

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

+ **RSA No. 388/2015**

% **Reserved on: 21st September, 2017**
Pronounced on: 26th September, 2017

SANTARA DEVI Appellant
Through: Mr. Udayan Jain and Mr. Amit
Sherawat, Advocates.

versus

LATISH KUMAR & ORS. Respondents
Through: Mr. Nawal Kishore, Advocate.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

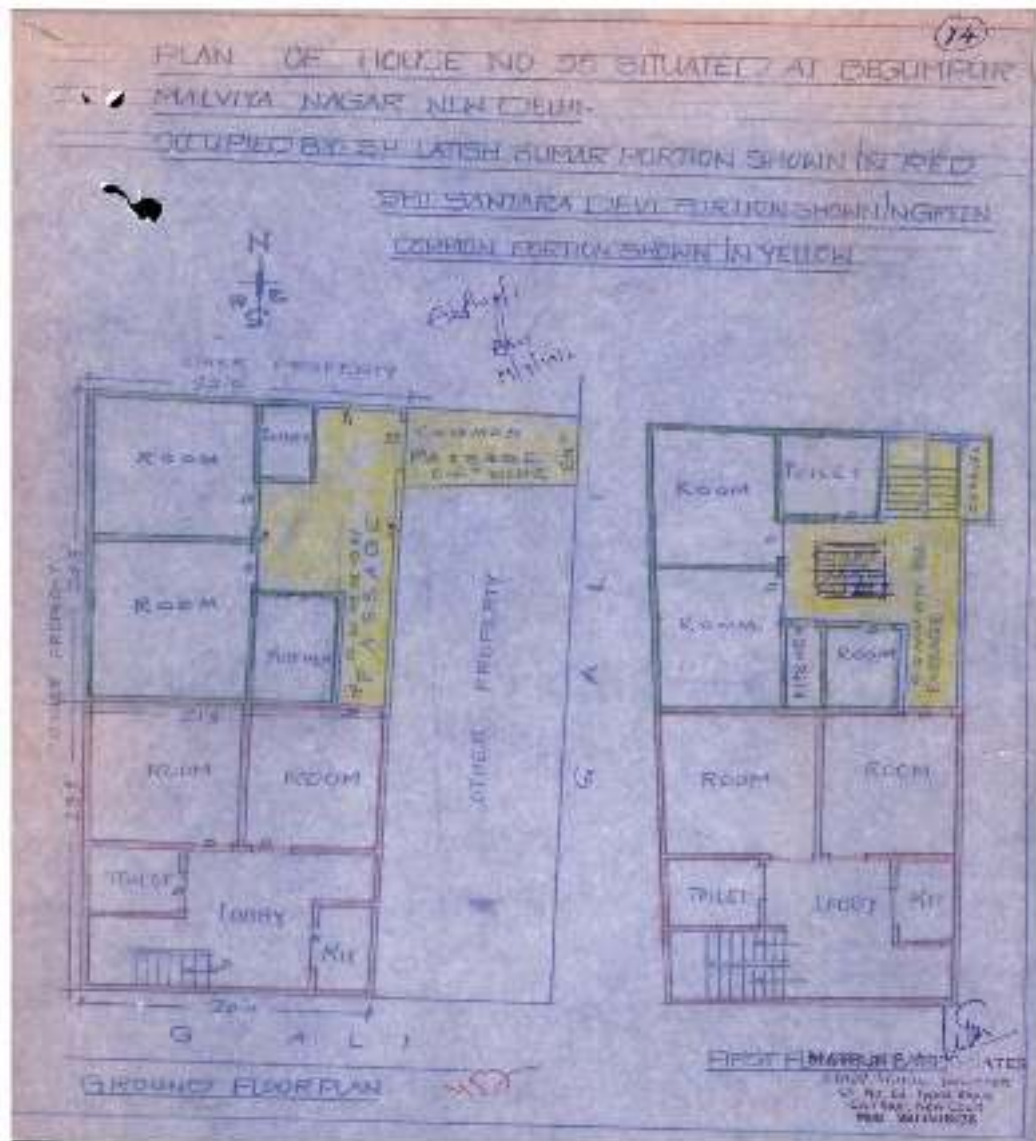
1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no.1 in the suit, Smt. Santara Devi, impugning the concurrent judgments of the courts below; of the Trial Court dated 20.5.2014 and the First Appellate Court dated 22.7.2015; by which the suit for injunction filed by the respondent no.1/plaintiff/Sh. Latish Kumar has been decreed and the appellant/defendant no.1 has been restrained from blocking the passage shown in yellow colour in the site plan Ex.PW1/1 in the property

bearing No.55, Village, Begumpur, Malviya Nagar, New Delhi. Appellant/defendant no.1 has also been restrained from making any construction in the area which the trial court has found to be a common passage.

2. The issue between the parties is whether a particular area of the property No.55, Village Begumpur, Malviya Nagar, New Delhi is a common area or whether this area is under an exclusive ownership of the appellant/defendant no.1. Appellant/defendant no.1 is the sister-in-law of the respondent no.1/plaintiff inasmuch as the late husband of appellant/defendant no.1 was the real brother of the respondent no.1/plaintiff.

3. In order to appreciate the disputes, and so that there is a bird's eye view of the disputes the site plan Ex.PW1/1 filed and proved by the respondent no.1/plaintiff is scanned below. The red colour portion is admittedly of the respondent no.1/plaintiff. The green coloured portion is admittedly of the appellant/defendant no.1. The dispute is whether the yellow coloured portion is a common area of the appellant/defendant no.1 and respondent no.1/plaintiff or whether this yellow coloured area is exclusively owned by the appellant/defendant no.1. Respondent no.1/plaintiff pleads that yellow coloured portion is a

common area, and therefore, no construction can be made by the appellant/defendant no.1 on the same including a staircase, whereas the appellant/defendant no.1 pleads that the yellow coloured portion falls in her share as it fell to the share of her late husband on division and hence the exclusive ownership is now with the appellant/defendant no.1. The scan site plan Ex.PW1/1 is as under:-



4. The following admitted facts are required to be noted:-

(i) The suit property No. 55, Begumpur, Malviya Nagar, New Delhi belonged to the father of the respondent no.1/plaintiff/Sh. Latish Kumar and Sh. Suraj Bhan, the late husband of the appellant/defendant no.1.

(ii) It is not in dispute that the suit property was equally divided between the two sons of late Sh. Ram Saran Dass i.e respondent no.1/plaintiff/Sh. Latish Kumar and the husband of the appellant/defendant no.1 Sh. Suraj Bhan. I may note that though there is some contradiction as to whether partition took place during the life time of the father Sh. Ram Saran Dass or thereafter, however, the fact that the property was equally divided between two sons of late Sh. Ram Saran Dass namely respondent no.1/plaintiff/Sh. Lalish Kumar and Sh. Suraj Bhan husband of the appellant/defendant no.1 is an admitted fact. The respondent no.1/plaintiff in the plaint para 2 clearly admits that the division of the property was in equal shares. This averment of para 2 of the plaint is reiterated in para 4 of the affidavit by way of evidence filed by the respondent no.1/plaintiff

wherein it is stated that the House No.55 was mutually divided into two equal portions.

(iii) There is no documentary evidence as to how the property No.55 was equally divided, and that is why the dispute was as to whether the yellow coloured portion of the site plan Ex.PW1/1 fell to the share of the husband of the appellant/defendant no.1 as contended by her or was a common area as is contended by the respondent no.1/plaintiff.

5. In the present case, after issues were framed evidence was led by both the parties. On behalf of the respondent no.1/plaintiff evidence was led of respondent no.1/plaintiff as PW-1, PW-2 Sh. Rajpal Singh one other son of late Sh. Ram Saran Dass, PW-3 Sh. Satpal Singh another son of Sh. Ram Saran Dass, and PW-4 Sh. Rajesh Kumar, a neighbor. Obviously, the depositions of the four witnesses on behalf of the respondent no.1/plaintiff, including the respondent no.1/plaintiff himself, are based as per oral statements, and there is no documentary evidence filed and proved by the respondent no.1/plaintiff or his witnesses as to whether the yellow coloured area is a common area and not exclusively owned by the appellant/defendant no.1.

6. On behalf of the appellant/defendant no.1 evidence was led of three witnesses including the appellant/defendant no.1 herself as DW-1. DW-2 was Sh. Bijender Singh Dagar, and who was the cousin of the appellant/defendant no.1. Defendant no.3 was Sh. Dharampal, the brother-in-law of the appellant/defendant no.1. These witnesses of the appellant/defendant no.1 have deposed on the lines of the case of the appellant/defendant no.1 in the written statement and once again the entire evidence on behalf of the appellant/defendant no.1 is only oral evidence and no documentary evidence has been filed and proved as to how the yellow coloured area in the site plan Ex.PW1/1 was exclusively owned by the appellant/defendant no.1 (and earlier by her husband Sh. Suraj Bhan) or whether this yellow coloured portion is a common area.

7. The trial court by its judgment dated 20.5.2014 decided this relevant issue of the yellow coloured portion being common area as claimed by the respondent no.1/plaintiff or exclusively owned by the appellant/defendant no.1 in issue no.3, by deciding the same in favor of the respondent no.1/plaintiff and which relevant discussion reads as under:-

“ISSUES NO.3:

Whether the plaintiff is entitled for decree of permanent injunction as prayed for in the suit?OPP

Burden of proving this issue is upon plaintiff. It is admitted that the property in question bearing No. 55 Village Begampur, Malviya Nagar, New Delhi was the common ancestral property which jointly fell into the share of plaintiff and husband of defendant no. 1. DW-1 Smt. Santara Devi in her cross examination admitted that she and the plaintiff have equal share in the said house. PW-2 Sh. Rajpal Singh in his cross examination also admitted that the suit property was divided between plaintiff and husband of defendant no. 1 during the life time of their father. The dispute in question is about a passage as shown in yellow colour in the site plan filed by plaintiff alongwith the plaint which is Ex. PW-1/1 on record. Plaintiff has claimed this portion as a common portion between the share of the property of plaintiff and the husband of defendant no. 1 to be used as a common passage by plaintiff and defendant no. 1 for ingress and egress of the property. A portion of the said common passage has been referred to A B C D in the site plan Ex. PW-1/1 in the cross examination of PW-1 wherein he has submitted that this portion is not open to sky and is thus covered. PW-3 Sh. Satpal Singh in his cross examination has submitted that plaintiff and defendant no. 1 have equal shares excluding the common passage and that the common passage has been correctly shown in the site plan Ex. PW-1/1.

DW-1 in her cross examination submitted that the entrance of the house was through a Gali in the east of the house when she joined the company of her husband after her marriage and that this was the only way to enter into the house. She also claimed that she as well as the plaintiff have equal share in the said house but claimed that the space shown in yellow in Ex. PW-1/1 falls within her portion and is not vacant. DW-2 Sh. Vijder Singh Dagar also admitted that there was only one way to enter the House No. 55 prior to the partition somewhere in the year 2000 when the house was partitioned in equal shares. He also admitted that the way to the house of the plaintiff remained intact even after the demolition and construction of the share of late Sh. Suraj Bhan. He also submitted that the plaintiff ended up opening a door on the other side of Gali subsequently at the time of construction of his portion. DW-3 Sh. Dharmapal in his cross examination submitted that father of the plaintiff at the time of settlement decided that the exit gates of plaintiff and defendant no. 1 be installed by them on their own particular sides in their respective portions after the construction of the new house. It has thus been admitted and also stands as a version of defendant that the H. No. 55 was one unit with only single gate on the eastern side for the ingress and egress of the property. The contention of the defendant no. 1 is primarily that the portion shown in yellow colour in Ex. PW-1/1 has fallen to her share and thus, cannot be taken to be the common passage.

As such, the settlement or the mutual family partition in this case is not denied. The term of settlement/partition to the effect that both plaintiff and

husband of defendant no. 1 got equal shares in the property is also not in dispute. But there is no written document specifying the precise dimensions of the property falling in share of plaintiff or husband of defendant no. 1 and also about the term of the exit gate to be used by plaintiff or husband of defendant no. 1 after partition as the portion of the property which earlier contained the gate for ingress and egress from the property fell into the share and portion of husband of defendant no. 1 so the arrangement, if any, decided at the time of partition to this effect stands in contention as there is no document specifying those terms.

It is not in doubt that there was only one gate on the Eastern side of the property prior to construction of the portion of the plaintiff. It has also come up in testimony that there was no dispute qua the passage till the construction of portion of property by the plaintiff. It is also not in dispute that the plaintiff constructed his property subsequent to the construction of property by husband of defendant no. 1. DW-1 denied the suggestion put forth to her by counsel for the plaintiff in her cross examination that the plaintiff continued using the passage in dispute till the construction of portion of the property by him. PW-3 Sh. Satpal Singh in his cross examination submitted that the property was equally divided between plaintiff and husband of defendant no. 1 excluding the common passage. PW-3 Sh. Satpal Singh also submitted that the defendant no. 1 constructed his share of the property completely leaving the common passage. Defendant no. 1 has not been able to prove or controvert the version put across by plaintiff as in as per the terms of settlement, plaintiff was to use the exit gate towards South of the property. This is more so as any such gate was never in existence prior to construction of portion of the property by the plaintiff. The plaintiff chalked out an additional exit gate towards the gali on the southern side of the property. This privilege was available to him on account of the portion of the property which fell in his share. A mutual arrangement to respect the privacy of each other, however, could have been reached at, to exclusively use the portions/gates in the property falling in respective shares of plaintiff and husband of defendant no. 1.

The above discussion makes it amply clear that the plaintiff since the property was single unit has been using that passage shown in yellow colour in the site plan Ex. PW-1/1 for ingress or egress of the property till he chalked out another gate on the south side of the property. Plaintiff has been able to underline effectively his continuous usage, both practically and logically till construction of his gate on the south side of the property. The south side gate undoubtedly gives him an advantage over the defendant no. 1 but he has been able to reasonably prove that the common passage as shown in yellow colour in the Site Plan Ex. PW-1/1 was available for usage by both plaintiff and husband of defendant no. 1. Any version to controvert this finding has not been proved by defendant no. 1. The right of usage of this portion shown in yellow colour in Site Plan Ex. PW-1/1 cannot be taken away from the plaintiff. The preponderance of probabilities accordingly lie

in favour of plaintiff. Plaintiff, as has been able to establish his right over the portion of property shown in yellow colour in the Site Plan Ex. PW-1/1, thus, has a right co-extensive with defendant no. 1 to use the said passage. Accordingly, plaintiff has thus proved himself to be entitled to an injunction in his favour to prevent the breach of an obligation in his favour.

This case was contested only by defendant no. 1. Defendant no. 2 and 3 were proceeded ex-parte by Ld. Predecessor of this court as they never appeared before the Court. Defendant no. 2 is the son of defendant no. 1 and also thus, one of the heir of Late Sh. Suraj Bhan, husband of defendant no. 1 so his position is equivalent to that of defendant no. 1. Defendant no. 1 has denied defendant no. 3 to be the legal heir of Late Sh. Suraj Bhan. As such, as defendant no. 3 has never appeared before the Court, but the address of defendant no. 3 has been shown to be distinct from the unit of the house in question and there is no relief claimed against defendant no. 3 in particular with no averment against defendant no. 3 in particular qua any obstruction or impediment in the usage of common passage, thus, no relief can be passed in favour of plaintiff to the prejudice of defendant no. 3.

In view of the above mentioned discussion, this issue stands decided in favour of plaintiff and against the defendant no. 1. The outcome shall also stand against defendant no. 2.”

8. The first appellate court in its impugned judgment dated 22.7.2015 has reproduced the aforesaid discussion on issue no.3 in its entirety and has further commented upon the statements made by the witnesses of the appellant/defendant no.1 and has accordingly upheld the judgment of the trial court. The other relevant paras of the impugned judgment of the first appellate court, other than the para which reproduces the discussion of the issue no.3 of the trial court as per para 12 of its judgment, are paras 18 to 21 and these paras read as under:-

“18. It is in the evidence of the plaintiff that the portion shown in yellow colour in the site plan was/is a common portion commonly used by both the

parties. As per the plaintiff, the defendant wanted to build staircase upon the common passage which gave a cause of action to the plaintiff to institute this suit. PW2 Rajpal Singh and PW3 Satpal Singh who are elder brothers of the plaintiff and brothers-in-law of the defendant no.1 have also commonly stated in their affidavits of evidence that there is a gali which was the only common passage of House no.55, Begumpur, Delhi and now it is a common gali for the plaintiff and the defendants and there is a common courtyard also in front of both the portions. During the cross-examination of PW2 and PW3, nothing has come out against the claim of the plaintiff with respect to the common passage. Testimonies of PW4 Rajesh Kumar also support the claim of the plaintiff.

19. On the other hand, there is no evidence on behalf of the defendants to prove that the portion shown in colour yellow in the site plan of the plaintiff has fallen exclusively to the share of the defendants. DW2 Bijender Singh Dagar who is cousin of the defendant no.1 has also admitted in his cross-examination that there was only one way to the old house. DW2 has also admitted in his cross-examination that after the demolition and construction of the share of Late Suraj Bhan the way to the house of the plaintiff remained intact. It is also in the evidence of the DW2 that the gate of the plaintiff which opens towards the kitchen of the defendant was in existence prior to the filing of present suit and now also. Cross-examination of the DW2 on the material point of common use of common portion is quite vaguely recorded but it also indicates that the plaintiff and the defendants both were having exit on East side.

20. The main contention raised by the defendant no.1 is that in the month of October 2009 the plaintiff broke open a partition wall marked 'A B' in the site plan filed by the defendant no.1 and also at first floor Marked 'C D' of the wall and fixed doors therein to grab the property of the defendants. But, there is no cogent evidence on behalf of the defendant no.1 to prove this contention. From a perusal of both site plans Ex.PW1/1 (filed by the plaintiff) and Ex.DW1/A (filed on behalf of the defendant) also, it is highly probably that the portion between the kitchen of the defendant no.1 and wall was left unconstructed/vacant so that it can be used by the plaintiff.

21. In the light of the pleadings and evidence of the parties and the discussion above-stated, I am of the view that the portion shown in yellow colour in the site plan Ex.PW1/1 was/is a common portion and it is commonly used by the plaintiff as well as the defendants."

9. For the disposal of this RSA, the following substantial question of law is framed:-

“Whether the courts below have not committed a gross illegality and complete perversity in holding the yellow coloured portion area of the site plan Ex.PW1/1 as a common area and not exclusively owned by the appellant/defendant no.1, inasmuch as the courts below have ignored vital admitted facts with the fact that the oral depositions have been interpreted perversely in favour of the respondent no.1/plaintiff?”

10. I have already stated above that it is an admitted position that property No.55 which belonged to the father was divided in two equal shares between the respondent no.1/plaintiff and the husband of the appellant/defendant no.1. Equal means roughly about equal in area unless for grave reasons there is a gargantuan difference in value as pleaded and proved. When we see the site plan Ex.PW1/1, which has been scanned above, it is seen that unless the yellow coloured portion is included in the green coloured portion of the appellant/defendant no.1, the area with the appellant/defendant no.1 does not become approximately equal to the area with the red coloured area in the site plan falling to the share of the respondent

no.1/plaintiff. This crucial aspect has been most illegally and perversely not at all observed upon by the courts below, and which was very vital in deciding as to whether the yellow coloured portion in Ex.PW1/1 fell to the share of the appellant/defendant no.1 or was a common area. Only when once the yellow coloured area is added to the green coloured area of the appellant/defendant no.1, then the total of green and yellow coloured areas become roughly equal to the red coloured area falling to the share of the respondent no.1/plaintiff, and therefore, this is one aspect completely in favour of the appellant/defendant no.1 for the yellow coloured area of Ex.PW1/1 to be falling exclusively to the share of the appellant/defendant no.1 and not being a common area as contended by the respondent no.1/plaintiff.

11. Second and the most important fact is that area which fell to the share of the respondent no.1/plaintiff, and which is the red coloured area in Ex.PW1/1 already has a staircase from going from the red coloured portion in the ground floor area to the red coloured portion of the first floor area of the respondent no.1/plaintiff. Therefore nothing in the yellow coloured area of Ex.PW1/1 is required

by the respondent no.1/plaintiff to be in possession of and enjoy his entire red coloured portion with the aspect that there is direct entry from a street to the red coloured portion of the respondent no.1/plaintiff thereby making the red coloured portion as an independent unit.

12. The aforesaid two aspects of roughly equal area and respondent no.1/plaintiff having a staircase in his red coloured area are to be taken with the fact that the red coloured portion of the property has a direct access from the street/gali in Southern side of the property, and that even without the alleged common area and the gate at the end of the common area at the yellow coloured portion is not available to the respondent no.1/plaintiff, even then respondent no.1/plaintiff in no manner is prevented from using and enjoying his red coloured portion of Ex.PW1/1 as a completely independent property and which red coloured area is equal to the share of the appellant/defendant no.1 only if the yellow coloured alleged common area is added to the green coloured portion falling to the share of the appellant/defendant no.1.

13. Only oral depositions of the witnesses of either of the parties in the present case will not amount to discharge of onus of proof on the respective parties with respect to whether the yellow coloured area in Ex.PW1/1 is a common area or exclusively owned by the appellant/defendant no.1 inasmuch as oral depositions are always in favour of the concerned person who brings the witness and onus of proof is not discharged by oral depositions once they are met by equal oral depositions by the witnesses of the other side. Therefore on mere oral depositions, it is not possible to decide the present case, and the circumstantial facts and evidence have necessarily to be looked into, and which have been discussed above, requiring that share of respondent no.1/plaintiff has to be equal to the share of the appellant/defendant no.1 and which can only happen if the yellow coloured portion is added to the green coloured admitted portion of Ex.PW1/1 of the appellant/defendant no.1. This has to be taken with the two other facts of the red coloured portion falling to the share of the respondent no.1/plaintiff in Ex.PW1/1 having an independent entrance directly from the street/gali to the South of the property but also that the red coloured portion of the first floor has access from the

staircase built in red coloured portion of the ground floor of the Ex.PW1/1, and thus showing that entire red coloured portion can be enjoyed by the respondent no.1/plaintiff without in any manner going to the yellow coloured portion thereby making the red coloured area as an independent house.

14. The courts below have fallen into an error in giving weight to alleged admissions in the cross-examination of DW-2/Sh. Bijender Singh Dagar wherein it is stated by the DW-2 on 22.10.2013 that it is correct that after demolition and construction of the share of late Sh. Suraj Bhan (husband of the appellant/defendant no.1), the way to the house of the respondent no.1/plaintiff remained intact because this statement of DW-2 is not an admission of the yellow coloured portion of Ex.PW1/1 being a common area inasmuch as what is stated by DW-2 on 22.10.2013 was only a statement of fact that the red coloured area of respondent no.1/plaintiff in Ex.PW1/1 could be approached from the yellow coloured portion. In any case, evidence has to be read as a whole and one stray admission cannot be a basis for the case of the respondent no.1/plaintiff to be accepted and yellow coloured portion to be treated as a common area, because this finding

would overlook the three important aspects of shares of respondent no.1/plaintiff and appellant/defendant no.1 to be equal, red coloured portion of the respondent no.1/plaintiff can be independently enjoyed by respondent no.1/plaintiff by direct entrance from the gali/street and the first floor portion of the red coloured area having a direct staircase from the ground floor red coloured area in Ex.PW1/1.

15. The courts below have also committed an error in holding that there is an admission of the appellant/defendant no.1/DW-1 in a statement made on 4.2.2013 that there was only one way to enter the house inasmuch as this statement was conditioned by further stating that that position was at the time of the marriage of the appellant/defendant no.1, and therefore, this statement was a historical fact and not the position after partition of the property between the respondent no.1/plaintiff and the husband of the appellant/defendant no.1. In the subsequent portion of the cross-examination, DW-1/appellant on 4.2.2013 categorically stated that it was wrong to suggest that the portion shown in yellow colour was available as a vacant space for respondent no.1/plaintiff to have a passage from the same. DW-1/appellant also categorically stated in her cross-

examination that the yellow coloured portion of Ex.PW-1/1 was in the portion which came to the share of the appellant/defendant no.1.

16. The courts below have also placed undue emphasis by holding that nothing has been elucidated from the cross-examination of the witnesses of the respondent no.1/plaintiff because equally when we read the cross-examination of all the three witnesses of the appellant/defendant no.1 including the appellant/defendant no.1 herself there is no admission by any of the DW-1 to 3 that the yellow coloured portion is not an area which did not exclusively belong to the appellant/defendant no.1.

17.(i) Learned counsel for the respondent no.1/plaintiff led great emphasis on the affidavit by way of evidence filed by the appellant/defendant no.1 in para 4 thereof wherein the appellant/defendant no.1 states that she and her son want to build a staircase on common passage 6' wide and it is therefore argued that the appellant/defendant no.1 herself admits that portion of the yellow coloured area where the staircase was built was a common passage, however, obviously what was stated in para 4 of the affidavit by way of evidence of the appellant/defendant no.1 is a mistake because what

ought to have been typed was that common open passage of 6' wide was alleged to be common area by the respondent no.1/plaintiff. This para 4 of the affidavit by way of evidence of the appellant/defendant no.1 reads as under:-

“4. That the deponent say and submit that the deponent and her son want to built staircase upon the common open passage six feet wide. It is submitted that the deponent has raised staircase on her portion and not in the portion of the plaintiff.”

(ii) No doubt, in para 4 of the affidavit by way of evidence of the appellant/defendant no.1, the appellant/defendant no.1 has mistakenly stated the open passage along with pre-fixed word common, however, this stray statement cannot take away the consistent case of the appellant/defendant no.1 in her written statement as also in other portions of her affidavit by way of evidence, as also the depositions of DW-2 and DW-3, that the yellow coloured area was not a common area but belonged exclusively to the appellant/defendant no.1. Immediately before para 4 of the affidavit by way of evidence which is relied upon by the counsel for the respondent no.1/plaintiff as an ‘admission’ of the yellow coloured area as a common area, the following lines appear earlier in para 3 of the self-same affidavit by way of evidence of the appellant/defendant no.1:-

“.....The deponent and her son are in possession of the premises shown in red colour in the site plan and the plaintiff has no right, title and interest in portion shown in Yellow colour in his site plan. It is further submitted that the plaintiff is not in possession of portion shown in yellow colour of his site plan. It is further submitted that the portion shown in yellow colour in the site plan is not common to the parties.”

(iii) In my opinion, therefore no capital can be made out by the respondent no.1/plaintiff of some mistake in para 4 of the affidavit by way of evidence of the appellant/defendant no.1 inasmuch as what is stated in para 4 gets clarified by the earlier lines of para 3 of affidavit by way of evidence and which clearly shows the case of the appellant/defendant no.1 that yellow coloured portion was exclusively owned by the appellant/defendant no.1.

18. In view of the aforesaid discussion, the substantial question of law is answered in favour of the appellant/defendant no.1, and consequentially the judgments of the courts below dated 20.5.2014 and 22.7.2015 are set aside. It is held that the yellow coloured portion in Ex.PW1/1 is not a common area but is an area which fell to the exclusive ownership of the share of Sh. Suraj Bhan, the husband of the appellant/defendant no.1 and consequently to the appellant/defendant no.1, and this yellow coloured area is not a common area as is the case of the respondent no.1/plaintiff. Suit of

the respondent no.1/plaintiff for injunction accordingly will stand dismissed. Appeal is accordingly allowed and disposed of. Parties are left to bear their own costs.

SEPTEMBER 26, 2017
ib/Ne

VALMIKI J. MEHTA, J

