

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

+ **RFA No. 184/2018 & CMs. 6356-6360/2018**

% **Reserved on : 22nd February, 2018**
Pronounced on : 27th February, 2018

DAL CHAND GAUTAM Appellant
Through: Mr. S.N.Bhardwaj and Ms.
Harsha Rani, Advocates.

versus

PANICKERS TRAVELS INDIA PVT. LTD. Respondent

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

1. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) by the plaintiff in the suit impugning the judgment of the trial court dated 24.8.2017 by which the trial court has dismissed the suit for recovery of damages of Rs.9,51,775/- filed by the appellant/plaintiff against the respondent/defendant no.1. Appellant/plaintiff sought compensation on account of the claim of the appellant/plaintiff that his property was

damaged on account of construction being made by the respondent/defendant no.1 in its property.

2. The facts of the case are that the appellant/plaintiff is the owner of the first floor of the property bearing H.No.957, Nai Wala, Karol Bagh, New Delhi situated on a plot admeasuring 50 sq. yards. The respondent (defendant no.1 in the trial court) was the owner of the adjoining property bearing no.958/4, Nai Wala, Karol Bagh, New Delhi situated on a plot of 200 sq. yards. It was pleaded in the plaint that in around December 2008, the respondent/defendant no.1 company demolished the existing superstructure on its property and started constructing basement and other floors. Appellant/plaintiff filed a suit for permanent injunction against the respondent/defendant no.1 and the Municipal Corporation of Delhi (MCD) for the respondent/defendant no.1 not to carry out construction allegedly because construction was being made without any sanction plan. The civil court which dealt with earlier suit filed by the appellant/plaintiff called for the report from the MCD and it transpired that there was a sanctioned plan and that the respondent/defendant no.1 had committed certain compoundable deviations in construction. Since the position

emerged that the respondent/defendant no.1 had already completed its building and no further construction was to take place, therefore, the appellant/plaintiff's earlier suit was disposed of. Appellant/plaintiff pleaded in this suit that on account of the illegal and unauthorized construction carried out by the respondent/defendant no.1 in its property several cracks appeared in the property of the appellant/plaintiff in the roof, walls and floor, and they were damaged. The respondent/defendant no.1 did not stop the construction activity in spite of requests of the appellant/plaintiff. Appellant/plaintiff got the property inspected through M/s A.K. Gupta & Associates to ascertain the *quantum* of damages, and who assessed the cost of repairs at Rs.4,46,275/-. Appellant/plaintiff also claimed an amount of Rs.5,00,000/- as compensation and notice charges of Rs.5,500/-. Hence the appellant/plaintiff filed the subject suit.

3. Respondent/defendant no.1 contested the suit and pleaded that it had not carried out any illegal construction and that construction was being carried out after obtaining sanction of the plans from the municipal authorities. It was also pleaded by the respondent/defendant no.1 that construction was carried out as per municipal bye-laws and

the suit was only filed in order to pressure the respondent/defendant no.1 to shell out an amount to the appellant/plaintiff. Respondent/defendant no.1 pleaded that it got inspected the suit property of the appellant/plaintiff through the Architect M/s Gogia & Associates who has filed a report that the property of the appellant/plaintiff was lying constructed unauthorizedly, was not properly maintained, and was a semi *pacca*/permanent construction only and there was no damage to the property of the appellant/plaintiff on account of construction by the respondent/defendant no.1. Suit was therefore prayed to be dismissed.

4. After pleadings were complete the following issues were framed:-

“Issues:

- (i) *Whether the suit suffers from non-joinder of builder? If so, to what effect? OPP*
- (ii) *Whether the defendant No.1 has carried out construction over plot No.1229/1140, QQ Block, House No.958/4, Nai Wala Karol Bagh, New Delhi as per the sanctioned site plan by MCD and the deviations have been regularized?OPP*
- (iii) *Whether the house of plaintiff and the ancillaries viz., electricity wiring have suffered structured damage on account of the excavation and the manner of construction by defendant no.1? If so, to what extent? OPP*
- (iv) *Whether the plaintiff is entitled to recover a sum of Rs.5,00,000/- or any other amount from defendant no.1 by way of damages for suffering harassment, torture and mental agony due to illegal activities of defendant No.1 and the builder employed by them? OPP.*

- (v) *Whether the plaintiff is entitled to recover interest on the amounts, if any, awarded under issues No.(iii) and (iv)? If so, at what rate and for which period? OPP*
- (iv) *Relief.”*

5. Parties led evidence and these aspects are recorded in paras 7 to 14 of the impugned judgment and which read as under:-

“7. In order to discharge the onus of proving the issues, the plaintiff examined himself as PW-1, Shri Yogender Sharma, Executive Engineer from Municipal Corporation as PW-2, Shri Anil Kumar Gupta, Architect as PW-3, Shri Chanderkant Babbar, Ahlmad from the Court of Ld. Civil Judge as PW-4, his neighbour Shri Surender Gautam as PW-5, Shri Mukesh Kumar, LDC from Record Room (Civil), Tis Hazari Courts as PW-6 and photographer Shri Amit Sharma as PW-7. Whereas, defendant No.1 examined Shri Gopal Krishnan, its Managing Director as DW-1 and Shri Ashok Verma from Building Department, Karol Bagh Zone, Municipal Corporation as DW-2.

8. The plaintiff in his evidence proved on record title documents in respect of suit property in his favour as Ex.PW1/1 and Ex.PW1/2. The status reports of MCD dated 06.05.2010 and 26.04.2011 filed in earlier suit as Ex.PW1/7 and Ex.PW1/10 respectively.

9. PW-2 Shri Yogender Sharma, EE from MCD in his evidence proved the Sanction Building Plan in respect of the said property as Ex.PW2/1, Indemnity Bond furnished by defendant No.1 to MCD as Ex.PW2/2, Affidavit/undertaking of defendant No.1 as Ex.PW2/3 and the Indemnity Bond for special area as Ex.PW2/4.

10. PW-3 Shri Anil Kumar Gupta, the approved valuer proved his report dated 11.12.2009 with regard to the estimated cost of repair of the suit property as Ex.PW1/8.

11. PW-4 Shri Chanderkant Babbar, Ahlmad from the Court of Ld. Civil Judge (Central) proved on record the plaint, affidavit and notice dated 06.07.2011 in an earlier suit for permanent and mandatory injunction filed by defendant No.1 against the plaintiff, being Civil Suit No.17/12, dated 24.02.2012 as Ex.PW4/1 to Ex.PW4/3 respectively.

12. PW-6 Shri Mukesh Kumar, LDC from Record Room (Civil) proved on record the documents and photographs filed in an earlier suit for permanent and mandatory injunction by the plaintiff, being Civil Suit No.572/09. The special emphasis of this witness was on report of Local Commissioner dated 06.12.2010 as Ex.PW6/4.

13. PW-7 Shri Amit Sharma, photographer has proved on record the various photographs depicting the suit property as well as the said property

from the time the said property had been purchased by defendant No.1 till the completion of construction. The said photographs are from Ex.PW7/1 to Ex.PW7/57.

14. Whereas, DW-1 Shri Gopal Krishnan in his evidence proved Authority Letter in his favour vide Resolution of defendant No.1 company as Ex.DW1/1, the Inspection Report of Architects Gogia & Associates, dated 03.03.2011 as Ex.DW1/2 (already Ex.PW6/2) and copy of Sanction Plan of the said property as mark X. Whereas, DW-2 Shri Ashok Verma from Building Department, Karol Bagh Zone, North DMC proved on record the Sanction Building Plan in respect of the said property as Ex.DW2/1 (Colly), Regularisation Plan as Ex.DW2/3 and final Sanction Plan as Ex.DW2/4."

6. Trial court has dismissed the suit by holding that not only the construction being made by the respondent/defendant no.1 was not unauthorized because it was in terms of a sanctioned plan, it was also held that whatever were the deviations in constructions were got compounded as per law. Trial court has also held that appellant/plaintiff failed to prove that any damage was caused to his property because the appellant/plaintiff's expert PW-3 who came and deposed for the appellant/plaintiff admitted in his cross-examination that he could not prove his qualification for being a qualified surveyor/draftsman and that PW-3 had not employed any instrument for assessing the structural damages to the property. The witness PW-3 also admitted that before submitting his report as Ex.PW1/8 he had not visited the property where the basement was lying dug. Trial court has also held that the case of the appellant/plaintiff lacks credibility

because if there were damages caused to the property of the appellant/plaintiff then the appellant/plaintiff would have said so in the earlier litigation but the appellant/plaintiff in the earlier litigation did not mention any damages caused to his property. Trial court has further held that if any damages were caused by the construction made by the respondent/defendant no.1 on the first floor of the property then surely on the floor beneath the property of the appellant/plaintiff on the ground floor which was in possession of one Sh. Manjeet Singh there would have been damages but admittedly Sh. Manjeet Singh never filed any complaint or filed any case with respect to any damage to his property by the construction of the respondent/defendant no.1. Trial court has further observed that appellant/plaintiff regularly took photographs and though appellant/plaintiff pleaded that heavy machinery was used, yet no photographs were filed to show the use of heavy machinery. Accordingly, trial court dismissed the suit by making the following observations:-

“20. Issue No. (ii):

Whether the defendant No. 1 has carried out construction over plot No. 1229/1140, QQ Block, House No. 958/4, Nai Wala, Karol Bagh, New Delhi as per the sanctioned site plan by MCD and the deviations have been regularized? OPD

The onus to prove this issue was upon defendant No. 1. The stand of defendant No. 1 throughout the litigation has been that the construction at the said property was undertaken after obtaining building sanction plan

from defendant No. 2/MCD. The copies of sanction plans are on record as Ex.DW2/1 (Colly) and Ex.DW2/4. Since, some deviations were found by the MCD in the construction viz., that the position of lift and staircase was shifted from the middle of the building to the corner, however, the same was permitted to be compounded by the MCD and a regularisation plan was issued, which is Ex.DW2/3. The stand of the plaintiff in this suit as well as the earlier suit bearing No. 572/09, disposed off on 26.04.2011 to the effect that the construction was undertaken by the defendant No. 1 at the said property has remained hollow in the teeth of the aforesaid documents. The plaintiff himself has made admission on record by placing on record documents Ex.PW1/11 (Ex.PW2/1), Ex.PW1/3 (Ex.PW2/2), Ex.PW1/4 (Ex.PW2/3) and Ex.PW1/5 (Ex.PW1/4). The said documents are part of sanction of building plans in respect of the said property. Even otherwise, there are reports filed by MCD in earlier suit which are Ex.PW1/7 and Ex.PW1/10 and the same clearly, categorically and unerringly establish that the building plans of the said property were duly sanctioned and the construction in respect thereof was carried out by defendant No.1 as per the plan and whether deviations were later found were compounded and a regularization plan Ex.DW2/3 was duly issued by the MCD. The issue is accordingly decided in favour of defendant No.1 and against the plaintiff.

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23. There are two inspection reports, one Ex.PW1/8, dated 11.12.2009, filed by the plaintiff and the other Ex.PW6/2 (Ex.DW1/2), dated 03.03.2011, filed by the defendant No.1. In Ex.PW1/8, it has been mentioned that the suit property is situated at the first floor. It was constructed in the year 1987 with Agra stone over T-Iron roofing and marble chips flooring. The cracks were noticed in the walls and roof by PW-3 at the time of inspection. The southern side wall of northern-eastern room was found fully damaged. When PW-3 came to witness box, he could not prove his qualifications to be a qualified surveyor/draftsmen. He admitted that he had not employed any instrument for assessing the structural damage to the suit property. He also admitted that before submitting his report Ex.PW1/8, he had not visited the said property where the basement was lying dugged. It is worthwhile to note that the aforesaid inspection was got conducted by the plaintiff during the pendency of the earlier suit in which there was no allegation about damage to the suit property.

24. On the other hand, the Inspection Report dated 03.03.2011 Ex.DW1/2 shows that the construction at the suit property was made 27-28 years prior to the date of inspection. The construction therein was found to be semi-pukka type and the same was not being maintained properly because of which minor cracks appeared in the cement plaster of the walls and ceiling. It was also observed that no proper waterproof

treatment on the terrace had been got done because of which the water seeped through the T-iron of terrace as well as the T-iron of roof causing chipping of cement plastering.

25. The plaintiff in his cross-examination categorically admitted that he had taken out a 5 feet projection through the entire width of the suit property and had covered it with temporary structure, but he tried to justify it by stating that similar projections had been taken out by the other persons of the locality as well. ***In the same breath, he categorically admitted that the defendant No. 1 had not taken out even an inch of projection.***

26. It is interesting to note that the most affected area of the demolition/construction at the said property should have been the ground floor, i.e. the floor beneath the suit property, which is admittedly in possession of Shri Manjeet Singh. In his cross-examination, the plaintiff categorically admitted that said Shri Manjeet Singh never filed any complaint with regard to damage to his property against defendant No. 1. This gives a clear indication that the report Ex.DW1/2 depicts the correct position of facts, i.e. the suit property was not being maintained properly. It had old structure containing large scale unauthorized construction, built with old fashioned iron strips and slabs without any water proofing treatment, which led to seepage and percolation of rain water from ceiling and projection to the walls of the suit property.

27. Now, let us analyse the photographs placed on record. It is interesting to note that the plaintiff has been taking photographs right from the beginning i.e. when earlier super-structure was there at the said property. He clicked a host of photographs when the construction activity was being undertaken by the defendant no. 1. A perusal of photographs Ex.PW7/11 and Ex.PW7/12 goes on to show that a portion of merely 10 ft. x 10 ft. of suit property was in direct contact with the said property and the demolition work was undertaken very cleanly with virtually no damage to the suit property. The outer walls of the suit property are looking very clean and undamaged after demolition of the earlier super-structure. These photographs clearly show the kind of construction existing at the suit property. These photographs further establish that the T-iron strips and kota stone slabs were already lying rusted. It has to be borne in mind that by then the construction had not started at the said property.

28. It was very vociferously argued by the learned counsel for the plaintiff that the defendant No. 1 had used very heavy machines and sledfe hammers in demolishing the super-structure which caused damage to the suit property. This argument is not tenable in the teeth of the host of photographs placed on record by the plaintiff. None of the photographs show any machine being used for demolition. It is admitted position that the plaintiff had been taking photographs right from the beginning, then he would not have missed the photographs depicting heavy machines being used for demolition work. In the cross-examination of DW-1, when it was

put to him that he had used JCB machine for demolition, then he explained that it was a stoney area, where JCB could not have done much and as such, the work of excavation was got done through mannual labour.

29. The plaintiff has pleaded damage to electricity wiring as well as to his computers, but no expert has been examined by him to prove the same. Seeing the facts from any angle would reveal that the plaintiff has not pleaded true facts. The issue (iii) is accordingly decided against the plaintiff.”

7. It is therefore seen that the trial court has given appropriate reasoning, discussion and conclusion and this Court finds no illegality in such discussion, reasoning and conclusion for being interfered in this appeal because the construction of the respondent/defendant no.1 was found to be as per the sanction plan and not done illegally and that appellant/plaintiff failed to prove any damage caused to its property because the report filed by the PW-3 Ex.PW1/8 did not inspire confidence as it was prepared without going to the site and also that the so called expert PW-3 did not show his qualifications. To the findings and conclusions of the trial court I would like to add that even for the sake of argument if it is presumed that there was damage to the property of the appellant/plaintiff yet once money is sought to be recovered on account of alleged damage then how the amount of damages has been proved has to be looked into and it is seen that except a self-serving statement made by PW-3

in his report Ex.PW1/8 no proof is filed not only of the damage caused but also as to how the amount of damages are calculated and on what basis would there be the cost of repairs. This report Ex.PW1/8 shows that there is no basis taken with reference to how the cost of repairs has been arrived at and costs of repairs are only stated in general figures without reference to how the cost is arrived at with reference either to PWD Manual of construction or any other construction etc rates which have to be proved by means of documents including of project work or electrification or sanitary work etc. This report Ex.PW1/8 reads as under:-

“INSPECTION REPORT

Inspection Report of Property No.957 (FF) Naiwala, Pyare Lal Road, Karol Bagh, New Delhi-110005 belonging to Sh. D.C.Gautam S/o Late Sh. N.S.Gautam.

At the request of Sh. D.C.Gautam, I inspected the above said property on 07.12.2009 at about 4.00 P.M. in presence of Sh. D.C.Gautam and his family. The site plan o above said property supplied by the owner on the spot. I took the notes about the damaged conditions of the above said property.

My observation in this regard are as under, the above said property is a first floor along with mumty, part of double storey building, constructed in the year 1987 with Agra Store over the T-Iron Roofing and Marble Chips Flooring and Cement Plastering all over inner and outer. But the condition of above said property is very poor and damaged at the time of my inspection.

The detail of Damages are as under:-

1. The major and minor cracks have been occurred in the walls and roofing, which is more clearly shown in the photograph.
2. The flooring of above said property is damaged as appearing the cracks.
3. The staircase G.F to F.F. and F.F. to Terrace is in damage condition. The cracks are appeared in the riser/trade/walls.

4. The electric wiring is fully damaged because of the leakage of water from the roof.
5. The southern side wall of northern-eastern room is fully damaged being the major cracks are appeared.

On my through inspection it is notice that the above said property is in damaged condition. The all damages are raised due to the new construction of adjoining plot and excavating of basement.

I am of the firm opinion that the above said premises is in very damaged condition and is standing in dangerous condition, because the roof is fully damaged. The property requires immediately change of roofing and reconstruction of southern side wall of northern-eastern room and repair of whole property, otherwise the property can fell down at any moment it is harmful for living persons.

The estimated cost of repair of above said property is as under:-

1.	Cost of Roofing 563.75 sq. @ Rs.500/- per sq. ft.	Rs.2,81,875
2.	Reconstruction of wall 124 sq. ft. @ Rs.100/- per sq. ft.	Rs.12,400/-
3.	Cost of cement plastering 800 sq. ft. approx. @ Rs.50/-psf.	Rs.40,000/-
4.	Cost of paint work 800 sq. ft. @ Rs.40/- per sq. ft.	Rs. 32,000/-
5.	Cost of electrification lump sum	Rs. 25,000/-
6.	Sanitary Work lump sum	Rs.25,000/-
7.	Cost of Repair of Cracks lump sum	<u>Rs. 30,000/-</u>
	TOTAL	Rs.4,46,275/-

8.(i) Learned counsel for the appellant/plaintiff argued that trial court has fallen into an error in dismissing the suit on the ground that construction of the respondent/defendant no.1 was not unauthorized but that this was not the issue which was of damage caused to the appellant/plaintiff's property, however this argument in my opinion does not have substance because this case of respondent/defendant no.1's construction being unauthorized was an

issue raised and hence was decided by the trial court. In view of the issue got framed by the appellant/plaintiff that the construction of the respondent/defendant no.1 on its property was not made after permission from the municipal authorities it was therefore that the trial court did frame such an issue and it was decided. Appellant/plaintiff having therefore specifically got an issue no.1 framed and which has been decided in terms of para 20 of the impugned judgment which is reproduced above cannot argue that trial court has fallen into an error in deciding this aspect.

(ii) Also, no doubt even if construction is legally made by a person yet damages can be caused to property of another person however such alleged damage caused will have to be proved and the only proof of damages caused was the report Ex.PW1/8 which has been reproduced above and which inspires no confidence of credibility with respect to its correctness/accuracy because as already discussed above the costs have been arrived at by the Expert without giving the basis on which the costs have been calculated i.e there is no reference to any rate sheet issued by any appropriate authority for construction or rate sheets with respect to sanitary or electrical work etc etc. Therefore, in

my opinion, trial court was justified in dismissing the suit as not only *quantum* of damages were not proved and also that damage to the property of the appellant/plaintiff was not proved as required by law.

9. Learned counsel for the appellant/plaintiff argued that appellant/plaintiff has now filed an application under Order XLI Rule 27 CPC being CM No. 6359/2018 to file additional documents, but in my opinion, this application cannot be allowed once the appellant/plaintiff has had complete opportunity during trial to prove his case. Clock cannot be again set back to the stage of appellant/plaintiff's evidence in the suit. Also, I have gone through the documents sought to be got produced by the appellant/plaintiff at this stage and none of these documents, and which are Annexures P-2 to P-5 and P-8 in this appeal, in any manner show as to how the respondent/defendant no.1's construction is the reason of any damage to the property of the appellant/plaintiff, and the only relevant document at best is Annexure P-5 which is the letter of the MCD dated 28.1.2016 addressed to the appellant/plaintiff with respect to appellant/plaintiff requiring to carry out repairs in his property, however even this document will not show that that damage to the

property of the appellant/plaintiff has been caused by construction by the respondent/defendant no.1 on its own property. Also, it is necessary to note that appellant/plaintiff's construction has been found not only to be illegal to a considerable extent but the report of the Expert filed by the respondent/defendant no.1 as Ex.DW1/2 shows that the construction of the appellant/plaintiff was only of semi *pacca* type i.e semi permanent type which was not properly maintained and it is for this reason of the nature of appellant/plaintiff's property that cracks would have appeared on the property of the appellant/plaintiff and it was not because of any negligence or lack of performance of due obligation by the respondent/defendant no.1.

10. In view of the aforesaid discussion, I do not find any merit in the appeal. Dismissed.

FEBRUARY 27,2018

VALMIKI J. MEHTA, J