

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

% *Judgment Reserved on : January 12, 2016*
Judgment Delivered on : January 18, 2016

+ **FAO (OS) 342/2015**

SUSHILA AGARWAL Appellant
Represented by: Mr.Jayant Mehta, Advocate with
Mr.Surabh Dev Karan Singh and
Ms.Madhavi Khare, Advocates

versus

PARSHOTAM SARUP AGARWAL & ORS. Respondents
Represented by: Ms.Tamali Wad, Advocate for R-1
and R-4
Mr.D.P.Mohanty, Advocate for R-2

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICEINDERMEET KAUR

PRADEEP NANDRAJOG, J.

1. Perpetual lease-hold rights concerning the suit property in M-Block, Connaught Place, New Delhi was admittedly in the name of late Sh.Ram Sarup Agarwal and his brother late Sh.Bisan Sarup Agarwal. The litigation concerns R.S.Agarwal's branch of the family. It is between the branches of his four sons named (i) M.S.Agarwal; (ii) B.S.Agarwal; (iii) P.S.Agarwal; and (iv) V.S. Agarwal. Three suits are pending on the original side of this Court.

2. CS(OS) 1465/2010 has been filed by M.S.Agarwal's branch of the family and the assertion is with respect to a passage on the first floor of the property. The right to passage is being disputed by P.S.Agarwal's branch of

the family.

3. CS(OS) 1290/2011 has also been filed by M.S.Agarwal's branch of the family and asserts right in the open area at the rear of the ground floor and in the terrace above the second floor of the property. Said rights are being contested by the other three branches.

4. CS(OS) No.1561/2010 has been filed by P.S.Agarwal's branch of the family seeking an injunction against M.S.Agarwal's branch from interfering in the use of an open space at the rear of the ground floor by P.S.Agarwal's branch of the family.

5. Of the various issues settled between the parties one issue is as under:-

'In which of the parties the right to the terrace above the second floor vests under the partition decree of the year 1959 and the declaratory decree of the year 1972 and if in more than one, than in what proportion? OPP'

6. Undisputedly there is a partition of the suit property as per a decree dated January 13, 1959 in suit No.359/1958 by a learned Sub-Judge in Delhi. The interpretation of the said decree and allied issue has cropped up concerning areas asserted to be common by some and exclusive by the other; which includes the terrace of the building.

7. In the backdrop of the aforesaid facts condensed by us, shorn of verbosity, we deal straight : head on, to the legality of the impugned order dated April 23, 2015 passed by the learned Single Judge and challenged by the appellant, who is the wife of late M.S.Agarwal.

8. Under the decree for partition, to which we have made a reference to in the preceding paragraph, no part of the second floor fell to the share of M.S.Agarwal. A part of the first floor fell to his share. Above the second floor is the open terrace.

9. The appellant wanted a direction against the defendants to allow her to place a generator to generate electricity either in the rear service lane behind flats No.M-36-38, on the ground floor or on the terrace of the second floor. Relief has been denied by the learned Single Judge and in the appeal arguments were advanced only with respect to installation of the generator on the terrace above the second floor.

10. We need not therefore deal with the reasoning of the learned Single Judge concerning generators to be permitted to be placed on the rear open space on the ground floor.

11. The learned Single Judge has noted that an earlier order dated February 14, 2014 had dealt with the issue and had held against the appellant. The reasoning in paragraphs 18 to 22 of the order dated February 14, 2014 noted by the learned Single Judge reads as under:-

“18. Though only the arguments are to be heard in the suits, but just like for the last nearly one year the same has not happened, the possibility of the same being delayed further cannot be ruled out. I am of the view that not permitting the P.S.Agarwal Group to install its generator in the said space, which may result in P.S.Agarwal Group not being able to fetch proper rent for its property No.M-36 which admittedly is lying vacant, will cause irreparable loss and injury to the P.S.Agarwal Group and which cannot be compensated. The counsel for M.S. Agarwal Group states that it has had to install its generator on the terrace of a adjoining building at a rent of Rs.20,000/- per month and the landlord is pressing for removal of the generator. He contends that both M.S. Agarwal and P.S. Agarwal Groups be allowed to install their generators in the said space. Though it has been informed that there is open space behind property no. M-37 and 38 and to which also the M.S. Agarwal Group is staking claim and where also M.S. Agarwal Group, which was in the order dated 21st March, 2013 denied permission to install its generator, can install its generator but V.S. Agarwal Group out of V.S. Agarwal and B.S. Agarwal Groups who otherwise claim stake to the said space is

not agreeable though the counsel for B.S. Agarwal Group is agreeable to allow M.S. Agarwal Group as a interim measure to install their generator therein.

19. The senior counsel for the P.S.Agarwal Group, under instructions has undertaken:-

(i) that in the event of it being held that M.S.Agarwal Group also has a right in the said rear open space behind M-36, the P.S.Agarwal and his son shall within one month of the said decision and subject to further orders in appeal pay to the M.S.Agarwal Group an amount calculated at the rate of ₹10,000/- per month w.e.f. August, 2010 (since when the M.S. Agarwal Group is paying rent) till the time the generator of the M.S.Agarwal Group remains installed on the terrace of the adjoining building and for which the M.S.Agarwal Group is paying a rent of ₹20,000/- per month.

(ii) that in the event of M.S.Agarwal Group also being held entitled to share in the said space, the P.S.Agarwal Group shall immediately as aforesaid allow M.S.Agarwal Group to install their generator and will not take the plea of the same being not possible owing to their own generator being installed therein; and,

(iii) that they will not take any adjournments for final hearing in the suit and fully co-operate in expeditious disposal thereof.

20. Mr. P.K. Rawal Advocate for the V.S. Agarwal Group also gives a similar undertaking to compensate the M.S. Agarwal with the remaining ₹10,000/- p.m. and on the other two aspects aforesaid.

21. I am of the view that the offer aforesaid backed by undertakings of the P.S. Agarwal and V.S. Agarwal Groups is fair and reasonable, particularly when there will be no way to

compensate the P.S. Agarwal and V.S. Agarwal Groups, if so restrained from using the said rear open spaces, in the event of the P.S. Agarwal Group being ultimately held exclusive owner of space behind M-36 and V.S. Agarwal and B.S. Agarwal Groups being ultimately held exclusive owners of space behind M-37 and 38.

22. The application is thus partly allowed by clarifying that notwithstanding the earlier interim orders and on the aforesaid undertakings, the P.S. Agarwal Group will be entitled to install generator in the space behind M-36 and the V.S. Agarwal Group and B.S. Agarwal Groups entitled to restrain the M.S. Agarwal Group from installing generator in the space behind M-37 and 38.

Hence, M.S. Agarwal Group (i.e. plaintiff) were not permitted to install the generator, as sought here.”

12. Posing the question : whether the appellant can be permitted to re-agitate the same issue, the learned Single Judge has noted the law declared by the Supreme Court in the decision reported as AIR 1964 SC 993 Arjun Singh vs. Mohindra Kumar & Ors. and 2008 (2) SCC 507 Ajay Mohan & Ors. vs. H.N. Rai & Ors. to conclude that the earlier interim order which sets at rest an issue concerning status-quo pending litigation cannot be re-agitated. But at the same time the learned Single Judge has also noted that a subsequent event concerning a communication dated September 05, 2014 may require the matter to be considered a little further with reference to the relief prayed by the appellant to be permitted to be allowed installation of generator on the roof of the second floor.

13. The fact concerning the issue relating to the communication dated September 05, 2014 is that the appellant is running a hotel from the first floor portion of the property assigned to her husband and needs power backup. She has taken the terrace of the adjoining building on rent where

she has installed a generator and claims that by a communication dated September 05, 2014 the owner of the terrace of the adjoining building has directed her to remove the generator.

14. The learned Single Judge has reasoned that the communication does not inspire any confidence for the reason till when he decided the controversy on April 23, 2015 the owner of the adjoining property had not taken any steps pursuant to the notice in question.

15. To put it simply : the learned Single Judge has found the notice to be a mere ruse.

16. As noted above there is a serious debate between the parties concerning ownership rights of the terrace and for which, as noted above, an issue has been settled between the parties.

17. It is highly debatable as this stage as to whether there is commonality in the terrace above the second floor or not, therefore unless a party shows an irreparable injury to it which cannot be compensated in terms of money an interim arrangement need not be directed which alters the existing status-quo. In weighing this assertion if at all made i.e. to change the status –quo, the possibility of the injury to the other side has to be kept in mind.

18. Now, as noted above, at the family partition no portion of the second floor has fallen to the share of the late husband of the appellant. The appellant, as told to us during the hearing intends to install a 62.5 KVA generator on the roof.

19. This takes us straight to the moot question : whether the structural load of the building can bear the load of 62.5 KVA generator on the roof. At the moment we ignore that occasioned when the generator works, howsoever muffled it may be, but would highlight that the vibrations would

be felt more by the occupants of the second floor viz-a-viz occupants of the first floor i.e. the resultant nuisance would be more to the occupants of the second floor.

20. The appellant relies upon the report of a structural consultant which is extremely cryptic. It is a two page report. It makes no reference to the nature of the construction and the simple assertion that the roof can bear the load is sans any reasoning.

21. On the contrary the respondents have filed a detailed report under the signatures of one Mr.O.P.Bhatia, a Chartered Engineer. Relevant part of the report is as under:-

“2.0 Description of Property and Observations

The property Hotel Blue located on Second Floor of M-126-128 of outer Circle of Connaught Place apposite Fire Fighting Complex is said to be constructed in 1935-1940 on the second floor with open terrace above. On first floor is Hotel Bright well established and having in between low level roof for keeping out A.C.equipment. The height of the rooms roof is 12’ from floor level. During the inspection on 212-3-2014 the following observations were made

- a. The roofs consist of reinforced brick work as in roofs and are very old*
- b. In all rooms multiple cracks were observed in the roofs and wall plaster which as per the observation might have appeared in small numbers since long and are continuously on the increase.*
- c. Certain under portions of the roof nearly 5’ x 10’ have fallen from the roof in most of the rooms exposing the reinforcement and brick work of reinforced brick work in roofs showing that the quality of material used has deteriorated to an unsafe limit.*
- d. The exposed reinforcement is hanging and are rusted in*

exposed portion and the bricks in exposed portion have been eroded due to weather effect thus reducing the strength of the roofs. The steel is rusted and at places has splinted into two portions thus showing that proper quality reinforcement do not exist at present and full strength is not being provided.

- e. Beam lintels on top of doors of bath rooms casted in RCC are fully deteriorated with cracks and reinforcement visible due to falling of concrete at places.*
- f. No maintenance work seems to have been taken up in hand recently since there are marks of seepage in roofs and on walls also which have disturbed the roof composition as well as wall plasters. The sound rebound of the roofs was observed with a hard wooden rod and it was found that most of the spots wounded hallow showing unstable condition of the roof.*
- g. TERRACE was also inspected and it was observed that water proofing though very old as visible has been done. There is a common RCC water over head tank constructed at one end which is also showing signs of deterioration.*
- h. Based on the above, it is seen that the structure being very old and with negligible maintenance and old designed Brick reinforced roof it is not safe to carry on with the present status of structure.*
- i. Roofs strength and leaks: Though the water proofing work has been carried out but it is observed that such type of cosmetic provisions by way of rendering water proofing treatment over weak slab will give no strength to the structure which is showing constant increase in deterioration by way of development of cracks in all roofs, the hollow sound observed in the roof slab at portions and visibility of reinforcement and exposed brick work in roof.*

3.0 STRUCTURE

- 1. Although no comments can be offered on general stability of*

the structure of the building walls, brick work, the initial observation and thorough inspection of fallen portion, reinforcement position, as observed in the fallen portion of roofs it is observed that the whole roof is unstable and unsafe and no measures other than replacement of roof after demolishing the old roof/Beams can take care of the stability/safety.

- 2. As the roof structure is itself weak and not considered to be self supporting, no further loading of the roof by way of placing any DG set or AC equipment is possible as the roofs are not fit to take any direct load at points of placing and the vibration effects thereof.*

4.0 INHERENT WEAKNESS OF ROOF STRUCTURE

As per the above discussed points the inherent weakness of reinforced brick Roof structure is apparent and due to the inherent weakness of Roof structure the roof may collapse on its own during heavy rains or otherwise thus endangering life of dwelling persons as well as persons using terrace and causing loss to property.

5.0 CONCLUSIONS/RECOMMENDATIONS

- 1. From my examination of the property there is evidence of ongoing Deterioration in Reinforced Roof for all the rooms, resulting into significant cracking within the roof and exposure of steel and brick work by way of falling of bottom layer of plaster. The slab is definitely existing with very old material which has been exposed to weather and is deteriorating keeping in view the poor state of Roof structure, and old specification adopted it is considered that the best solution to avoid any type of probable danger to insiders is that the roofs of total floor be demolished and re-constructed adopting specified norms for RCC roofs duly designed Proper Water proofing with proper slope to down taking pipes be provided under proper supervision.*
- 2. Over head tank with RCC base and walls is also required to be reconstructed.*

3. *All walls are required to be re-plastered and application of putty after scrubbing old plaster be followed after the roof is re-laid.*
4. *In no case any cosmetic repairs i.e. rendering plaster to underneath exposed ceilings are recommended keeping in view the structural and safety aspects, because these are only temporary measures and do not give any guarantee of stability.*
5. *In case DG sets or any other equipment for Backup is required to be placed on terrace, proper position be planned and marked on Roof Plan for the Design Engineer to account for extra reinforcement/Beams for support of such equipment to avoid direct load vibration effects on the roofs.*
6. *No legal aspect or financial aspect has been kept in view as the same is out of scope of my preview.*
7. *I am not directly or indirectly connect with the property under reference and only professional conclusions have been drawn for further action deemed fit by the client.”.*

22. We would be guided by the legal principles that the report of an expert which gives good reasons in support of the conclusion needs to be preferred in comparison to the report of an expert which is cryptic.

23. Keeping in view the report submitted by Mr.O.P.Bhatia, prima-facie, the building in question, which is a very old building, may suffer structural damage if a 62.5 KVA generator is installed at the roof of the building. Very strong reason must exist to alter a existing status-quo which has remained for more than three decades.

24. Dismissing the appeal we would request the learned Single Judge to decide the three suits in which we are informed evidence has been completed and the three suits are ripe for final hearing. They have been

listed in the category of ‘Final Hearing Matters’. Liberty granted to the parties to make a mention before the learned Single Judge to set down the three suits for hearing at a fixed date.

25. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

JANUARY 18, 2016
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