

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

% **Date of decision: 2nd August, 2018.**

+ **RSA 190/2017**

A.S GUPTA (SINCE DECEASED THR HIS LRS) Appellant

Through: Mr. Irfan Ahmed, Adv.

Versus

**G.D SHARMA (DECEASED THROUGH LR)
& ORS**

..... Respondents

Through: None for R-1.

Mr. Sahil Dagar, Adv. for R-2.

Mr. Jaideep Malik, ASC for SDMC.

Mr. Dhanesh Relan, Standing Counsel

with Mr. Kamal Sorout & Ms. Mrinalini
Sharma, Advs. for DDA.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the CPC impugns the judgment and decree (dated 17th January, 2017 in RCA SCJ 5736/2016 of the Court of Senior Civil Judge (South)) of dismissal of first appeal under Section 96 of the CPC preferred by the appellant/defendant against the judgment and decree (dated 5th March, 2015 in Suit No.437/2014 (Unique ID No.02401C0201802003) of the Court of Civil Judge (West)) of permanent injunction in a suit filed by the respondent no.1/plaintiff against the appellant/defendant and against the respondents 2 to 4/defendants namely Bharti Airtel Ltd., South Delhi Municipal Corporation and Delhi Development Authority.

2. This appeal came up first before this Court on 26th July, 2017 when, without indicating the substantial question of law if any arising, notice thereof was ordered to be issued.

3. Counsel for the respondent no.2/defendant-Bharti Airtel Ltd., counsel for respondent no.3/defendant -South Delhi Municipal Corporation and counsel for respondent no.4/defendant -Delhi Development Authority have been appearing.

4. The order dated 15th November, 2017 records that the respondent no.1/plaintiff had been served but none appeared on behalf of the respondent no.1/plaintiff. Thereafter on 13th April, 2018 also none appeared for the respondent no.1/plaintiff. Today also none appears for the respondent no.1/plaintiff. The Suit Court record and the First Appellate Court records have been received.

5. The respondent no.1/plaintiff instituted the suit from which this appeal arises, claiming to be the owner of the first floor and agreement purchaser of the second floor of property No.K-6, NDSE Part-II, New Delhi and pleading: (i) that the appellant/defendant was the owner of the ground floor of the property and had sold and agreed to sell the first and second floors respectively to the respondent no.1/plaintiff; and, (ii) that the appellant/defendant had let out the ground floor to the respondent no.2/defendant-Bharti Airtel Ltd. which was running a telephone exchange-cum-office therein and in the process of installation and operation of the telephone exchange, had caused damage to the water and sewage line of the property and obstructed access, which the respondent no.1/plaintiff under the sale deed had of the rear portion of the property where the underground water tank and the booster were installed. Reliefs of, (a) permanent injunction restraining the appellant/defendant and respondents 2 to 4/defendants from using the ground floor meant for residential purposes for

commercial and industrial purposes; (b) injunction restraining the appellant/defendant and the respondents 2 to 4/defendants from damaging and tampering with the sewage pipe lines, water supply pipelines, water booster pump and water storage tanks; (c) mandatory injunction directing the appellant/defendant and the respondents 2 to 4/defendants to restore status quo; and, (d) permanent injunction restraining the appellant/defendant and the respondents 2 to 4/defendants from obstructing the respondent no.1/plaintiff from having access to the water facility in the rear courtyard of the premises were claimed.

6. The Suit Court passed a decree in favour of the respondent no.1/plaintiff and against the appellant/defendant and the respondents 2 to 4/defendants i) of permanent injunction against misusing the residential premises for commercial purposes thereby causing nuisance and safety hazard to the respondent no.1/plaintiff and his family members; and, ii) of permanent injunction from damaging or tampering with sewage line or water supply pipelines or water booster pump or water storage tank of the respondent No.1/plaintiff installed in the rear portion of the property and from obstructing the respondent no.1/plaintiff's access to the same.

7. The First Appeal preferred by the appellant/defendant, as aforesaid, has been dismissed.

8. The only argument of the counsel for the appellant/defendant is with respect to para 12 of the judgment of the Appellate Court as under:-

“12. Needless to conclude, the right to access the rear courtyard are not easementary/prescriptive rights as have been alleged by the appellant but have accrued in favour of the respondent No.1/plaintiff by virtue of the registered sale deed

which confers absolute/blanket rights over the plaintiff/respondent no.1.”

9. It is argued, that the First Appellate court has held the respondent no.1/plaintiff to have absolute/blanket rights over the rear courtyard, though the sale deed executed by the appellant/defendant in favour of the respondent no.1/plaintiff with respect to the first floor has only the following clause:-

“That the vendee will have the right to use the back passage in the rear courtyard for using booster pump and shall have free access to the place where the booster pump and any other accessories including the underground water tank on the ground exist.”

10. I have enquired from the counsel for the appellant/defendant, whether any site plan of the property has been proved.

11. The counsel for the appellant/defendant states that there is no site plan. A perusal of the Trial Court record also does not show any such site plan. I may, however, mention that the sale deed, in which the respondent/plaintiff is referred to as vendee and the appellant/defendant as the vendor, besides the aforesaid clause, is also found to contain, inter alia, the following clauses:-

“That the vendor shall have no objection if the vendee construct a wall on the ground floor to make the entrance of first floor independent of which the vendee has exclusive and independent right, title and interest.

That the vendor shall have no objection if the vendee expand the balcony in front and the back subject to sanction of the local authorities.

That the vendor has no objection if the vendee provide a separate new water tank and install booster pump on the ground floor for use by upper flats residents alongwith the existing water tank and booster pump.”

12. A perusal of the paper book shows that the judgment of the Suit Court is accompanied with a decree sheet which is as under:-

“The Suit presented on 17.05.2003. This suit coming on this day for final disposal before me in the presence of Sh. Amarjeet Singh, Ld. Counsel for plaintiff and Sh. R.D. Mahant for Defendant no.1 Sh. Dharamvir Gupta for defendant MCD and Ld. SLO for Defendant DDA. It is ordered that the defendants are hereby restrained from misusing the residential premises i.e. the suit property for commercial purposes, thereby causing nuisance and safety hazards to the plaintiff or his family members. The defendants are further restrained from damaging or tempering with sewage, water pipe lines or water booster pump or storage tanks of the plaintiff installed in the rear portion of the suit property and further from obstructing the plaintiff’s access to the same. Relief of Permanent Injunction is accordingly granted. Relief of Mandatory injunction is denied.”

13. The decree of the First Appellate Court is as under:

*“The suit coming on this day for final disposal in the presence of none. It is ordered that the **appeal filed by the appellant bears no merits and stands dismissed.**”*

14. I have enquired from the counsel for the appellant/defendant, whether the respondent no.1/plaintiff has filed any execution.
15. The counsel for the appellant/defendant states he has no knowledge.

16. Without the site plan and without knowing the nature of access of the respondent no.1/plaintiff of the rear courtyard, the right of access of respondent No.1/plaintiff cannot be controlled as is sought by the counsel for the appellant/defendant.

17. The counsel for the appellant/defendant contends that the right of access of respondent No.1/plaintiff should be after reasonable notice.

18. Suffice it is to state that there is no such a requirement in the sale deed. No such plea is found to be contained in the written statement of the appellant/defendant also. It is quite obvious that the argument has been made for the first time in this appeal only.

19. As far as the argument aforesaid, of the first Appellate Court holding right of the respondent no.1/plaintiff of accessing the rear courtyard to be not the easementary but under the contract i.e. registered sale deed with the appellant/defendant being in excess of what is contained in the sale deed, is concerned, the same is without any foundation and premised on the apprehensions. In any case, the same does not raise any substantial question of law and the question, even if any arises will have to be raised in execution under Section 47 of the CPC.

20. There is, thus, no merit in the appeal.

21. Dismissed.

RAJIV SAHAI ENDLAW, J.

AUGUST 02, 2018

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