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

+ **Date of Decision: 14.08.2015**

% **RSA 167/2015**

JOTINDER SHARMA

..... Appellant

Through: Mr. Sanjeev Mahajan, Advocate

versus

SEEMA CHOWDHARY & ANR

..... Respondent

Through: Mr. Durgeh Kumar Ahuja, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. On the last date, arguments were heard in the appeal. At that stage, the parties stated that they wish to explore the possibility of a settlement.
2. Today, it is reported that no settlement could be reached between the parties. Accordingly, I proceed to dispose of the appeal.
3. The present second appeal is directed against the judgment dated 18.12.2014 passed by the learned District & Sessions Judge, South District, Saket in RCA No.37/2013 titled Jotinder Sharma v. Dr Seema Chowdhury & Anr., whereby the First Appellate Court dismissed the first appeal preferred by the appellant/defendant and affirmed the judgment and decree passed by the SCJ-cum-RC, Saket Courts in CS No.348/2011, titled Dr.

Seema Chowdhury v. Jotinder Sharma.

4. Respondent no.1, Dr. Seema Chowdhury filed the aforesaid suit against the appellant and the MCD to seek the relief of permanent and mandatory injunction, wherein the plaintiff sought an injunction to restrain the appellant/defendant from carrying out any illegal construction over the terrace of the second floor flat of the property bearing No.E-361, Greater Kailash-II, New Delhi and to seek a mandatory injunction directing the appellant to remove the illegal construction raised by her over the terrace. The plaintiff also sought a direction to the MCD to take appropriate action against the appellant/defendant no.1 for raising illegal construction, as aforestated.

5. The case of the plaintiff is that the property bearing No.E-361, Greater Kailash II was owned by Sh. Gurnam Singh Dhariwal and Shri Ram Singh. The said persons sold their undivided share in the said plot to the builder, namely, M/s Uppal Agencies. The builder raised the construction consisting of ground, first and second floor, and sold the same to different buyers. The first floor was sold to Sh. Vijay Kumar Gupta by a registered sale deed dated 22.05.1998. The second floor was sold to Sh. O.P. Bansal and Smt. Krishna Bansal vide sale deed dated 29.06.1998. The first floor was then sold by Sh. Vijay Kumar Gupta to one Sh. Naveen Malhotra vide registered sale deed dated 19.02.2008, who further sold it to the defendant no.1/appellant vide registered sale deed dated 29.05.2009. Similarly, Sh. O.P. Bansal and Smt. Krishna Bansal sold the second floor of the property and the rights acquired by them under their sale deed to one Sh. Shyam Narayan – the father of the plaintiff vide registered sale deed dated

08.11.2002. Shyam Narayan gifted the second floor and the rights acquired under the aforesaid chain of title documents vide registered gift dated 09.01.2006 in favour of the plaintiff.

6. The case of the plaintiff was that under the sale deed pertaining to the second floor, the purchaser had acquired the entire constructed second floor with one servant quarter under overhead water storage tank with common WC on the second floor terrace. Apart from the aforesaid, the plaintiff also acquired the terrace rights as detailed in clause 4 of the sale deed dated 29.06.1998. Clause 4 of the said sale deed dated 29.06.1998 reads as follows:

“4. That till such time the construction of third floor in the said building becomes permissible, the entire second floor terrace (excluding servant rooms, common W.C, common facilities/amenities and right of access through staircase and passage thereto for the repair/cleaning etc., by the owners/occupants of all the portion of the building) shall be for use by the owners of First and Second Floors, who shall use their respective portion as demarcated in the attached Plan. However, as and when construction of third floor becomes permissible, the SECOND PARTY, only after first getting the plans approved by the concerned authorities, shall have full rights to cause such construction upon the entire second floor terrace (including the portion, which is for use by the owner of first floor and where the servant quarters etc., are built). It is also a condition that as and when construction of such third floor is under taken by the Buyers herein, which will be subject to first approval of plans by the concerned authorities, the Second Party shall have to re-provide the identical servant quarters, overhead water storage tanks and other common facilities/ amenities on the terrace of top floor at their own cost

and expenses. The criteria for the use of terrace of top floor shall again be the same as for the second floor terrace i.e., the owner of first floor shall also be entitled to use the similar portion of terrace on top floor and the owners of all other portions of the said building shall have the right of access thereto for the purposes as aforesaid. The Second Party shall also ensure that during the course of any such construction activity the normal supply of water to the owners of ground and first floors remains uninterrupted”.

7. On the aforesaid premise, the plaintiff contends that the defendant no.1/appellant had no right to raise the construction on any portion of the terrace floor as had been sought to be done by the plaintiff. The defendant/appellant in his defence pleaded that the sale deed executed in favour of his predecessor in interest was earlier in point of time, i.e. of 22.05.1998 and under the said sale deed, the predecessor in interest of the defendant/appellant had been sold not only the first floor flat, but also one servant room under the overhead water storage tank with common WC on the second floor terrace and *“for use only of small portion of rear terrace (as earmarked thereof)”*. The appellant/defendant sought to emphasise its right to use the small portion of rear terrace to justify raising of construction on the rear terrace.

8. The Trial Court discussed the rival contentions on the aforesaid aspect under issue no.3 threadbare, and returned the finding that the defendant/appellant had completed construction as denoted in Ex. PW-1/D1 between A to F over terrace above the second floor. It was further held that the defendant/appellant had only user right, and not the right of construction. Consequently, the said issue no.3, i.e. whether the plaintiff is entitled for a

decree of permanent injunction as prayed for in the suit was decided in favour of the plaintiff. Issue no.4, as to whether the plaintiff was entitled to mandatory injunction with regard to removal of the existing structure raised by the appellant/defendant, was also decided in favour of the plaintiff.

9. The First Appellate Court has concurred with the findings of the Trial Court.

10. The submission of counsel for the appellant before this Court is that the rights acquired by the predecessor in interest of the appellant vide sale deed dated 22.05.1998 could not be whittled down on the basis of the subsequent sale deed executed by the builder in favour of the predecessor in interest of the plaintiff/respondent no.1 on 29.06.1998.

11. With this proposition, there could be no quarrel. However, the courts below have consistently held on the interpretation of the sale deed relied upon by the plaintiff, that the right of the plaintiff was only that of use of a smaller portion of the rear portion which had been earmarked, and the said right did not extend to a right to raise construction on any portion of the terrace, much less on any portion of the rear terrace.

12. The findings returned by the courts below - apart from being consistent, are premised on the evidence led by the parties and on the interpretation of the documents relied upon by the parties. Though the subsequent sale deed dated 29.06.1998 executed in favour of the predecessor in interest of the respondent/plaintiff would not govern or curtail the rights vested in the plaintiffs predecessor in interest by virtue of the sale deed dated 22.05.1998, the same can be looked into to bring out the contrast, and to better appreciate the rights vested in the predecessor in interest of the

appellant, which have been acquired by the appellant by virtue of the sale deed dated 22.05.1998. The right vested in the appellant is in respect of, inter alia, one servant quarter under overhead water storage tank with common WC on the terrace floor. The use of the word “second floor terrace”, in my view, is merely descriptive of the terrace, which existed when the sale deed was executed. Similarly, the right to “use only of small portion of rear terrace” only pertains to the right to user as a terrace, and not for the purpose of raising construction, which, if permitted would go beyond the right of user of a portion of the terrace floor and would get enlarged into a right of occupation, and a right to construct on the portion of the terrace floor. In fact, the said right of use of a small portion of the rear terrace does not even attach it to the words “second floor”. Therefore, whichever is the terrace floor, the appellant would have the right in one servant room under the overhead water storage tank with common WC, and the right of user only of small portion of rear terrace. The appellant cannot insist that his servant room under the overhead water storage tank with common WC should exist on the terrace of the second floor alone, and that it cannot be on the terrace above the third floor, or fourth floor, as the case may be, upon raising of further construction in accordance with law, by the person who has acquired the right of such construction on the terrace of the second floor, or third floor, as the case may be. Similarly, the right of use only of a smaller portion of the rear terrace would relate to whichever terrace comes into existence, upon raising of further construction in accordance with law. In any event, the right of use only of a smaller portion of rear terrace, as aforesaid, only pertains to use as a terrace, and not for purpose of occupying the same to the exclusion of others, or raising construction thereon.

13. In the aforesaid circumstances, I find no merit in this appeal. The same does not raise any substantial question of law to be considered by this Court. Dismissed.

VIPIN SANGHI, J

AUGUST 14, 2015

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