

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

% **Date of decision: 15th October, 2018.**

+ **RSA 149/2018**

LATE RANJIT SINGH THR LRS & ORS Appellants
Through: Mr. Ajit Dayal & Ms. Shabana
Ahmed, Advs.

Versus

KARAN SINGH & ANR Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.43380/2018 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

RSA 149/2018 & CM No.43379/2018 (for stay)

3. This Regular Second Appeal under Section 100 of the Code of Civil Procedure Code, 1908 is preferred against the judgment and decree [dated 17th July, 2018 in M.No.60320/2016 of the Court of Senior Civil Judge, Central] dismissing the First Appeal under Section 96 of the CPC preferred by the three appellants viz. Ranjit Singh, Rachna and Neha against the judgment and decree [dated 15th May, 2010 in Suit No.367/2005 of the Court of Civil Judge, North] allowing the suit filed by the two respondents / plaintiffs viz. Karan Singh and Kailash Wati @ Kailashpati against the appellants / defendants.

4. The respondents / plaintiffs instituted the suit, from which this second appeal arises, for permanent injunction restraining the appellants / defendants from interfering in the peaceful enjoyment by the respondents/plaintiffs of the portions owned by the respondents / plaintiffs of property No.2924, Peepal Mahadev, Hauz Qazi, Delhi, including by entering upon any part thereof for access from the first floor of the property to the second floor and to the terrace above the second floor of the property.

5. The suit was allowed and the appellants / defendants restrained from (a) interfering in the peaceful enjoyment of the portions owned by the respondents / plaintiffs including by entering upon any part thereof including toilet, bath on the first floor, stairs from first floor to second floor and the terrace of the second floor of the property bearing No.2924, Peepal Mahadev, Hauz Qazi, Delhi as shown in the site plan proved in the suit; and, (b) raising any construction above the appellants' / defendants' portion of the first floor giving opening of any door or window towards the terrace of second floor belonging to the respondents / plaintiffs.

6. The appellants / defendants preferred first appeal against the aforesaid judgment and decree and which was disposed of vide judgment dated 27th November, 2012. The First Appellate Court, while agreeing with all the findings of the Suit Court, however observed / held that since the respondents / plaintiffs in cross-examination had admitted the existence of a tin shed above the second floor and not disputed the possession thereof of the appellants / defendants and since there was no other access to the aforesaid tin shed except through the staircase from the first floor to the second floor, even though the said staircase had been sold by the predecessor of the

appellants/defendants to the respondents / plaintiffs, it would amount to great injustice if the appellants / defendants would not be able to approach the tin shed through the staircase till the first floor; accordingly, it was held that the respondents / plaintiffs were bound to provide access to the appellants / defendants to the said tin shed through the staircase from the first floor to the second floor. It was reasoned that the inclusion of the said staircase in the sale deed in favour of the respondents / plaintiffs by the common predecessor did not divest the appellants / defendants from their right to visit the tin shed which was in existence since prior to execution of the sale deed in favour of the respondents / plaintiffs.

7. Aggrieved from the aforesaid portion of the judgment and decree dated 27th November, 2012 of the First Appellate Court, the respondents / plaintiffs preferred a Second Appeal being RSA No.1/2013 which came up before this Court on 4th January, 2013 when, after brief submissions, the counsel for the respondents / plaintiffs withdrew the appeal with liberty to approach the First Appellate Court in accordance with law and the Second Appeal was dismissed with liberty as prayed for.

8. Thereafter the respondents / plaintiffs preferred a review application to the First Appellate Court and which review application appears to have been entertained inasmuch as the same remained pending for the next five years i.e. till 17th July, 2018. From a reading of the impugned order dated 17th July, 2018, it appears that the First Appellate Court allowed the review and has heard the appeal afresh and has now dismissed the appeal of the appellants/defendants in entirety, reasoning that once the First Appellate Court, in the judgment dated 27th November, 2012 upheld the judgment and

decree of the Suit Court and whereunder the staircase stood sold to the respondents / plaintiffs, no liberty could be granted to the appellants / defendants to use the same.

9. Aggrieved therefrom, this Second Appeal has been preferred.

10. It is perhaps owing to the aforesaid rigmarole that the Registry has raised an objection as to the maintainability of the Second Appeal.

11. The Second Appeal is however found to lie.

12. I have enquired from the counsel for the appellants / defendants that once the entire property belonged to the common predecessors of the parties who had executed a sale deed of a portion of the same in favour of the respondents / plaintiffs and which sale was not challenged by the appellants / defendants, whether not on execution of the said sale deed, the appellants / defendants, even if prior to the sale deed, as members of the family had been in use of any portion of the property i.e. the tin shed, on execution of the sale deed, lost right to such use unless permitted by the respondents / plaintiffs.

13. The counsel for the appellants / defendants has argued that, (i) the appellants / defendants would like to show the sale deed by placing a copy thereof on record; (ii) the First Appellate Court in the judgment dated 27th November, 2012 rightly referred to the cross-examination of the respondent / plaintiff where the respondents / plaintiffs had admitted use by the appellants / defendants of the tin shed above the second floor; (iii) that the First Appellate Court has exceeded its jurisdiction in, in exercise of power of review, in altering the earlier judgment dated 27th November, 2012. Reliance is placed on *State of West Bengal Vs. Kamal Sengupta* AIR 2009 SC (Supp) 476 holding that if an error is not self-evident and detection thereof requires

long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order XLVII Rule 1 CPC. The counsel for the appellants/defendants has also handed over in the Court an Article titled “Dog Law Analysis of Power of Court to Cause Review of its Decision: India” by an Advocate, published on 30th June, 2018 in Wisdom Crux, an electronic journal.

14. The Suit Court as well as the First Appellate Court have returned concurrent findings that the portion of the property, qua which the appellants/defendants have been enjoined, has been sold by the predecessor in title of the appellants/defendants to the respondents/plaintiffs. However since the counsel for the appellants/defendants has urged that he desires to show the Sale Deeds executed by the predecessor of the appellants/defendants in favour of the appellants/defendants to contend that in fact there was no such sale, he has been asked to show the Sale Deed.

15. The counsel for the appellants/defendants states that he has not filed a copy of the Sale Deed along with the memorandum of this appeal and seeks adjournment to file the same.

16. The aforesaid shows that the argument, of concurrent finding of fact returned by the Suit Court and the First Appellate Court being contrary to the Sale Deed, is raised without any seriousness. Had the appellants/defendants been serious in the said plea, they would have along with the memorandum of this appeal filed a copy thereof to demonstrate to this Court the error in the said concurrent finding of fact. The appellants/defendants, after having the appeal listed for admission and arguing the same, cannot seek adjournment. The counsel for the appellants/defendants forgets that a Second Appeal is not to be entertained as a matter of right and is to be entertained only if entails a

substantial question of law and the Court, to able to gauge the same, when the appeal comes up for admission, is required to study the same beforehand and all of which takes considerable time. The time of the Court cannot be wasted twice over. Thus adjournment is refused.

17. However, since the counsel for the appellants/defendants has urged the argument, to deal effectively with the same, it is deemed appropriate to requisition the Trial Court record before adjudicating whether the appeal is to be entertained or not. However it is not deemed appropriate to derail the hearing for the said purpose. This order was thus halted at this stage to be completed in the Chamber after requisitioning the Trial Court files and going through the same.

18. The counsel for the appellants/defendants has not urged any other argument and if at all, on perusing the Trial Court record, need to hear the counsel for the appellants/defendants further will arise, the appeal will be listed therefor.

19. The Trial Court record has been received and been perused.

20. The respondents/plaintiffs instituted the suit from which this Second Appeal arises, pleading (i) that they are the owners of part of property no.2924, Peepal Mahadev, Hauz Qazi, Delhi – 110006, by purchase through Sale Deed dated 5th January, 1995 executed by Ratan Singh as *Karta* of his Hindu Undivided Family (HUF); the copies of the Sale Deeds together with site plan show the portions conveyed to the respondents/plaintiffs; (ii) the remaining portion of the property remained with the HUF of Ratan Singh; (iii) Ratan Singh died about four or five years prior to his institution of suit and his son Sanjay Singh, for consideration, did not claim any right in the property and therefore the appellant/defendant no.1 Ranjit Singh became the

owner of the portion of the property remaining after sale in favour of the respondents/plaintiffs; (iv) that the ground floor toilets were left over to be used in common by all the occupants; (v) the first floor toilet and bath was conveyed to the respondents/plaintiffs; (vi) the only approach to the second floor, terrace and room through the staircase was conveyed to the respondents/plaintiffs; (vii) there was no other staircase to the open terrace above room on the first floor owned by the appellant/defendant no.1; (viii) that the appellants/defendants no.2&3 are the wife and daughter of the appellant/defendant no.1; (ix) that the respondent/plaintiff no.1 was earlier holding two tenancies under Ratan Singh; one in respect of the room and its terrace above the main entrance of the property as also the terrace of the said room and which tenancy still continues under the appellant/defendant no.1 and the second tenancy was in respect of most of the portion of the property conveyed to the respondents/plaintiffs under the Sale Deed dated 5th January, 1995; (x) that the respondents/plaintiffs had earlier instituted a suit against Ranjit Singh which was decided on 16th December, 1994 in favour of the respondents/plaintiffs; the appellants/defendants had disobeyed the injunction granted in the said suit in favour of the respondents/plaintiffs and proceedings in that regard were pending; (xi) that the appellants/defendants, without obtaining permission from the Municipal Corporation of Delhi (MCD), started construction above the first floor portion belonging to the appellants/defendants; (xii) that the respondents/defendants objected to the same as the appellants/defendants were attempting to open door and windows towards the respondents'/plaintiffs' part of the terrace and which they were not entitled to do; and, (xiii) that the appellants/defendants were also interfering with the peaceful possession of the respondents/plaintiffs.

The respondents/plaintiffs thus instituted the suit, seeking to restrain the appellants/defendants from interfering in the peaceful enjoyment of the portions of the property owned by the respondents/plaintiffs and from entering into the said portions and from using the staircase from the first floor to the second floor of the property and which staircase under the Sale Deed dated 15th January, 1995 had been sold to the respondents/plaintiffs.

21. The appellants/defendants contested the suit by filing a written statement *inter alia* pleading that (i) the toilet and bath on the first floor, qua which relief was claimed, were owned by the appellants/defendants and were in continuous use of the appellants/defendants; (ii) the said toilet and bath were also included in the Sale Deed dated 20th September, 1999 executed by Ratan Singh in favour of the appellant/defendant no.2, being the daughter of Ranjit Singh; (iii) similarly, the staircase from the first floor to the second floor had always been in use of the appellants/defendants and the appellants/defendants had been accessing a tin shed owned by them on the terrace above the first floor portion belonging to the appellants/defendants; (iv) that the appellants/defendants as owner of the property were entitled to raise whatever construction they desired; (v) the appellants/defendants did not accept the contents of the Sale Deed dated 5th January, 1995 and the site plan annexed thereto executed by Ratan Singh in favour of the respondents/plaintiffs; (vi) that the respondents/plaintiffs had themselves got prepared the said Sale Deed and got the same signed from Ratan Singh; and, (vii) that Ratan Singh in his lifetime had sold the entire remaining portion of the property vide Sale Deeds dated 20th September, 1999 to the appellants/defendants.

22. I may at this stage highlight that the appellants/defendants, in their written statement did not dispute that in terms of the Sale Deed dated 5th January, 1995 executed by Ratan Singh in favour of the respondents/plaintiffs, the only staircase from the first floor to the second floor was sold to the respondents/plaintiffs. The only plea of the appellants/defendants was that the said Sale Deed was got prepared by the respondents/plaintiffs themselves and got signed from Ratan Singh and that Ratan Singh vide subsequent Sale Deed in favour of the appellants/defendants had conveyed the bathroom and latrine on the first floor to the appellants/defendants. Though the appellants/defendants disputed the contents of the Sale Deed dated 5th January, 1995 executed by Ratan Singh in favour of respondents/plaintiffs, but did not take any steps for having the said Sale Deed, to the said extent or otherwise, annulled/cancelled. The appellants/defendants, by pleading subsequent Sale Deed by Ratan Singh in their favour, also admit the entitlement of Ratan Singh to sell the property. Once Ratan Singh had sold any particular portion of the property to the respondents/plaintiffs, he could not have by a subsequent Sale Deed transferred the same portion to the appellants/defendants.

23. I have also perused the Sale Deeds on the Trial Court record along with the site plan annexed thereto and do not find any basis whatsoever in the argument of the counsel for the appellants/defendants that under the said Sale Deed the toilet on the first floor or the staircase from the first floor to the second floor was not sold to the respondents/plaintiffs. It is perhaps for this reason only that the counsel for the appellants/defendants also did not

deem it appropriate to file copies of the Sale Deed before this Court and has raised the arguments off the cuff.

24. No error qualifying as a substantial question of law is thus found in the concurrent finding of fact of the Suit Court and the First Appellate Court that the property with respect to which decree of injunction has been issued in favour of the respondents/plaintiffs and against the appellants/defendants stood conveyed by the predecessor in interest of the appellants/defendants.

25. As far as the only other argument of the counsel for the appellants/defendants, of the First Appellate Court having wrongly exercised the power of review is concerned, I may at the outset deprecate the action of the counsel for the appellants/defendants of relying on a journalistic piece authored by an advocate on the law relating to review. The deductions drawn in the said academic article have no authenticity. It was for the counsel for the appellants/defendants to, by referring to the judgments mentioned in the said academic article, buttress his arguments and which has not been done.

26. I have already hereinabove observed that the review sought by the respondents/plaintiffs before the First Appellate Court remained pending for six years. A perusal of the record of the First Appellate Court also requisitioned in this Court shows that the parties had ample opportunity to address. Though technically the First Appellate Court ought to have first allowed the review and then listed the appeal for fresh hearing and which procedure is not found to have been followed but from the very factum of the review remaining pending for such long period of time, I am satisfied that the purpose in following the technically correct procedure has been served.

27. No error is found in the reasoning given in the impugned order, that the First Appellate Court in the judgment dated 27th November, 2012 having

agreed with the findings of the fact and conclusions of law therefrom drawn by the Suit Court, did indeed err in, on the basis of admission of user, holding the appellants/defendants entitled to use the staircase which was included in the portion of the property sold to the respondents/plaintiffs and in which the appellants/defendants or their predecessor in title had no right. Use by the appellants/defendants of any portion of the property belonging to the respondents/plaintiffs was permissive and could be stopped at the will of the respondents/plaintiffs and the appellants/defendants by such user did not acquire any rights.

28. It also cannot be lost sight of that it was not the case of the appellants/defendants that the construction sought to be raised by the appellants/defendants on their portion of the first floor of the property was in accordance with law. The appellants/defendants also did not set up a case of any easementary rights.

29. I am even otherwise, on going through the Trial Court record, satisfied that the finding reached by the Suit Court and the First Appellate Court are in accordance with the evidence on record.

30. This Second Appeal does not raise any substantial question of law and is dismissed.

31. The Trial Court record requisitioned in this Court be returned forthwith.

RAJIV SAHAI ENDLAW, J.

OCTOBER 15, 2018

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