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

Reserved on : 1st February, 2018

Date of decision : 15th May, 2018

+ **RFA 389/2015 & CM APPL. 19318/2015**

N K BHATIA (NOW DECEASED THR LRS) Appellant

Through : Mr. Anish Shrestha, Advocate.
(M-9891876595)

versus

GARGI ANAND Respondent

Through : Chaudhary Ranjit Singh, Advocate.
(M-9810222625)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. Shri Baldev Singh (*hereinafter* 'Owner') purchased property bearing no.C-27, Block No. I, Greater Kailash Enclave-I, New Delhi measuring 473.75 sq. yards (*hereinafter referred as the* 'Suit Property') from the DDA. He had initially constructed in approximately 300 sq. ft of the property and in respect of the 170 sq. ft plot which was lying vacant in the front side of the property he entered into a Collaboration Agreement (*hereinafter* 'Agreement') dated 27th April, 1988 with Shri Navin Kumar Bhatia (*hereinafter* 'Builder'). As per the said Agreement, the Builder was to carry out the construction on the ground floor, first floor and second floor of 170 sq. yards of the suit property after obtaining the necessary permissions from the concerned authorities. The Owner was to get the complete ground floor along with the exclusive use of the complete drive way and right to use the entry from the front court yard (adjacent to plot No.C-26 side) and of the

common staircase/entry along with 1/3rd undivided share in the said land i.e. in 170 sq. yards. Clause 3 of the Agreement reads as under:

“3) The constructed area shall be distributed by the Owner and the Builder as under:-

(i) The Owner shall get the complete ground floor along with the exclusive use of the complete drive way and right to use entry from front court yard (adjacent to plot No.C-26 side) and of common stair case/entry alongwith 1/3rd undivided share in the said land i.e. in 170 sq. yards. The Builder further agrees that he shall construct the additional portion of the existing structure of the owner in the Second floor by constructing two rooms and one toilet approximate area 350 sq. ft. at his expense, the subject matter which is not of this agreement. The owner shall have absolute right to this additional portion so constructed.

(ii) The Builder shall get the complete first floor and the Second floor along with the entry from the front court yard (adjacent to plot No.C-26 side) and use of common staircase/entrance marked Yellow on the Plan with 2/3rd undivided share in the said land admeasuring 170 sq. yards. The builder shall have no right or claim to use the complete drive way and open front Court Yard for parking or any allied purpose what-so-ever.

(iii) That in the event of any change in Municipal By-laws in the Union Territory of Delhi in respect of grant of permission to construct 3rd Storey or more on the said property (170 Sq. Yards,) the owner shall have full right to construct the additional structure storeys on the top of second floor, for which the Builder hereby agrees and binds himself that he will not raise any objection in this regard what-so-ever.

b) The Builder shall pay a sum of Rs.3,00,000/- (Rupees three lacs only) to the Owner in addition

to his Owners share as per Sub-clause (1) above and as per modus hereunder:-

(i) Rs.2,00,000/- (Rupees two lacs only) at the time of signing of this Agreement vide P.O. NO. 001977 dated 27.4.1988 drawn on the Union Bank of India, Kailash Colony, New Delhi.

(ii) The balance of Rs.1,00,000/- (Rupees one lacs only) shall be paid by the Builder to the Owner at the time of execution of General Power of Attorney and Will in favour of the Builder or his nominee (s) or his prospective buyers in one installment or on or before 31.12.1988.”

2. The construction was completed and the occupancy certificate was issued by the DDA on 20th July, 1989 recognizing the ground floor, first floor and *barsati* floor. As per the Agreement, only the first floor and the second floor would vest with the Builder along with the use of the common staircase. The Builder was not to stake any right or claim to use the driveway and open front courtyard for parking or any other purpose. The agreement also provides that if municipal by-laws permitted construction on the third floor then the owner would have the right to construct above the second floor i.e. on the third floor. The Owner passed away on 18th April, 1999 and his wife expired on 28th September, 1999. He had executed Will dated 9th October, 1992 by which he had bequeathed to his daughters i.e. the Plaintiff Gargi Anand as under:

“C. Portion bequeathed to daughter Smt. Gargi, Wife of Shri Subhash Anand, R/o 40, Mahila Colony, Shahdara, Delhi.

She shall inherit the Ground Floor and the Thired Floor portion of the front portion of the house, The Ground Floor portion consists of two bed rooms with attached bath rooms, a drawing-cum-

dining room and a kitchen on the Ground Floor and vacant land in front of this portion, alongwith common staircase with Mr. Naveen Kumar Bhatia, son of Shri B. R. Bhatia or any other person besides the terrace of the Third Floor of the front portion of the house. This portion is already in occupation of myself, the executant and my wife, Smt. Maya. My said daughter shall exclusively inherit this portion, which is already in my occupation to the exclusion of all other legal heirs and she shall have absolute right to rent out or sell or otherwise manage the said portion in any manner she likes without any interference. My said daughter shall also inherit the First Floor of the garage block with right to make any construction on the Second Floor portion of a garage block. And Whereas there are certain common portions which shall be inherited by my aforesaid legal heirs in common. The staircase of the rear portion of the house, the small space between the front portion and the rear portion and the drive-way shall be common to all the beneficiaries of this Will. The booster pump shall also be available to common to all the beneficiaries i.e. my wife, son and daughter. They shall be inherit land of the house proportionately.”

3. Upon the death of the Owner, disputes arose between his son Shri Paramdev Verma and the Plaintiff herein Gargi Anand. The said disputes were finally resolved in suit No. 134/2003 on 10th July, 2003. The Builder raised unauthorized construction on the third floor, according to the Plaintiff, in March, 2001 and also prevented the Plaintiff from accessing the third floor through the common staircase. The Plaintiff then filed the subject suit for possession, injunction and recovery of mesne profits seeking the

following reliefs.

“(i) Pass a decree for possession in respect of the portion comprising one room on the third floor of the premises bearing no.C-27, (Front Portion), Greater Kailash Enclave-I, New Delhi-110048 as shown in red in the site plan, filed with the plaint in favour of the plaintiff and against the defendant no.1.

(ii) Pass a decree for a sum of Rs.3,60,000/- on account of Damages, Mesne Profit for use and occupation of the portion shown in red in the site plan enclosed and depriving the plaintiff from using the entire third floor to its optimum utility;

(iii) Pass a decree for Mesne Profit/Damages for use and occupation of the portion shown in red in the site plan enclosed and depriving the plaintiff from using the entire third floor to its optimum utility. During the pendency of the suit on the value determined during the enquiry under Order XX Rule 12 read with Section 151 CPC till the delivery of the possession by the defendant;

(iv) Pass an Award interest @ 18% per annum on the amount decreed as prayed in clause No.3.

(v) Pass a decree for Perpetual Injunction restraining the defendant his employees, nominees, agents, servants, assignees etc., from blocking the passage and stair case leading to the third floor of the property in question i.e. bearing No.C-27, (Front Portion), Greater Kailash Enclave-I, New Delhi-110048 to the plaintiff her family members, employees, nominees, agents, servants, assignees etc.

(vi) Pass a decree for Mandatory Injunction directing the defendant to demolish the unauthorized construction made by him on the third floor of the property in dispute i.e. bearing No.C-27, (Front Portion), Greater Kailash Enclave-I, New Delhi-110048 as shown red in the

site plan enclosed;

(vii) Cost of the suit and such other or further relief which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case may also be granted to the plaintiff and against the defendant."

4. The Builder claims in his written statement that the construction on the third floor had taken place in 1989 itself and it was at the Owner's request that instead of 350 sq. feet on the third floor 800 sq. feet was constructed. It was also claimed by the Builder that he was permitted to raise two servant quarters in the third floor and that the staircase was not to be common. In view of the disputes raised, the following issues were struck on 3rd February, 2006.

"1. Whether the plaintiff has not approached the court with clean hands and has suppressed various material facts from the court? OPD

2. Whether the suit is bad for non-joinder of necessary parties? OPD

3. Whether the Site Plan filed by the defendant shows the correct accommodation with correct measurement as alleged in the written statement? OPD

4. Whether the suit has not been properly valued for the purposes of court fees and jurisdiction? OPD

5. Whether the plaintiff is entitled to a decree for possession of the suit property? OPP

6. Whether the plaintiff is entitled to recover a sum of Rs.3,60,000/- on account of mesne profits/damages for use and occupation of the suit property? OPP

7. Whether the plaintiff is entitled to mesne profits/damages for use and occupation from the date of filing of the suit till the suit property is

vacated? OPP

8. Whether the plaintiff is entitled to interest, if so, at what rate and for what period? OPP

9. Whether the plaintiff is entitled to permanent injunction? OPP

10. Whether the plaintiff is entitled to mandatory injunction? OPP.

11. Relief.”

5. The Plaintiff led the evidence of 7 witnesses. Her husband was appointed as her attorney holder. She, inter alia, proved the Agreement, the completion certificate, compromise decree recorded with her brother, Will executed by her father Shri Baldev Singh, Power of Attorney executed in favour of the Defendant Builder, site plan etc. Officials were produced from the High Court to prove the settlement decree with her brother and from the DDA and Sub-Registrar, Mehrauli office.

6. The Trial Court after examining the evidence held that the challenge to the Agreement raised by the Defendant is unwarranted inasmuch as the Defendant acquired the right, title or interest through the said Agreement. The Trial Court did not rely upon Ex.DW-1/2 which is the possession letter but went by the Collaboration Agreement dated 27th April, 1988. The Trial Court held that the so-called possession letter dated 1st September, 1989 was not even pleaded in the written statement and could, therefore, not be believed. Thus, the Trial Court held that the Plaintiff was not guilty of suppression as was alleged. Insofar as the right of possession of the Plaintiff is concerned, the Trial Court held that the Plaintiff was the Owner of the third floor and that he is entitled to possession of the third floor and that the construction carried out by the Defendant is illegal. Insofar as the use of the common staircase is concerned, the Trial Court held that the Defendant was

given the use of the staircase to the first floor and second floor from the front courtyard adjacent to plot no.C-26 and the use of the common staircase on the plan. The Trial Court analysed the Agreement, Wills and GPA and came to the following conclusion.

“23.7 It is therefore, evident from a bare reading of the aforesaid clauses that the defendant shall have independent right of access to his floor from the front stair case and that right extinguished at the second floor itself as no roof rights were given to the defendant. This clearly manifest that the plaintiff was to access the terrace floor of the front portion of the property from the central stair case and the defendant had independent access to his portion at first and second floor, front portion through the front stair case which admittedly leads from his property at the first and second floor. Thus, by virtue of evidence reflected from the admitted documents, oral evidence to the contrary is not to be accepted. The plaintiff has been expressly deprived with the right of joint use of the front stair case and therefore, the plaintiff fails for the relief of seeking Permanent Injunction. The issue is accordingly decided against the plaintiff and in favour of the defendant.”

After analysing the documents a partial decree was passed by the Trial Court in the following terms.

- “(i) A decree of possession in respect of roof portion land under suit property i.e. two rooms and one toilet existing on the third floor, front portion of property no.C-27, Greater Kailash Enclave-I, New Delhi-110048 more particularly described in defendant’s site plan Ex.DW1/3.*
- (ii) Decree of Mandatory Injunction is hereby*

passed directing the defendant to demolish the said construction and hand over the physical vacant possession of the said portion to the plaintiff immediately after the period of limitation to prefer an appeal against this order/judgment by efflux of time.

(iii) the remaining reliefs as prayed are hereby expressly declined in view of the findings of the issues above. However, the plaintiff is awarded costs of the suit.”

7. In the present appeal, the question that arises is whether the staircase located in the 170 sq. yards portion of the property, is to be used jointly by the owner and the Builder or is the staircase to be treated as being for the exclusive use of the Builder. The Collaboration agreement clearly used the word common staircase in clause 3(1). The Will dated 9th October, 1992 also used the words common staircase with Mr. Navin Kumar Bhatia in the portion bequeathed to the daughter i.e. Plaintiff. Even in the GPA dated 28th September, 1992 executed by Shri Baldev Singh to Shri Navin Kumar Bhatia which was in respect of the collaboration, right to the independent access from the ground floor to the first floor and second floor has been provided. However, clause 12 of the GPA reads as under:

“12. To sell and dispose off the flat(s) constructed on the aforementioned premises comprising one bedroom, one toilet, one drawing, one dining room, one kitchen on the first floor and three bedrooms, three toilets on the second floor with right of independent access from the ground floor to first and second floor. (The owner shall have free access on upto 2nd floor terrace) alongwith 2/3rd out of 170 sq. yard undivided share in land comprising the front portion of property no.C-27, Greater Kailash Enclave-I, New Delhi-110048.

In whole or in portion to anybody my attorney likes and or any terms and conditions of the which my attorney considers suitable of the said portions of the building, to execute the proper sale agreement, sale deeds and to sign any other applications, forms, bonds, receipts, declaration, affidavits and to get the same registered and to present, admit the same for registration in the office of the Sub-Registrar, New Delhi/Delhi/U.P. and to collect it thereafter.”

8. A harmonious interpretation of these documents leaves no doubt that the word ‘*independent access*’ and ‘*free access*’ in effect, means independent access for the Builder to the First and Second floor, as part of the 170 sq. yards and not any common access with the remaining 300 sq. ft located at the rear of the property. ‘*Free access*’ to the Owner means that the owner shall have access through the same staircase for the 2nd floor terrace. It does not mean that there would be two staircases, one leading only to the Ground floor and then to the Terrace and one leading only to the First Floor and the Second Floor. Such a situation is totally impractical and contrary to what is contemplated. The documents do not contemplate two staircases being carved out from the 170 sq. yards plot. The GPA is very clear that the Owners shall have ‘*free access*’ to the second-floor terrace.

9. The manner in which the Builder has interpreted the Agreement has resulted in completely depriving the Owner from access to the terrace from within 170 sq. yards area which was completely contrary to the agreement between the parties. The Builder cannot take away the rights of the Owner to the third floor by constructing the staircase in such a manner that it cannot be used by the Owner. The Builder has obviously made a vile attempt to

usurp the third floor, by not granting access through the *common staircase*. In his cross examination, on 3rd May, 2007 the Builder clearly admits that *“it is correct that there is one staircase in the property constructed on 170 sq. yards”* and he also admits that *“roof right of the property remained with the Plaintiff.”*

10. The Agreement has been interpreted in a manner so as to deprive the Owner of the use of the third floor of the property. Admittedly the ground floor and third floor belong to the Owner. When the appeal was first listed before this Court, keys of the two rooms and one toilet in the 170 sq. yards portion on the third floor was deposited in this Court on 29th May, 2015. On 15th March, 2016 this Court also directed the demolition of the unauthorized construction on the third floor which, however, was stayed by the Supreme Court on 1st April, 2016. Vide order dated 23rd February, 2017, the Supreme Court directed as under:

“3. The High Court by the impugned interim order dated 15.03.2016 during the pendency of the appeal had directed the concerned Engineer, South Delhi Municipal Corporation to demolish the portion of the 3rd floor of property situated in Greater Kailash Enclave-I, New Delhi on or before 08.04.2016 and to raise the bill for demolition charges on the appellant. The appellant was directed to make the payment of the said bill. The aforesaid order has been questioned in the present appeal.

4. After hearing the matter, this Court had directed stay of operation of the impugned order vide order dated 1.4.2016. In our opinion, said interim order deserves to be continued till the final decision of the appeal by the High Court.

5. The High Court is requested to expedite the case and decide it expeditiously.

6. It is made clear that we have stayed the order regarding demolition during pendency of appeal in the High Court. The appeal is allowed to the aforesaid extent.”

11. The Agreement is clear that there was a common staircase which is also clear from the Will and GPA. Thus, the fact that there is only one staircase in the 170 sq. yards portion of the property clearly means that it is a common staircase to be used by the Owner for the purpose of accessing the third floor. The independent staircase referred to in the GPA has to only mean that the independent staircase is independent from the rear portion of the 300 sq. ft of the property and not an independent staircase within 170 sq. yards of the property. Thus, the Trial Court is wrong in holding that the Plaintiff is not entitled to access to the third floor through the staircase.

12. From the records it is also clear that the Defendant made the construction of the servant quarters on the third floor after obtaining the completion certificate from the authorities. This is admitted by him in the cross-examination as under:

“I obtained completion certificate in the month of August, 1989. I have not brought original certificate today. Servants quarters were constructed in the year 1989 after the completion certificate was obtained.”

It was clear that at the time of obtaining the completion certificate the servant quarters was clearly hidden from the authorities. There can be nothing which can be termed as exclusive use of common staircase since there is only one staircase in the property and the roof rights vested with the Plaintiff who ought to be given access to the roof. In view of the fact that

the rooms constructed on the third floor were unauthorized, no mesne profit was liable to be granted.

13. The appeal is dismissed and the cross objections of the Plaintiff are allowed and the suit is decreed in the following terms.

1) A decree for possession is granted in favour of the Plaintiff against the Defendant in respect of the third floor admeasuring 170 sq.yards of property no.C-27, Block No. I, Greater Kailash Enclave-I, New Delhi.

2) A mandatory injunction directing the Plaintiff to remove any unauthorized construction on the third floor including tin sheds and any other moveables;

3) A decree of declaration in favour of the Plaintiff, declaring the Plaintiff as the owner of the third floor with rights to use the common staircase for access to the third floor (i.e., roof above second floor), in the 170 sq. yards part of the property; and a decree of permanent injunction restraining the Defendants from blocking the passage and staircase leading to the third floor of the property.

4) The Plaintiff having been declared the owner of the third floor would be entitled to enjoy the peaceful use and occupation of the third floor including the ownership thereof. Construction may be carried out on the third floor by the Plaintiff or anyone duly authorised by her, in accordance with law and after obtaining the proper sanctions from the authorities.

14. Relief of mesne profits is rejected. All pending applications are also disposed of. Decree sheet be drawn accordingly.

PRATHIBA M. SINGH, J.
JUDGE

MAY 15, 2018/dk