court.

11. The affidavit by way of examination-in-chief of Mr. Jayant Gandhi and his cross-examination which have been annexed by the counsel for the appellant / plaintiff to the written submissions are not found on the trial court record. Though a reading of the order sheet of the trial court does show that the two suits, i.e. the suit from which this appeal arises and the suit aforesaid filed by respondent/defendant no.1 against the appellant/plaintiff for recovery of damages for defamation, were ordered to be tried by the same Court as common questions arose in both and to avoid conflicting judgments but also contains an order refusing to consolidate the two suits as Issues had been separately framed in both the suits and evidence had also been separately recorded though the two were being listed on the same date. In this scenario, it is not understood as to on what basis the counsel for the appellant / plaintiff wants this Court to read the evidence recorded in the other suit especially when the appellant /plaintiff did not take any steps for having the said evidence placed on record of the suit from which this appeal arises. Mention may also be

made of the fact that the appellant /plaintiff has not even bothered to place the judgment in the other suit before this Court.

12. That brings me to the aspect of limitation. No specific Article of the schedule to the Limitation Act is found to provide the period of limitation for the suit of the present kind. Thus the residuary Article 113 which provides for a limitation of three years commencing from the date when the right to sue accrues would apply. It has been so held by the learned ADJ also and has not been controverted by either of the counsels. The question which arises is as to when right to sue would accrue.

13. The relationship between the parties is not contractual. It is also not the case of the appellant/plaintiff that the respondents/defendants have violated any law or omitted to do anything which he was by an enactment in force for the time being required to do, resulting in loss/damage to the appellant/plaintiff. The claim of the appellant/plaintiff is thus based on tort i.e. breach of duty leading to damage. This duty is towards persons generally and its breach is redressable by an action for damages. Supreme Court, in ***Jai Laxmi Salt Works (P) Ltd. Vs. State of Gujarat*** (1994) 4 SCC 1 explained that the cause of action to claim damages arises when the actual loss has taken place and injury suffered and not the date when the negligence took place. This Court in

K.L. Juneja Vs. Bawa Dan Singh 1997 (40) DRJ 684, in the context of claim for damages on account of personal injury suffered owing to construction activity by the defendant, in the context of Article 113 held that sometimes injuries are latent and their effect appears only after some time; in those cases it cannot be said that the starting point of limitation should be the day when the accident took place.

14. I have perused the pleadings and the evidence of the appellant / plaintiff in this light.

15. The appellant / plaintiff, in the plaint, though in the substantive paragraphs did not give any date and merely stated that during the construction by the respondents / defendants of first floor damage was caused to the property of the appellant / plaintiff which was initially got repaired by the respondents / defendants and 'after that' more cracks appeared but in the cause of action paragraph pleaded that the cracks developed in October, 2000.

16. The son and attorney of the appellant / plaintiff in his affidavit by way of examination-in-chief deposed that the cracks first developed in July, 2000; however in cross examination he stated he could not remember the exact month and the date when the first crack occurred and that he did not ask for stoppage of construction work by the respondents / defendants when he first

noticed the crack but added that the cracks occurred when the construction work was going on. Upon being asked when the construction commenced, he stated that it was initially done in the year 1998-99 and subsequently carried out in the year 2000.

17. The neighbour examined by the appellant / plaintiff also deposed of the construction having taken place in the year 2000 and was not cross examined on the aspect of limitation.

18. The expert and son-in-law of the appellant / plaintiff in his affidavit by way of examination-in-chief did not depose about the date when the cracks had developed and was not cross examined on the said aspect.

19. The respondents / defendants though in their written statement took the plea of limitation but without any particulars and merely on the basis of the averment in the plaint of digging having been done in the year 1998-99 and to which the appellant / plaintiff in the plaint had attributed the cracks.

20. However, as I have already held hereinabove the date of commencement of limitation would be the date of occurrence of loss/damage and not the date of occurrence of the cause of loss/damage inasmuch as without the loss/damage being known to the appellant / plaintiff, no cause of action would accrue to the appellant / plaintiff.

21. The respondents / defendants in their evidence denied having dug up the foundation of the plot and claimed having commenced construction on the second floor only of the house and having sold the house with unfinished second floor to Sh. Surrender Kumar Bansal on 5th June, 2000.

22. The learned Additional District Judge held the suit to be barred by time without analysing when the right to sue would accrue and swayed by the averments of the appellant/plaintiff of the cracks being attributable to the respondents/defendants having left their plot of land dug up for long and which digging up happened more than three years prior to the institution of the suit and by the document of sale of 5th June, 2000 provided by respondents/defendants and whereafter the respondents/defendants could not have continued the construction. However, the said dates are irrelevant as aforesaid. The relevant date is the date when cracks attributable to the respondents/defendants appeared in the walls of property of appellant/plaintiff and about which the respondents/defendants have not said anything whatsoever inspite of the onus of the issue of limitation being on them.

23. In the factual scenario aforesaid I am unable to agree with the finding of the learned ADJ of the suit claim being barred by time. It is the categorical case of the appellant / plaintiff that the cracks occurred in the year 2000 and

without the respondents / defendants establishing that the cracks had appeared more than three years prior to the institution of the suit i.e. prior to 1st July, 2000, the suit ought not to have been dismissed as barred by time.

24. That brings me to the more important question of whether any damage has been caused to the property of the appellant / plaintiff and if so whether the same is attributable to the respondents / defendants.

25. I find on the trial court record four photographs of walls having hairline cracks thereon but visible to the naked eye. The respondents / defendants have not challenged the said photographs being of the property of the appellant / plaintiff. The same show cracks existing in the walls of the property of the appellant / plaintiff. However, merely because cracks have appeared in the property of the appellant / plaintiff does not mean that the construction by the respondents / defendants on the adjoining plot is the cause thereof. The cracks can appear for diverse reasons and the doctrine of *res ipsa loquitur* has no applicability thereto. In fact there is nothing to show that the cracks on the walls visible in the photographs are not old i.e. of a date prior to commencement of construction on plot No.323. No scientific test has been conducted to determine the age thereof.

26. The expert examined by the appellant / plaintiff though son-in-law of the appellant / plaintiff opined that the cracks had developed due to slip of soil underneath the foundation of the property of the appellant / plaintiff and that it seemed that at the time of construction of adjoining property No.323 while excavating the foundation, water may have flown underneath the property of the appellant / plaintiff resulting in slippage of soil underneath the foundation thereof. In his cross examination, he stated that the cracks varied from negligible to 2mm to 5mm width though it was not so stated in his report and that he inspected the property on 21st December, 2000 when some portion of adjacent property No.323 was still lying dug up; however the next moment he changed his statement and stated that no part of the property was dug up at that time. In reply to the question whether the cracks could be attributable to earthquakes, which he admitted to have occurred since the construction of the property, he stated that if it had been so, there would have been cracks on the other side of the property abutting property No.325.

27. I am of the opinion that the said expert of the appellant / plaintiff has not been able to prove that the cause of the cracks was attributable to the construction on the adjoining property. All that he deposed was that the cracks were attributable to the respondents / defendants because of seepage of water

underneath the foundation of the property of the appellant / plaintiff from the excavation carried out by the respondents / defendants for construction of their property. However if that were to be so, then that would mean that digging of foundation for every construction would cause damage to the adjoining property and which is not the case. I also find it strange that though the expert was the son-in-law of the appellant / plaintiff but he claims to have been called in only on 21st December, 2000 when according to the appellant / plaintiff cracks had occurred in the first half of the year 2000. It is unbelievable that if any damage was being caused to the property of the appellant / plaintiff while construction of the adjoining property was going on, she would not have immediately gotten it examined from her son-in-law as she ultimately did and would not have immediately taken steps to restrain the respondents / defendants from causing any further damage to her property.

28. I have also perused the evidence of the son and attorney of the appellant / plaintiff and of the neighbour examined by the appellant / plaintiff and in their testimonies also did not find the appellant / plaintiff to have proved that the cracks in her property were attributable to the respondents / defendants.

29. I therefore tend to agree with the reading of the evidence in this regard by the learned ADJ and the learned ADJ in his judgment having dealt exhaustively with the testimonies, do not feel the need to reiterate the same.

30. For the appellant / plaintiff to succeed in her claim for compensation for damage caused to her property, she was required to prove that the damage was attributable to something which the respondents / defendants ought to have done and had not done or to something which the respondents / defendants ought not to have been but had done. Without the appellant / plaintiff proving that, even if the damage occurred to the property of the appellant/plaintiff during construction raised by the respondents / defendants on adjoining plot of land, the plaintiff would have no claim for compensation against the respondents / defendants. It cannot be lost sight of that the lay out plan sanctioned by the authorities of new colonies invariably provides for small size plots and the building bye-laws do not require any buffer / set back between the constructions of two houses. It cannot also be lost sight of that owners of adjoining plots of lands are not compelled to raise construction at the same time and one is bound to construct after the other. If in such situation, if inspite of due care having been taken, damage occurs to the adjoining property owing to the necessity of digging along the foundation of already built up

adjacent house, the same will not give rise to a claim for compensation. Such damage, after all can also be attributable to defects/faults in own construction, of not foreseeing impact of construction in future on adjoining plots and safeguarding against any damage therefrom.

31. I therefore find the appellant / plaintiff to have failed to prove her case and no error can be found with the judgment of the learned ADJ of dismissal of the suit of the appellant / plaintiff.

32. Resultantly, the appeal is dismissed. However I refrain from imposing costs.

Decree sheet be drawn.

APRIL 19th, 2016
'gsr'

RAJIV SAHAI ENDLAW, J.