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

+ **Date of Decision: 16.12.2015**

% **RSA 373/2015 and C.M. No. 25232/2015**

VIJAY KUMAR SETHI

..... Appellant

Through: Dr. Sarbjit Sharma and Ms. Vrishti
Gupta, Advocates

versus

MANAK CHAND & ORS

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The present second appeal is directed against the judgment & decree dated 18.08.2015 passed by the First Appellate Court, namely the learned Additional District & Sessions Judge (Central), Tis Hazari Courts, Delhi in RCA No.50/2014 preferred by the appellant/ defendant No.4 in the suit. The First Appellate Court has dismissed the said first appeal preferred by the appellant to assail the judgment and decree passed by the Trial Court, namely the learned Civil Judge, Delhi in Suit No.14/2004. By the said judgment, whereby the suit of the respondent No.1/ plaintiff was decreed.

2. Respondent No.1/ Sh. Manak Chand Jain, the original plaintiff had

filed the said suit impleading his three brothers as defendants No.1 to 3, the appellant along with his two other brothers and sister as defendants No.4 to 7, Municipal Corporation of Delhi through Delhi Electricity Supply Undertaking (DESU) as defendant No.8, and one Rajesh Kumar Khurana as defendant No.9 to seek the relief of mandatory and perpetual injunction.

3. The said suit had been filed on the premise that the property bearing No.43-44, Chandni Chowk was partitioned between him and his three brothers, i.e. defendants No.1 to 3 by virtue of an award, which was made a rule of the Court by the learned Sub-Judge, First Class, Panipat on 11.06.1965 and a final decree for partition was drawn up. By virtue of the said partition, the plaintiff had become the owner of a specific portion of the suit property, while certain other portions were left common. Certain portion on the first floor fell to the share of the plaintiff, who became the exclusive owner thereof. The plaintiff claimed that there was a staircase leading from the ground floor to the first floor from the main Chandni Chowk, which was kept as a common property of the plaintiff and defendants No.1 to 3. The plaintiff used the said staircase to access the first floor portions exclusively belonging to the plaintiff.

4. The plaintiff claimed that there were two electric connections sanctioned by Municipal Corporation of Delhi through Delhi Electric Supply Undertaking (DESU) in the name of Sh. R.C. Sethi, the predecessor-in-interest of defendants No.4 to 7, which were installed on the side wall of the staircase (facing Chandni Chowk). Sh. R.C. Sethi was an occupant in some other part of the building. The said meters continued to remain installed on the side wall of the staircase up to 22.12.1980, when the plaintiff visited the

premises. When the plaintiff again visited the premises on 21.01.1981, he was surprised to find that the said two meters had been illegally shifted and installed on the door in a passage to the plaintiffs portion on the first floor of the building. The plaintiff stated that the illegal shifting had been done without permission of defendant No.8/ DESU, and the plaintiff immediately reported the same to the DESU vide letter dated 21.01.1981. No action was taken. So he sent a reminder on 08.04.1981.

5. The DESU conducted an inquiry and was satisfied that illegal shifting of meters had taken place. However, the authorities failed to take any action for removal of the meters installed on the door in the passage, and restore the same to their original place. Then, the plaintiff sent a letter dated 09.06.1981 to the Vigilance Officer, DESU.

6. The plaintiff stated that defendants No.4 to 7 illegally constructed a wall between points A and B shown in the plan filed with the plaint, where the door earlier existed on the first floor, in the night intervening 21.06.1981 and 22.06.1981 in collusion with defendants No.1 to 3, and the two meters were installed on the said wall. This led to the passage of the plaintiff to his portion on the first floor - from the staircase leading from ground floor to first floor from main Chandni Chowk, getting blocked. The plaintiff stated that he learnt that defendants No.1 to 3 had sold their portion on the first floor to defendant No.9 and, consequently, he was impleaded as a defendant. The plan filed by the plaintiff along with the plaint showed the common staircase in yellow colour, while the portions on the first floor exclusively belonging to the plaintiff were shown in red colour. This plan, in red colour, showed the portion falling on both sides of the door/ wall between points A

and B in red colour.

7. The defendants No.1 to 3, namely the brothers of the original plaintiff filed their written statement, wherein they admitted the factum that the property bearing Municipal No.43-44, Chandni Chowk was owned by the plaintiff and defendants No.1 to 3; the said property was partitioned between plaintiff and defendants No.1 to 3 by virtue of an award, which was made Rule of the Court on 11.06.1965 and a final decree of partition drawn up; the plaintiff became owner of the specific portion of the suit property, *inter alia*, shown in red colour in the plan filed with the plaint and he also had the right of common user of the staircase leading from ground floor to first floor from main Chandni Chowk shown in yellow colour in the plan filed with the plaint. They, however, denied that a wall had been erected between points A & B on the first floor to replace the existing door. They denied that they had seen the electricity meters of Sh.R.C. Sethi at any other place, except where they are presently located i.e. on the disputed wall. They claimed that the wall was old and already in existence. They claimed that the plaintiff was desirous of creating a passage by breaking the preexisting wall between the points A & B.

8. Defendants No.4 to 7 filed their common written statement. They stated that the wall between points A & B was present for the last more than 30 years. They denied that they had installed the wall between points A & B. They denied that the plaintiff had passage through a door between points A & B to his portion on the first floor. The existence of the door at any earlier point of time was denied. Defendant No.9 also denied the averments of the plaintiff.

9. The Trial Court framed the issue: Whether the plaintiff was entitled to injunction, as prayed for? The plaintiff examined several witnesses, including Sh. Roop Singh, Junior Clerk from DESU as PW-1; Ms. Renu Rani, Advocate, who was appointed by the Court as Local Commissioner, as PW-4; Sh. D.R. Gulati, Superintendent, DESU, Mayur Vihar, as PW-5; and, himself as PW-7. Defendant No.4 examined himself as D4W1 and he produced Sh. Sudesh Kumar, Record Keeper, as D4W2.

10. The Trial Court on the basis of the evidence led by the parties returned the finding that the two electricity meters of Sh. Sethi were initially installed and fixed on the ground floor at a height of about 5-feet from the ground level in the staircase sometime in 1960's; they were later shifted to the first floor of the premises, though they were not shifted by DESU as per record; the plaintiff had made complaints to DESU regarding shifting of the electricity meters by defendants No.4 to 7, which resulted in inspection by DESU conducted on 28.02.1981; the inspection report Ex.PW-3/3 showed that penalty was sought to be imposed for the illegal shifting of meters; the meters had been shifted and installed on the door between points A & B; PW-1 had carried out physical inspection on 26.02.1981, that electricity meters were found affixed on door of the first floor by affixing wooden screw of 4 inches, and no board was installed.

11. The Trial Court also returned a finding that, admittedly, the staircase leading from ground floor to first floor had remained common for the plaintiff and his brothers; after partition, a portion of the property was sold vide sale deed Ex.PW-2/1 by the plaintiff to Defendant No.4; the sale deed Ex.PW-2/1 contains the undertaking of defendants No.4 to 7 not to in any

manner obstruct the door mark Z in plan Ex.PW-2/2. The Trial Court held that the aforesaid evidence showed that the defendants had illegally shifted the meters and installed the same on the wooden door on the first floor between points A & B, and later a wall had been erected in front of the wooden door and meters were affixed on the wall. The report of the Local Commissioner also established that a door still exists behind the wall. Consequently, the Trial Court decreed the plaintiff's suit. The first appeal preferred by the appellant was dismissed and the findings returned by the Trial Court were affirmed.

12. The submission of learned counsel for the appellant is that the suit of the plaintiff was barred by limitation. He submits that though no such issue was raised before the Trial Court at the instance of the defendants No.4 to 7 or the other defendants, the Trial Court was bound to examine the aspect of limitation on its own by virtue of Section 3 of the Indian Limitation Act. Learned counsel submits that the plaintiff had claimed that the cause of action arose when the wall was allegedly constructed in the night intervening 21.06.1981 and 22.06.1981, whereas the suit had been filed on 09.07.1984 on the premise that the same was filed on the first day after re-opening of the Courts after Summer Vacation.

13. Learned counsel further submits that the findings returned by the two Courts are perverse as a perusal of the plan filed along with the award Ex.PW-7/4, which was made rule of the Court vide Ex. PW-7/3, shows that that a wall existed between point A & B. He has referred to the testimony of PW-7 – the plaintiff, who was confronted in his cross examination with the said award and the plan Ex. PW-7/4. PW-7 stated that there was a

discrepancy in the plan, as between point A & B no door was shown, although it existed at that time.

14. Mr. Sharma submits that if there was indeed a door, and not a wall between point A & B as shown in the plan Ex. PW-7/4, when the property were partitioned between the three brothers/defendant nos.1 to 3, there was no reason to file an incorrect plan along with the award. The plaintiff would certainly have protected his interest by filing the corrected plan showing the door, and not the wall, between point A & B as it would have had a material bearing on the rights of the plaintiff.

15. Having heard counsel for the appellant and perused the judgment of the two courts below as well as the evidence relied upon by the appellant and referred to in the two judgments, I am of the view that there is absolutely no merit in the present appeal, and the same does not raise any substantial question of law for consideration of this court. The appellant has not been able to point out any perversity in the concurrent finding of fact returned by the two courts below, which evidently are based on appreciation of evidence brought on record.

16. The first submission of the appellant that the suit was barred by limitation has no merit. Limitation is a mixed question of fact and law in most cases. In the present case, the case of the respondent no.1/plaintiff was that defendant nos.4 to 7 in collusion with defendant nos.1 to 3 had replaced the door between point A & B with a wall, and installed their electricity meters on the said wall unauthorisedly and to the detriment of the plaintiff. This removal of the door and construction of the wall had taken place,

according to the plaintiff, on the night intervening 21.06.1981 and 22.06.1981. The plaintiff had clearly pleaded in para 15 of the plaint that the cause of action to file the suit had arisen on the night intervening 21.06.1981 and 22.06.1981 when the door was replaced by the wall between point A & B. The plaintiff also disclosed that he issued a statutory notice to defendant no.8, DESU/MCD dated 27.09.1983 before filing the suit.

17. The courts below have found in favour of the plaintiff with regard to the making of the wall in front of the door. The said finding is premised on cogent evidence. The courts have also found in favour of the plaintiff that the wall had been constructed at the time claimed by the plaintiff. The records of DESU have been examined. Pertinently, the case of the defendants – including the appellant, was that no new wall had been constructed and the wall had existed for 30 years. This defence of the appellants/defendants was completely belied in the face of the evidence brought on record. Thus, there was no reason to disbelieve the claim of the plaintiff that the wall had been raised on the intervening night of 21.06.1981 and 22.06.1981.

18. The plaintiff had averred that the suit was filed in limitation as it was filed on the date of reopening of the court after summer vacations – since the limitation expired during the summer vacations. It is not the appellants case that the suit was not filed on the day of reopening of the court after the summer vacations in the year 1984. Moreover, as correctly observed by the courts below, the plaintiff was entitled to exclude the period of the statutory notice issued to defendant no.8/DESU/MCD. Thus, the suit was clearly filed within the period of limitation.

19. So far as the submission of Mr. Sharma premised on the testimony of PW-7 and Ex. PW-7/4 is concerned, this too has no merit. Pertinently, the respondent no.1/plaintiff, firstly, stated that there was discrepancy in the plan Ex. PW-7/4 inasmuch, as, in place of the door between point A & B, the wall had been shown. Secondly, and even more importantly, whereas the award was made rule of the court on 11.06.1965, the respondent no.1/plaintiff sold the portion of his share in the property to the appellant vide sale deed dated 27.03.1979 Ex. PW-2/1. Along with the said sale deed, the plan was annexed – which is Ex. PW-2/2. In this sale deed, the appellant Vijay Kumar Sethi was shown as the vendor. Respondent nos.7 to 9, who are also the LR's of late Sh. R.C. Sethi, were shown as the confirming party.

20. The courts below have taken note of the said sale deed Ex. PW-2/1 and the plan annexed to the sale deed Ex. PW-2/2 as also clauses 1, 3, 6 and 8 of the sale deed, which shows that the appellant and the other LR's of late Sh. R.C. Sethi acknowledged the fact a door existed between point A & B, and they also undertook not to obstruct the passage of the plaintiff through the said door. This finding is recorded in para 10 of the impugned judgment, which reads as follows:

“10. That the plea of the appellant and the respondents no.7 to 9 is falsified by two documents executed between them and the respondent no.1. After the partition of the property between the respondent no.1 and the respondent no.2 to 4, the respondent no.1 had sold a portion of the said property which had fallen to his share to the appellant vide sale deed dated 27.03.1979 Ex. PW2/1. Along with the sale deed a plan was also annexed which was proved as Ex. PW2/2. The appellant was the vendee and the respondents no.7 to 9 were the confirming party in the said sale deed. Clause 1, 3, 6 and 8 of the said sale deed and

the schedule mentioned therein clearly indicate that the portion which was claimed by the respondent no.1 as the common portion was indeed a common portion and that there was a door between the points A and B and the plea that the wall was existing for the last more than 30 years at that place is thus falsified”.

Pertinently, counsel for the appellant has not pointed out any error in the said finding of the first appellate court.

21. Clause 3 of Ex. PW-2/1 records that the vendor, i.e. the plaintiff has transferred the ownership of property no.45, Chandni Chowk, Delhi to the vendee except the co-ownership rights, inter alia, in the staircase marked-R from ground floor to the first floor. Clause 6 of Ex. PW-2/1 records the undertaking of the vendee, i.e. the appellant, as well as that of the confirming party, that they “*will no obstruct the way passage of the vendor or of his men, visitors, servants, and licensees etc. through the platform marked ‘J’ space marked ‘M’ and staircase marked ‘R’ racing chandni chowk, Delhi from ground floor to first floor and space marked ‘K’ to his portion of 44 chandni chowk, Delhi, through the existing door marked ‘Z’ in the plan attached. The vendor or his men, visitors, servants, and licencees etc. shall not have any right to use the stair case from first floor level to second floor level or any portion thereof or any other portion of premises no.45, chandni chowl, Delhi*”.

22. Consequently, there is no merit in the submission that in the plan Ex. PW-7/4, no door was shown and only a wall had been shown between point A & B. The sale by the plaintiff/respondent no.1 in favour of the appellant took place much later i.e. on 27.03.1979 and being the owner, nothing

prevented the respondent/plaintiff from replacing the wall with a door prior to its sale on 27.03.1979. The appellant bought the property detailed in Ex. PW-2/1 as it existed on the date of the sale with the conditions mentioned in the sale deed Ex. PW-2/1, and cannot now be heard to say that only a wall existed between point A & B when the award was made rule of the court in the year 1965.

23. For all the aforesaid reasons, I find absolutely no merit in the present second appeal and the same is, accordingly, dismissed.

VIPIN SANGHI, J

DECEMBER 16, 2015

bsr/sr