

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

+ **RFA No. 922/2016 & CM No. 43994/2016**

% **30th July, 2018**

OMKAR SINGH BHANDARI Appellant
Through: Mr. B.S.Chauhan, Advocate.

versus

DHANNA DEVI Respondent
Through: Mr. Rajat Sachdev, Advocate.

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 plaintiff in the suit impugning the Judgment of the Trial Court dated 15.2.2016 by which the trial court has dismissed the suit without trial and at the stage of pleadings. Trial court has dismissed the suit by holding that if the appellant/plaintiff purchased from the seller-Rubina Rais the suit property, but since Ms. Rubina Rais did not purchase the suit property from the earlier owners, therefore, the appellant/plaintiff would not be the owner of the suit property i.e the top floor above the second floor

being the third floor of the Janta Flat bearing No. 280-C/A6, Top Floor, Paschim Vihar, Delhi.

2. The chain of undisputed title documents is as under:-

(i) The original owner Sh. Mohan Singh sold rights in the second floor by means of registered documentation dated 9.3.2006 to Smt. Dhanna Devi. (ii) Smt. Dhanna Devi by means of registered documentation dated 18.10.2007 transferred the second floor of the aforesaid Janta Flat to Mohd. Zakir. (iii) Mohd. Zakir by means of documentation dated 16.9.2008 transferred rights in the second floor to Smt. Rubina Rais. (iv) The appellant/plaintiff purchased the suit property from Smt. Rubina Rais in terms of the documentation dated 24.1.2011.

3. Trial court has dismissed the suit by observing that since what was sold by the aforesaid documentation was only the second floor without the top floor i.e the terrace floor/third floor above the second floor was not the subject matter of documentation, hence the appellant/plaintiff could not have purchased the suit property being the top floor i.e the third floor over the second floor which was first sold

by Sh. Mohan Singh to Smt. Dhanna Devi and ultimately came to be owned by the appellant/plaintiff.

4. In my opinion, it is a matter of evidence as to when the second floor as a whole was sold, whether the same was or was not sold with roof rights for constructing a third floor over the second floor. The position which has arisen in this case is because really the third floor is an illegal third floor being not sanctioned by the Delhi Development Authority (DDA) with respect to the subject flat. Various issues will arise in the suit including as to whether there are any rights whatsoever which could at all have been created in the third floor in favour of the appellant/plaintiff, being an illegal construction. Also there will be the factual issue as to what will be the effect of having ownership of the second floor, i.e second floor is with or without terrace rights being the top floor constructed on the terrace over the second floor, in terms of the clear chain of documentation from Sh. Mohan Singh to Smt. Dhanna Devi, Smt. Dhanna Devi to Mohd. Zakir, Mohd. Zakir to Smt. Rubina Rais and Smt. Rubina Rais to the appellant/plaintiff.

5. Therefore, the subject suit was not a suit which could have been dismissed without trial at the stage of pleadings, and only after

evidence would have been led as to whether or not the top floor or the third or the terrace floor above the second floor was or was not subject matter of the entire chain of documents commencing from Sh. Mohan Singh and ending with the appellant/plaintiff, could the issue of existence or lack of existence of title of the third floor (suit property) in favour of the appellant/plaintiff could be decided. Therefore, trial has to take place on all the aspects including the aspect as to whether an illegal constructed floor could or could not have been sold, provided of course that such a defence is taken by the respondent/defendant.

6. In view of the aforesaid discussion, this appeal is allowed. The impugned judgment of the Trial Court dated 15.2.2016 is set aside. Trial court will now decide the suit in accordance with law after trial including on the legal issue as to whether legally a third floor is capable of being transferred in the facts of the present case where DDA does not permit construction on the third floor.

7. Parties to appear before the District and Sessions Judge, West Tis Hazari Courts, Delhi on 28.8.2018 and the District and Sessions

Judge will decide the suit itself or will mark the suit for disposal to a competent court in accordance with law. Parties are left to bear their own costs.

JULY 30, 2018/ib

VALMIKI J. MEHTA, J

