

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

+ **RFA No. 1038/2017**

% **Reserved on: 13th December, 2017**
Pronounced on: 19th December, 2017

RAM DEV SHARMA & ANR. Appellants

Through: Mr. P.N. Bhardwaj, Advocate
with Mr. Ashutosh Bhardwaj,
Advocate.

versus

RAKESH KUMAR SRIVASTAV & ORS. Respondents

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

C.M. Appl. No. 45190/2017 (for exemption)

Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

RFA No. 1038/2017 and C.M. Appl. No. 45189/2017 (for stay)

1. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) by the appellants/defendant nos. 2 and 3 in the suit, impugning the judgment of the trial court dated 16.8.2017 by which the trial court has decreed the suit of the

respondent nos. 1 and 2/plaintiffs by granting various reliefs of injunctions. The operative relief para of the impugned judgment reads as under:-

“RELIEF

In view of the above, suit of the plaintiffs is allowed and decree of permanent injunction is hereby passed in favour of plaintiffs and against defendants thereby restraining the defendants, their agent, assigns, employee etc. from demolishing the original existing roof and the iron jaal over the common passage/Chhatta existing between the property No. 329 and property No. 331 to 337, Kucha Ghasi Ram, Chandini Chowk, Delhi-6 under the notice dt 13.06.2001 issued under Section 348 and 349 of DMC Act.

A decree of permanent injunction is hereby passed in favour of plaintiffs and against defendants thereby restraining the defendants, their agent, assigns, employee etc. from regularising the construction over the common passage/Chhatta existing between the property No. 329 and property No. 331 to 337, Kucha Ghasi Ram, Chandini Chowk, Delhi-6.

A decree of mandatory injunction is hereby passed in favour of plaintiffs against defendants thereby directing defendant No.1 to remove the entire construction over the common passage/Chhatta existing between the property No. 329 and property No. 331 to 337, Kucha Ghasi Ram, Chandini Chowk, Delhi-6. It is made clear that defendant No.1 will not do an eyewash of removal by only puncturing here and there the unauthorised construction, it will remove the complete construction only over the Chhatta. Defendants No. 2 and 3 are restrained from obstructing the demolition activities to be carried out in pursuance to present judgment by defendant No.1 over the Chhatta in question existing between the property No. 329 and property No. 331 to 337, Kucha Ghasi Ram, Chandini Chowk, Delhi-6. It is further made clear that in case unauthorised construction could not be demolished on account of operation (if in operation as on date) of The National Capital Territory of Delhi Laws (Special Provisions) Second Act 2011, the property be kept booked for demolition as per DMC Act and be dealt with in accordance with the provisions therein.

Copy of this judgment be send to Commissioner, North Delhi Municipal Corporation to direct inquiry under his supervision as to how the doors and windows of MCD School existing in property No.329 (or 328, Kucha Ghasi Ram, Chandini Chowk, Delhi) were virtually closed by allowing the raising of wall/construction over the Chhatta/common passage existing between the property No. 329 and property No. 331 to 337, Kucha Ghasi Ram, Chandini Chowk, Delhi-6 and place report of enquiry to this Court

or to the successor of this Court within three months. He will also direct enquiry as to why no official were examined in the present case to justify their issuance of notice under Section 348/349 dt 13.06.2001 in respect over common Chhatta.

Cost of the suit is awarded to the plaintiffs.

Decree sheet be prepared accordingly.

Ahlmad is directed to prepare a separate miscellaneous file for the purpose enquiry report to be submitted by Commissioner of North Delhi Municipal Corporation within three months and list the same for 01.12.2017

File be consigned to Record Room after necessary compliance.”

2. The only issue which was called upon for decision in the subject suit filed by the respondent nos. 1 and 2/plaintiffs, as also in this first appeal, was/is whether the construction made by the appellants/defendant nos. 2 and 3 on the common passage was a new construction or it was only renovation of the old existing construction. The passage/*chatta* is admittedly a common passage and the issue is of construction over the ground floor height of the open common passage/*chatta*. The common passage/*chatta* is between the property no. 329, Kucha Ghasi Ram, Chandni Chowk, Delhi-6, and the property nos. 331-337, Kucha Ghasi Ram, Chandini Chowk, Delhi-6, which is owned by the appellants/defendant nos. 2 and 3.

3. The facts of the case are that respondent nos. 1 and 2/plaintiffs filed the subject suit pleading that they were the co-owners of the property bearing no. 330, Kucha Ghasi Ram, Chandini Chowk,

Delhi-6 and the only passage to the property of the respondent nos. 1 and 2/plaintiffs was through the common passage/public street known as *Chatta*. This *chatta*/passage exists between property nos. 329 and 330 on the one hand and property nos. 331-337 on the other. In property no. 329, Kucha Ghasi Ram, Chandini Chowk, Delhi-6, a Municipal Corporation of Delhi (MCD) Primary School has been running for the last over fifty years and the property is commonly known as MCD school building. Part of the common passage/*Chatta* in front side and back side is covered with construction of a roof and on the remaining part there is an iron jaal/railing. The case of the respondent nos. 1 and 2/plaintiffs was that the iron jaal as well as the constructed roof of the common passage were open to the sky and in fact there were constructed windows of the MCD Primary School which opened on the first floor towards the first floor height over the *chatta*/passage. There were also two doors of the MCD Primary School building on the first floor which open to the first floor height over the common passage/*chatta*. It was further pleaded in the plaint that in 1995 the appellants/defendant nos. 2 and 3 purchased property nos. 331-337 from earlier owners Smt. Weeran Wali and Sh. Rajender

Sharda who had purchased the said property by virtue of two sale deeds dated 28.9.1990. In the sale deeds the description of the property nos. 331-337 which is shown is of ground floor having six shops, first floor having ten rooms and bathrooms and a big courtyard and there was only one room on the second floor and the remaining part of the second floor was an open terrace. This very same construction was also shown in the house tax records of the municipality for the property nos. 331-337. Appellant no. 1/defendant no.2 was pleaded to be a known builder of unauthorized markets in the walled city area of Old Delhi and he after getting the property nos. 331-337 vacated from the tenants started raising huge unauthorized construction without obtaining any sanctioned plan. Appellant no. 1/defendant no.2 made fresh construction right till the third floor of property nos. 331-337. It was further pleaded that the construction made by the appellants/defendant nos. 2 and 3 is completely illegal especially over the first floor height above the common passage area. Respondent nos. 1 and 2/plaintiffs had earlier filed a writ petition, but since disputed questions of facts were involved, the writ petition was

dismissed with liberty to file a suit and thus the present suit came to be filed.

4. Appellants/defendant nos. 2 and 3 contested the suit by filing written statement. It was pleaded by the appellants/defendant nos.2 and 3 that they did not make any unauthorized construction but they had only made permissible renovations/repairs in their property nos. 331-337. It was pleaded that the iron grill and roof at the first floor height over the passage/*chatta* is not open to the sky and the common passage from first floor height and above has been covered from beginning. It was also denied that there was a MCD School which exists or is running in property no. 329.

5. After pleadings were complete, the trial court framed issues and parties led evidence, and which aspects are recorded in paras 17 to 20 of the impugned judgment and these paras read as under:-

“17. From the pleadings of the parties, following issues were framed vide order dated 06.02.2006:-

1. Whether the plaintiffs have cause of action to institute the present suit? OPP
2. Whether the suit of the plaintiffs is barred by the provision of Section 477/478 of the DMC Act as alleged in preliminary objection of the defendant in the WS of defendant No.1? OPD

3. Whether the suit is not properly valued for the purpose of court fees and jurisdiction as alleged in WS of defendant? OPD

4. Whether the suit of the plaintiffs is barred by principle of resjudicata as alleged in the preliminary objection of defendants? OPD

5. Whether the suit of the plaintiffs is not maintainable as alleged in the preliminary objection No.6 of the WS of defendant No.1? OPD-1

6. Whether the plaintiffs is entitled to the relief of injunction as claimed in the plaint, if so, in what from? OPP

7. Relief

18. Plaintiff No.1 examined himself as PW1 and filed his affidavit Ex. PW1/A in examination in chief in the lines of the plaint and relied upon site plan Ex PW1/1, inspection report of MCD dt 29.11.1996 Ex PW1/2, certified copy of the order dt 21.07.1997 Ex PW1/3, photographs showing illegal construction and closing of doors and windows Ex PW1/4 (colly). He was duly cross examined by defendants.

19. Plaintiffs also examined PW2 Shalini Kapoor Ld Local Commissioner and exhibited her report Ex PW2/A, spot proceedings Ex PW2/B, 22 photographs taken during spot proceedings Ex PW/2C, negatives thereof Ex PW1/D, receipt of photographer Ex PW1/E. Plaintiffs also examined PW3 Sh Shushil Kumar a LDC, RKD Branch, High Court of Delhi, Delhi and PW4 Sh Manu Vasudev and Ahlmad from the Court of Kiran Bansal, the then CJ, Dlehi who brought the case file of suit No. 900/96 wherein report dt 29.11.1996 was filed b MCD. Said report was exhibited as Ex PW4/1. She was duly cross examined by counsel for defendants

20. Defendant No.1 Municipal Corporation did not examine any witness on its behalf. Defendant No.2 examined himself as DW1 and filed his affidavit Ex DW2/A in examination in chief which was on the lines of his written statement and relied upon Appellate Tribunal MCD's order dt 12.10.19998 Ex DW1/1, speaking order dt 17.08.2001 by S.M. Hassan marked as Mark A, Notice under Section 348 Mark A/1 and under Section 349 Mark A/2, order dt 14.11.2002 passed in LPA No. 697/2002 Ex DW1/2, site plan filed by defendant Ex DW/3, statement and order dt 1.05.2007 Mark- A/3. He was duly cross examined by the counsel for plaintiffs."

6. The only relevant issues were issue nos. 4 and 5, and both these issues have been decided by the trial court in favor of the

respondent nos. 1 and 2/plaintiffs and against the appellants/defendant nos. 2 and 3.

7. Before I turn to the discussion and reasoning of the trial court given in the impugned judgment for deciding the relevant issues, it will be necessary for this Court to reproduce the angst of the trial court Judge who passed the impugned judgment, and which is depicted by para 30 of the impugned judgment, and this para reads as under:-

“30. Onus to prove this issue is upon the defendant No.1 which did not lead any evidence in the present suit, hence it can be said that defendant No.1 has failed to prove this issue. However on the basis of material available on record this issue can be taken up in detail as it highlights how the officer/staff who man the institution fails the institution for their personal gain. Any law or any institution achieve its goal only when persons responsible for their execution does his/her job honestly and sincerely. In whole of Delhi illegal and unauthorised construction came up and has flourished not because they were unnoticed for years and by the time they were noticed it was too late to take action. In Delhi the moment one brick is laid news immediately reaches to the local beat officer who comes to the spot takes his pie and turns away his eyes as if nothing is happening but only after informing the area JE not for the purpose of getting the work stopped but for assisting him to come and collect his share from such construction. The bigger the construction the bigger is involvement of chain of officers of different agency. Municipal department cannot come on its own as it is not a human being. It works through human agency and if human agency turns away their eyes from the job for which they are paid for, no institution will achieve its goal.” (underlining added)

8. In my opinion, the aforesaid para rightly brings out the substance of the issues involved with respect to appellants/defendant

nos. 2 and 3 misusing the office of the MCD to achieve their illegal ends.

9. As regards issue no. 5, and which was the main issue, and which was with respect to any construction already existing over the first floor height of the passage/*chatta* or there was any new construction over the first floor height and above of the passage/*chatta* and at which first floor height over the passage/*chatta* there was an iron grill with some construction forming a roof opening to the sky, in this regard trial court notes that from the first floor of property no. 329 it was found that there existed doors and windows which opened up to the passage/*chatta* and jaal already constructed at the height of the first floor, and which would have been possible only if there was no construction higher from first floor height of the passage/*chatta*. Obviously, trial court is correct in concluding that why would there be two doors (one door having an exhaust fan) and two windows opening towards the first floor portion height of the passage/*chatta* if there was already a wall constructed and existing in property nos. 331 to 337 right till the wall of the property no.329. Obviously, since there was no construction on the first floor and above with respect to iron grill

with roof at first floor height and above property nos. 331 to 337, therefore through such doors and windows of property no.329 there was access to the first floor portion height of the passage/*chatta* and which also gave light and air to first floor of property no.329. Trial court, in my opinion, has very pithily and exhaustively discussed these aspects in paras 31 to 35 of the impugned judgment. I completely agree with the reasons and discussions contained in these paras and the same read as under:-

“31. In the present case, there is no dispute that there is common passage/Chhatta to access various properties including that of plaintiffs and defendant No. 2 and 3. There is no dispute that roof of common/passage Chhatta had jaal in between. There is further no dispute that over the common passage/Chhatta construction is in existence which has a covered the jaal thereby preventing air/light. Contention of the plaintiffs is that over the common passage/ Chhatta there was no constructions and it was open upto sky. Not only this two doors and windows of adjacent school being run by MCD open towards the roof of the Chhatta which have been blocked by the newly raised construction over the common passage/Chhatta. Stand and contention of the defendant No. 2 and 3 is that such construction over the passage was in existence since long and defendant No. 2 and 3 have not raised any new construction but has carried out only permissible repairs as construction was in dilapidated consideration.

32. In reply to specific allegation of plaintiffs that two doors and window of school open towards the roof of the common passage/chhatta, defendant No. 2 and 3 in their written statement pleaded that doors and window of the school are in same condition as they were existing prior to purchase of the property No. 331 to 337 by defendant No. 2 and 3. Thus defendants No.2 and 3 did not deny specifically that two doors and windows on the first floor of the school were opening towards the roof of the common passage/Chhatta.

33. When the present matter was pending before the Hon'ble High Court it has appointed Shalini Kapoor (Advocate) as local commissioner to visit the suit property and report. She visited the suit property and

inspected the suit property in the presence of both parties and prepared spot proceedings, took 22 photographs and filed her report. She also appeared in the witness box to prove her report etc. Defendants have not filed any objection to her report. When she was in witness box counsel for defendant mainly questioned her as to how she ascertained that property in which school was being run bears property No.329. No question was asked with respect to photographs Ex PW2/4 (colly) and portion etc shown in the photographs. Meaning thereby that the contents of the photographs have not been disputed by defendants.

34. Photographs No. 4, 5, 6 and 7 clearly show that wall has been raised very close to windows which cannot open because of the wall. Ld Local Commissioner has also reported that in the school she found two windows which would have opened towards the Chhatta, had been closed by wall. She also reported that 2 doors had been closed and one of the door had an exhaust fan fitted. Existence of doors and windows on the first floor of the school have not been disputed by the defendants and their opening towards the roof of Chhatta was also not denied in the written statement specifically but in cross examination DW1 denied that doors and windows opened towards the roof of the Chhatta.

35. Photographs as noted above reveal the complicity of the officials of the MCD. Existence of window and doors on the first floor of the school towards the roof of the Chhatta in itself indicates that there was no construction on the roof of the Chhatta otherwise which engineer/architect would make provision for window and doors towards a wall. If construction on the roof of Chhatta was in existence prior to school raising its first floor then certainly there would have not been any provision for doors and windows towards the roof of Chhatta. Provision for doors and windows with opening towards a wall defies any logic. No one affixes exhaust fan towards a wall. All this go to show that there was no construction on the roof of the Chhatta and defendant No.2 and 3 in connivance with official of MCD and School Authorities extended its coverage over the roof of the common passage/Chhatta and raised construction over there and got the notice of booking hushed up under order dt. 17.08.2001. Said order deliberately did not deal with this aspect of construction over the roof of common passage/Chhatta and it is very strange that despite getting it inspected the property the concerned officer Shri S. M. Hassan did not come to note that doors and window had been closed by a wall or why provision for windows and doors were kept towards a wall. Either the said officer himself was kept in dark by the person from whom he got it inspected or he himself botched up the entire investigation and passed favourable order in favour of defendant No.2 and 3."
(underlining added)

10. In my opinion, the trial court is completely justified in holding that why would an engineer/architect make provision for doors and windows if at all there was the wall of property nos. 331 to 337. Trial court has further rightly concluded that no one fixes doors (one having an exhaust fan) and windows which open towards a wall and which defies all logic. Trial court also rightly noticed that there is no dispute that the Local Commissioner's report proved as Ex.PW2/A along with the photographs Ex.PW2/C clearly show doors and windows existing in property no. 329 opening towards the portion above the jaal and constructed portion of the passage/*chatta* at the height of the first floor. Trial court also rightly noticed that the only argument of the appellants/defendant nos. 2 and 3 was that the construction already existed in property nos. 331-337 and which they renovated and it was not as if any new construction was made, and therefore such argument showed the absurdity in the same because if there was already construction of a wall existing on the first floor height of the property nos. 331-337 covering and over any construction on the first floor height jaal, then there was no reason why from the MCD Primary School in property no. 329 in the first

floor there would have existed open doors and windows towards the passage/*chatta* at the first floor height. Learned counsel for the appellants/defendant nos. 2 and 3 could not show to me how the findings and conclusions of the trial court, especially paras 31 to 35, were in any manner illegal or incorrect.

11. Learned counsel for the appellants/defendant nos. 2 and 3 sought to argue that the appellate tribunal of MCD vide its order dated 12.10.1998 Ex.DW1/1 held that there was no illegal construction but there was only renovation on the first floor and above of the property nos.331 to 337, however, in my opinion this argument is without substance and liable to be rejected for the reason that the issue before the MCD Tribunal was with respect to whether construction made by the appellants/defendant nos. 2 and 3 was legal or illegal and the MCD appellate tribunal was not deciding any private disputes between two private parties as to whether the passage/*chatta* portion from the height of first floor and above was or was not a common portion which was not constructed upon. In fact, it is for this reason that while deciding issue no.4, trial court has held that in fact the decision passed by the Assistant Engineer dated 17.8.2001 was not binding upon

respondent nos.1 and 2/plaintiffs inasmuch as the said judgment was not in *a lis* between the appellants/defendant nos. 2 and 3 and the respondent nos.1 and 2/plaintiffs. This reasoning given by the trial court in para 29 of the impugned judgment though is with respect to an order dated 17.8.2001 passed by the Assistant Engineer of the MCD, however, this very reasoning will also apply for discarding the argument urged on behalf of the appellants/defendant nos. 2 and 3 who are placing reliance upon the judgment of the MCD Tribunal dated 12.10.1998/Ex.DW1/1. This para 29 of the impugned judgment reads as under:-

“29. Ld. Counsel for defendant while arguing pointed out that order dt 17.08.2001 passed by Shri S.M.Hasan, Assistant Engineer has decided the question involved in the present suit and therefore said order operates as resjudicata and will bar the present suit. The contention of the Ld. Counsel for the defendant is highly misplaced for the reason that first and foremost requirement for the application of principle of res-judicata is that former decision must have come from court of competent jurisdiction and secondly such lis must be between the same parties. Neither of the two condition is met as the said decision cannot be said to be from a Court as defined under Code of Civil Procedure 1908 and secondly plaintiffs was not party in such proceedings. Apart from this, said order dt 17.08.2001 did not deal with the question whether the construction over/upon the common Chhatta/passage in question was authorised or unauthorised, though said order under umbrella order held that construction on the first floor and second floor were in existence since long and were repaired only which were permissible as per clause 6.4.1. of unified Building Bye Laws. It did not discuss or rule that said first floor or second floor construction was in existence since long even over the common Chhatta/passage. Hence on merits also order dt 17.08.2001 does not operate as res-judicatta. Hence, in view of the above discussion issue No.4 is decided against the defendant and in favor of plaintiffs.” (underlining added)

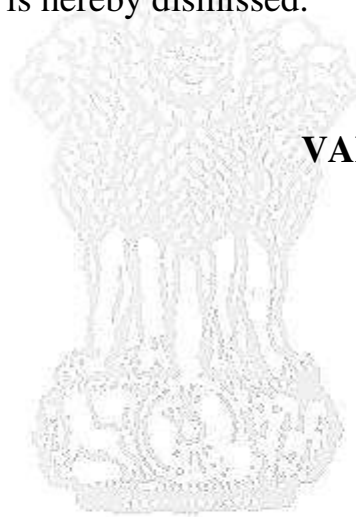
12. In my opinion the trial court has in fact after decreeing the suit of the respondent nos. 1 and 2/plaintiffs rightly directed the Commissioner of MCD to conduct an enquiry with respect to the illegalities and such observations are contained in the second last sub-para of the relief para of the impugned judgment.

13. In view of the above discussion, I do not find any merit in the appeal and the same is hereby dismissed.

DECEMBER 19, 2017

AK/Ne

VALMIKI J. MEHTA, J



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