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

+ RFA 658/2015

PRABHATO DEVI (SINCE DECEASED) THR LRS Appellant
Through: Mr R.D. Sharma, Mr Rajat Sharma &
Mr Chetan Sharma, Advs.

versus

NARESH KUMAR Respondent
Through

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

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06.10.2015

CM No. 22206/2015 (Exemption)

1. Allowed subject to just exceptions.

RFA 658/2015 & CM No. 22205/2015 (O. 41 R. 27 CPC)

2. This is an appeal preferred against the judgement dated 07.07.2015 passed by the Addl. District Judge (ADJ).

3. Briefly, the facts of the case are as follows:

3.1 The appellant/ plaintiff instituted a suit against the respondent/ defendant for damages and compensation. The appellant/ plaintiff set up a case that, he was the absolute owner of the property bearing no. F-298 (also known as 443), Near Primary School, Lado Sarai, New Delhi (in short the F-298 property). It was averred that the respondent/ defendant, who was the occupier of property bearing no. M-26, Near Primary School, Lado Sarai, New Delhi (in short the M-26 property), had carried out construction on the said property in a manner which had caused damage to the property of the appellant/ plaintiff i.e. F-298 property.

3.2 According to the appellant/ plaintiff, M-26 property was an adjacent

property and, therefore, on account of illegal and unauthorized construction being carried out therein, damage was caused to F-298 property.

3.3 To be noted, the appellant/ plaintiff had also filed a writ petition in this court, which was numbered as: WP(C) No. 5720/2004. In the said writ petition, allegations of illegal and unauthorized construction being carried out by the respondent/ defendant were made.

3.4 The appellant/ plaintiff in the course of the suit proceedings had relied upon the orders passed by the municipal authorities with respect to M-26 property which, according to the appellant/ plaintiff, demonstrated illegal construction in the said property. The writ petition, I am told, was ultimately disposed of with liberty to the appellant/ plaintiff to take recourse to an appropriate remedy. The order of the writ court though, has not been appended with the appeal.

3.5 Nevertheless, the appellant/ plaintiff, in the suit from which the instant appeal arises, claimed compensation of an amount equivalent to Rs.11,01,000/-.

4. In the suit, the following issues were framed:

“....(1) Whether there is no cause of action for filing the present suit as claimed for by the defendant in Preliminary Objection No.1 of his written statement? OPD

(2) Whether the present suit is bad on account of non-joinder of necessary parties as claimed for by the defendant in preliminary objection no.5 of the written statement? OPD

(3) Whether the present suit has not been filed by a competent and authorized person as claimed for by the defendant in Preliminary Objection No. 7 of his written statement? OPD

(4) Whether the plaintiff is entitled to recover the suit amount from the defendant? OPD

(5) Whether the plaintiff is entitled to recovery any interest

from the defendant? If so at what rate and for what period?
OPP

(6) Relief....”

5. After evidence had been led by the parties, the trial court, ultimately, dismissed the suit.

6. In the course of its discussion, the trial court, in my view, correctly appreciated the controversy by posing a question to itself, which was, that what the appellant/ plaintiff was required to prove was whether the respondent's/ defendant's action of carrying out illegal construction in M-26 property, had caused damage to his property i.e. F-298 property.

6.1 The trial court based on the evidence, which emerged before it, reached, inter alia, the following findings of fact:

(i) There was a gap of 3 feet between the outer walls of the two properties i.e. property no. F-298 and M-26.

(ii) PW4, that is, the appellant's/plaintiff's witness, conceded that, toilets and bathrooms had been constructed in the balcony of the property, in which he resided as a tenant i.e. F-298 property.

(iii) PW4, had stated in his deposition that 17-18 families were residing in F-298 property, and, in all, a total number of 100 persons were residing in the said building.

(iv) PW4, in paragraph 2 of his affidavit of evidence had stated that on account of construction in property bearing no. M-36, cracks had developed in F-298 property. Importantly, in the affidavit of evidence, there was no mention of M-26 property.

(v) That the appellant/ plaintiff had not examined any architect or any other expert witness to prove that damage had been caused to F-298

property on account of construction being carried out in M-26 property.

(vi) That PW1, who is the son of the deceased appellant/ plaintiff, had categorically admitted that F-298 property was a three-storey building, in which, columns had not been erected in the course of construction of the said property. PW1, had also, further admitted, that neither he himself, nor his deceased mother, had obtained any sanction of site plan for constructing F-298 property. PW1, also, admitted it to be correct that a toilet in F-298 property was constructed on the first and second floors.

7. Based on the aforesaid, the trial court came to the conclusion that the appellant/ plaintiff had failed to prove that damage was caused to his property i.e. F-298 property on account of construction being carried out by the respondent/ defendant in his property i.e. M-26 property.

8. I have asked the learned counsel for the appellant/ plaintiff as to whether any expert witness was produced to demonstrate that damage had been caused to the appellant's/ plaintiff's property i.e. F-298 property. Learned counsel for the appellant fairly conceded that no such expert witness was called. Learned counsel, however, sought indulgence to lead evidence in this court.

9. A reading of the impugned judgement and the findings recorded therein clearly demonstrate that while there may have been illegal and unauthorized construction in the M-26 property, in respect of which, the concerned municipal authority had taken action and demolished some portion of the said property, there is certainly no material placed on record that the alleged damage, said to have been suffered by the appellant/ plaintiff in his property i.e. F-298 property, was on account of the construction carried out in M-26 property.

10. In these circumstances, I find no good reason to interfere with the

impugned judgement and decree, which is passed, based on appreciation of evidence, placed before the trial court. The appeal is, accordingly, dismissed.

11. Consequently, the captioned application has been rendered infructuous and, accordingly, is also dismissed.

RAJIV SHAKDHER, J

OCTOBER 06, 2015

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