

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

+ **RFA No. 295/2018 & CM No. 12390/2018**

% **1st November, 2018**

SANJAY ARORA & ANR.

..... Appellants

Through: Ms. Ekta Sikri, Mr. Ajay Pal
Singh and Mr. Abhinav Garg,
Advocates (8860843870)

versus

SURENDER SINGH & ORS.

..... Respondents

Through: Mr. G.B. Singh, Advocate
(9911119367)

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiffs in the suit impugning the Judgment of the trial court dated 15.12.2017 by which the trial court has dismissed the suit for possession and *mesne* profits filed by the appellants/plaintiffs with respect to the two flats on the east side and west side on the 4th floor of the property/building No. 15-

A, Jangpura Lane, Bhogal, New Delhi. The suit was dismissed despite the fact that the appellants/plaintiffs led evidence and proved their case and the respondents/defendants had led no evidence as their right to lead evidence was closed.

2. The facts of the case are that the appellants/plaintiffs pleaded that in terms of the usual documents being the Agreement to Sell, Power of Attorney, Will etc., dated 20.11.2000, they purchased the rights in the two flats on the 4th floor on the east side and west side of the suit building from the builder/collaborator Smt. Krishna Saini. The builder, Smt. Krishna Saini, had entered into a Collaboration Agreement dated 30.12.1999 with the respondents/defendants, and as per this collaboration agreement, the rights to the basement, the second floor with the terrace and the rights over the third floor fell to the share of the builder, Smt. Krishna Saini, and the rights to the ground floor, first floor and third floor without roof rights fell to the share of the respondent nos. 1 and 2/defendant nos.1 and 2/owners. Simultaneous to the entering into of the collaboration agreement, the respondent nos. 1 and 2/defendant nos.1 and 2/owners executed a General Power of Attorney in favour of the

builder, Smt. Krishna Saini. The appellants/plaintiffs pleaded that on the execution of the documents dated 20.11.2000 they received the possession of the 4th floor, and were in possession thereof till 18.06.2009, and when it was found that the respondents/defendants had taken illegal possession of the subject property at 4th floor and had also stolen all the articles lying therein including sofa-set, kitchen appliances, gas, stove, cylinder, almirah, cooler, fan etc of the value of Rs. 1,00,000/-. The appellants/plaintiffs consequently registered an ***FIR No. 286/2009*** with Police Station Hazrat Nizamuddin against the respondents/defendants on 10.07.2009. In the criminal proceedings, the respondents/defendants had applied for anticipatory bail as also regular bail and wherein they stated that they had rented out the suit premises. Accordingly, the subject suit for possession and *mesne* profits was filed.

3. The respondents/defendants filed their joint written statement and pleaded that respondent no. 1/defendant no.1 and his brother Sh. Harbhajan Singh are the owners of the suit property with respect to which the other brothers had executed in their favour a registered Relinquishment Deed on 29.10.1998. It was admitted that

on 30.12.1999 the respondent no. 1/defendant no.1 and his brother Sh. Harbhajan Singh had entered into a collaboration agreement with the builder Smt. Krishna Saini. It was also admitted that the builder Smt. Krishna Saini was entitled to basement, second floor and roof rights over the third floor, whereas respondent no. 1/defendant no.1 and his brother, Sh. Harbhajan Singh, were entitled to ground floor, first floor and third floor without roof rights to the property. It was further pleaded by the respondents/defendants that the builder left the construction incomplete and it was the respondent no. 1/defendant no.1 and his brother who made remaining construction above the third floor and fourth floor from their own funds and since then they are in possession of these floors. The suit was hence prayed to be dismissed.

4. The trial court framed issues and appellants/plaintiffs led evidence, and these aspects are recorded in paras 5 to 5.2 of the impugned judgment, which read as under:-

“5. On the pleadings of the parties, following issues are framed on 14.03.2013:-

1. Whether plaintiff is entitled for a decree of possession of the suit premises as mentioned in the plaint? OPP
2. Whether plaintiff is entitled for a decree of recovery of *mesne* profit alongwith interest as claimed in the plaint? OPP

3. Whether the suit is not maintainable in the present form?
OPD

4. Whether the plaint is liable to be rejected under Order VII Rule 11 of the Code of Civil Procedure, 1908? OPD

5. Whether plaintiff has not approached this court with clean hands and concealed the material fact, if so to what effect?
OPD

6. Whether the suit is bad for non-joinder and mis-joinder of parties, if so to what effect? OPD

7. Relief.”

5.1 To prove their case, the plaintiffs have examined six witnesses, Sh. Sanjay Arora, plaintiff no.1 stepped into witness box as PW1 and filed his evidence by way of affidavit as Ex.PW1/1 and deposed in consonance with the pleadings made by him in plaint. He also relied upon documents Ex.PW1/A to Ex.PW1/O. Sh. Manoj Kumar, plaintiff no.2 examined as PW2 who tendered his affidavit of evidence Ex.PW2/1 and relied upon title documents Ex.PW2/A(colly). Sh. Tajendra, UDC from Sub Registrar-V, Mehrauli was examined as PW3/2. Sh. Anil Kumar Singh from office of Sub-Registrar VII was examined as PW4 who produced record pertaining to GPA Ex.PW4/1. Sh. Ravinder Jain, Architect has proved site plan Ex.PW1/C. Sh. Anil Saini, brother-in-law of builder Krishna Saini (now deceased) deposed as PW6.

5.2 Despite ample opportunities, defendants have failed to adduce evidence and vide order dated 27.03.2017, opportunity to lead defendant's evidence was closed.”

5. The trial court by the impugned judgment has dismissed the suit by observing that the 4th floor is an illegal floor as per the Municipal Bye-laws, and therefore appellants/plaintiffs cannot claim any right in the same.

6. In my opinion, the trial court has grossly erred in dismissing the suit because if there was any illegal construction then whether the same has to be demolished or it has to continue to exist will be upon the Municipal Corporation of Delhi and the relevant laws as applicable, but that would not mean that the legal ownership of an illegal property would not vest with a person who has ownership of the same. The appellants/plaintiffs have proved in the trial court the entire set of documents executed in their favour as Ex.PW1/A-Ex.PW1/O and Ex.PW2/A(Colly). Both the appellants/plaintiffs stepped into the witness box and proved their cases. It is seen that out of the documents which have been proved by the appellants/plaintiffs one document which is proved is the Bail Application dated 25.8.2000/ Ex.PW1/J, and the respondent no. 1/defendant no. 1 in his bail application has clearly stated that it was the builder, Smt. Krishna Saini, who had constructed up to the 5th floor illegally and that 4th floor, being the suit floor/property, was with the respondent no. 1/defendant no. 1. These paras, therefore, show that the case set up by the respondents/defendants in the written statement that the building was only constructed by Smt. Krishna Saini only up till the second

floor, is a false case and that in fact there did exist the 4th floor and which was sold in terms of the usual documentation dated 20.11.2000 by the builder, Smt. Krishna Saini, to the appellants/plaintiffs. The relevant paras of the Bail Application dated 25.08.2000/Ex.PW1/J are paras 3-5 and these paras read as under:-

“3. That the true facts of the case are that the applicant/accused and his brother had entered into a collaboration agreement with the builder. The said builder built up the house upto 5th floor; but the inferior quality materials were used in the said building. Thereafter, it was agreed between the applicant/accused, his brother and the said builder that the possession of the 4th floor will remain with the applicant/accused; but the said builder has illegally entered into alleged GPA with the complainant.

4. That the applicant/accused let out the said 4th Floor on rent and presently Ms. Bhagwanti W/o Deepak is residing on the said floor since April, 2008. The copy of tenant verification letter is enclosed.

5. That nothing has been recovered from the possession of the applicant/accused or at his instance as at the time of surrender by the applicant/accused before this Hon’ble Court, the police did not ask the police remand to the applicant/accused for his interrogation.”

(Underlining Added)

7. As already stated above, the respondents/defendants have led no evidence. Once the appellants/plaintiffs proved their case, and the respondents/defendants had led no evidence and hence failed to prove their case, the appellants/plaintiffs are bound to succeed and the

trial court has therefore seriously erred in dismissing the subject suit for possession and *mesne* profits.

8. Counsel for the appellants/plaintiffs at this stage states that the concern of the appellants/plaintiffs is really to get back possession of their valuable property and the appellants/plaintiffs do not press for the relief of *mesne* profits.

9. In view of the aforesaid discussion, this appeal is allowed. The impugned judgment of the trial court dated 15.12.2017 is set aside. The suit of the appellants/plaintiffs is decreed by passing a decree for possession in favor of the appellants/plaintiffs and against the respondents/defendants with respect to the suit property being two flats on the 4th floor, east side and west side, property/building no. 15-A, Jangpura Lane, Bhogal, New Delhi.

10. The appeal is accordingly allowed and disposed of in terms of the aforesaid observations. Parties are left to bear their own costs.

NOVEMBER 01, 2018/ib

VALMIKI J. MEHTA, J