

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

+ **RFA No. 244/2016**

% **24th July, 2018**

SANGEETA Appellant

Through: Mr. Udayan Jain, Mr. Amit
Sherawat and Mr. Kamal
Sharma, Advocates.

versus

GEETA Respondent

Through: None.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

RFA 244/2016 and C.M. Appl. No. 7894/2018 (for stay)

1. This Regular First Appeal under Section 96 the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 19.12.2015 by which the trial court has rejected the plaint of the appellant/plaintiff under Order VII Rule 11 CPC. At the outset, I may note that the order though is said to have been passed by applying Order VII Rule 11 CPC, in reality the

order will have to be treated as one either under Order VII Rule 11 CPC or under Order XII Rule 6 CPC.

2. Appellant/plaintiff filed the subject suit for possession of an area of 9.12 sq. yards from the respondent/defendant on the third floor and the fourth floor (terrace floor) of the property no. 190-A/1, back side Khasra No. 89, Village Masjid Moth, now known as Gautam Nagar, New Delhi, or in the alternative an amount of Rs.16,22,600/- being the value of the area of 9.12 sq. yards. As per the plaint it is pleaded that both the parties to the suit are real sisters and they purchased by means of two Sale Deeds dated 27.4.2009 50 sq. yards each on the third floor and terrace floor of the aforesaid property, with the front portion of 50 sq. yards being purchased by the appellant/plaintiff in terms of her Sale Deed and the back portion of 50 sq. yards of the third floor and terrace floor purchased by the respondent/defendant in terms of her Sale Deed. The Sale Deeds were duly registered with the Sub-Registrar on 4.5.2009.

3. Appellant/plaintiff pleaded that after demolishing the old structure on the third floor, both the sisters i.e. plaintiff and defendant, jointly constructed the third floor totaling to 100 sq. yards and each

party thereafter moved into the possession of their constructed portion. In the plaint it is further pleaded that the plaintiff realized after taking possession that she had taken an area less than 50 sq. yards because the area of the constructed portion with her in the front portion of the third floor was 40.88 sq. yards i.e 9.12 sq. yards less than the 50 sq. yards which she had purchased in terms of the Sale Deed dated 27.4.2009, and therefore appellant/plaintiff requested the respondent/defendant to handover 9.12. sq. yards area or give her monetary compensation, and since this was not agreed to by the respondent/defendant, the subject suit came to be filed seeking the relief of recovery of 9.12 sq. yards or the value there of totaling to Rs.16,22,600/-.

4. Trial court has dismissed the suit by observing that parties have jointly constructed the property and there is no averment that respondent/defendant has by force or fraud constructed more, and once there is no such averment, the construction made which has been taken possession of by the respective parties would be as per their consent and consequently there is no cause of action for filing of the

suit. The relevant paras of the impugned judgment are paras 9-11 and these paras read as under:-

“9. Facts alleged in the plaint are that the plaintiff and defendant are real sisters and have purchased half-half portion each of property bearing no.190-A/1, 3rd Floor, Gautam Nagar, New Delhi from Smt. Gurdeep Kaur, Smt. Swarajit Kaur and Smt. Bhupinder Kaur by way of two sale deeds dated 04.05.2009 and taken possession from the owners; that it is agreed between the plaintiff and the defendant that after removing the existing structure at the time of purchase to get constructed two flats jointly i.e. 190-A/1, 3rd Floor (front side), Gautam Nagar, New Delhi and 190-A/1, 3rd floor (back side), Gautam Nagar, New Delhi on the area of 50-50 sq. yards and each party will come in possession of one flat on mutual consent; after construction of two flats jointly i.e. 190-A/1, 3rd Floor (front side), Gautam Nagar, New Delhi both the parties on their mutual agreement, the plaintiff came in possession of front side portion and the defendant took possession of back side portion of the property and the plaintiff was in the impression that the area of her flat is 50 sq. yards; that after taking possession of front portion of the property, the plaintiff came to know that the flat which she has taken having less than 50 sq. yards and out of 50 sq. yards area, the area of the flat is only 40.88 sq. yards and remaining 09.12 sq. yards is in the possession of the defendant; that after having knowledge of the above said facts, the plaintiff requested the defendant to handover 9.12 sq. yards area to the plaintiff but being sister, the defendant requested the plaintiff that the defendant will hand over the area of 09.12 sq. yards which is in her possession or will give cost of that area i.e. 09.12 sq. yards at the present market rate prevailing at the time of payment to the plaintiff.

10. From the plaint, it is quite clear that the flats of the plaintiff and the defendant were jointly constructed by the parties. It is not the case of the plaintiff that the defendant has, by playing fraud or by force, taken excess plot and constructed her flat. When both the flats were constructed by the parties jointly and possession of the respective flats were taken by them on their mutual agreement and the plaintiff took front portion, I have failed to understand how can the defendant be blamed for giving less portion to the defendant. The act of the parties for construction of flats were joint and the flats were taken by them after construction as per their mutual understanding. In these circumstances, therefore, I am of the clear view that there is nothing in the plaint on the part of the defendant for which she can be blamed for and the plaint does not disclose any cause of action against the defendant.

11. Again, as per the provisions of Order VII Rule 1(e) CPC, the plaint should contain the facts constituting the cause of action and when it arose. But, the plaintiff has not stated in the plaint when the construction of the flats was completed or when they took possession of their respective flats or even when she came to know that area of her flat is less. So, the plaint is also not deemed to be properly instituted as it does not comply with the rules as contained in Order VII CPC.”

5(i). In sum and substance therefore it is seen that the case of the appellant/plaintiff is that having purchased 50 sq. yards of front portion of the third floor of the property by her Sale Deed dated 27.4.2009, and since after construction the respondent/defendant is having an area in excess of 50 sq. yards being an area of 9.12 sq. yards, either the respondent/defendant gives this area of 9.12 sq. yards to the appellant/plaintiff or gives value of this area of 9.12 sq. yards to the appellant/plaintiff.

(ii). In my opinion there were no disputed question of fact which requires trial , as rightly held by the trial court, and on the admissions made in the plaint the trial court has rightly rejected the plaint under Order VII Rule 11 CPC, and as stated above, the rejection of the plaint can even be a dismissal of the suit under Order XII Rule 6 CPC. I agree with the findings and conclusions of the trial court because it is

an admitted fact that after demolition of the old construction existing on the third floor, both the parties jointly constructed the entire third floor, i.e. it is not as if the respondent/defendant surreptitiously constructed her portion in excess and the appellant/plaintiff therefore has been illegally cheated by the respondent/defendant. I cannot agree with the arguments urged on behalf of the appellant/plaintiff that a specific agreement has to be proved because the plaint itself shows an implied agreement between the parties of each party taking whatever construction has been respectively made on the third floor of the property, with the front portion of the property, having been taken by the appellant/plaintiff and the rear portion having been taken by the respondent/defendant.

6. Once the contents of the plaint are taken as correct, and there is no dispute with respect to the construction being made on the third floor of the property jointly by the parties i.e. with consent of both the parties, and that appellant/plaintiff was very much a part of the entire process of construction, clearly there is an implied agreement that the appellant/plaintiff was to take in ownership whatever was constructed in the front portion of the third floor and

respondent/defendant was to take whatever was constructed on the back portion of the third floor.

7. During the course of arguments in order to ensure that there is justice and equity, counsel for the respondent/defendant very fairly suggested that if the appellant/plaintiff feels that the back portion in excess of 50 sq. yards is illegally with the respondent/defendant, and the so called additional area of 9.12 sq. yards, (which will really almost become part of the walls), is not to fall to the constructed area of the respondent/defendant at the rear, then the respondent/defendant will very happily give her portion to the appellant/plaintiff and take the appellant's/plaintiff's lesser share as that falling to the respondent/defendant on this aspect the counsel for the appellant/plaintiff took a pass over for taking instructions and after taking instructions it is stated that the appellant/plaintiff is not agreeable to the proposal that the appellant/plaintiff can take the back portion which is allegedly more of 9.12 sq. yards and the respondent/defendant can take the front portion which is less by about 9.12 sq. yards.

8. In my opinion, therefore the conduct of the respondent/defendant can be said to be more than fair and really it shows that the sisters during the construction constructed their respective areas with minor changes as per implied agreement between them, and which may will in reality fall into area of walls, and consequently I do not find any illegality in the impugned judgment rejecting the plaint.

9. In view of the aforesaid, I do not find any merit in the appeal and the same is hereby dismissed.

JULY 24, 2018

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VALMIKI J. MEHTA, J