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

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Judgment pronounced on: 02.08.2019

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RSA No.182/2016

SANJAY RANA

.....Appellant

Through: Mr. J.C. Mahindro, Mr. Babulal and
Mr. Kuljeevan Sidharth, Advocates.

Versus

IMARTI DEVI & ORS.

.....Respondents

Through: Mr. Satish Saha, Advocate for Respondent No.1.
Mr. Rahul Singh Advocate for Respondents No.
2(i), (ii) and (iii).
Ms. Renu Gupta, Advocate for Respondent No.3.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.

1. This Regular Second Appeal under section 100 of the Civil Procedure Code, 1908 impugns the judgment dated 22.11.2012 passed by the learned Trial Court and the judgment dated 22.03.2016 passed by the First Appellate Court, *inter alia*, directing the appellant, respondent no. 2 and Mrs. Nirmal Rana (Defendant no.3¹ in the suit) to restore the suit property bearing no. 103, Gali Krishna, Pahar Ganj, New Delhi- 110055, in its original position, as shown in the site plan, by removing/ demolishing the

¹ Not arrayed as a party in these proceedings

staircase from the *gali*/public street and any other unauthorized or illegal construction, additions and alterations.

FACTS:

2. In the suit filed by Respondent no.1, mandatory injunction was sought against the (i) appellant, (ii) respondent no.2, (iii) respondent no.3 and Mrs. Nirmal Rana. She had stated that she was the owner and landlady of the property bearing Municipal No. 100, 102 and 103 in Ward No. XV, Gali Krishna, Pahar Ganj, New Delhi- 110055 (the last number 103, being the suit property); that she had purchased the same, from the previous owner through a Sale Deed dated 17.11.2000; that respondent no.2 has been a tenant in the suit property under the previous owner, but after the transfer of ownership to the plaintiff, she became the landlady of the tenant by operation of law. The appellant had purchased a portion on the first floor (front side) of the property bearing no. 101 from its previous owner and access to the said portion was through the staircase bearing municipal no. 101, which was to be used only by the appellant in common with the occupant of the rear portion of the first floor; that after the purchase of the property, the appellant and Mrs. Nirmal Rana in collusion and connivance with respondent no.2 erected a pucca staircase from and within the property which has resulted in the change of shape and size of the suit property. It was further submitted that a portion of the *gali*/public street had also been encroached upon by the appellant, respondent no.2 and Mrs. Nirmal Rana and that a legal notice dated 19.03.2001 in this regard was served by her to remove the said staircase which was not replied by any of the defendants.

3. The learned counsel for the appellant contested the suit and submitted that the appellant had purchased the entire divided half share of the first

floor, second floor along with open terrace rights and a staircase on the front side of the property bearing no. 101-103 and that at the time of purchase, it was mutually agreed that the appellant shall have the right to construct an independent staircase from the portion of the shop in occupation of R2 and that the said staircase was constructed on or before 16.10.1999 in pursuance to the said oral agreement. The learned counsel for the MCD (R3) submitted that the steps on the gali/public street were already removed by the Works Department and that it cannot be ascertained whether the construction was carried out in the suit property.

4. The learned Trial Court framed the following issues:

“11. From the pleadings of parties, following issues were framed on 26.04.2004 for trial, namely;-

1. Whether the defendant no. 1 to 3 unlawfully built a staircase on the suit property and extended some thereon on public land by encroaching upon the same? OPP.

2. Whether the suit is not maintainable u/s 477/478 of the Delhi Municipal Corporation Act? OPD.

3. Whether the suit is not maintainable in view of the facts that the alleged encroachment has already been removed by the MCD? OPD.

4. Whether the plaintiff has not approached to this court with clean hands? OPD.

5. Whether the plaintiff is entitled to any relief; if so, what relief.

5. Subsequently, by order dated 13.07.2011, following additional issues were also added:

“1A. Whether the staircase in the suit property was constructed by the defendant no. 2 in October, 1999 as per mutual understanding between the defendant no. 2, previous owner and defendant no. 1? OPD 2 & 3.

1B. Whether the suit is bad for non joinder of previous owners? OPD 2 & 3.

1C. Whether the suit is barred by res judicata as argued by defendants no.2&3.”

6. The aforesaid issues were duly considered by the impugned judgment dated 22.11.2012 as under:

“25. In the light of the evidence of the parties, it is proved that the defendant no. 1 was inducted as a tenant in respect of the suit property owned by the previous owner. It is also proved that the suit property has been purchased by the plaintiff and by operation of law the defendant no. 1 had become tenant in respect of the suit property under the plaintiff. It is also proved that the plaintiff has purchased other properties i.e. 100 & 102 beside the suit property. It is also proved that the plaintiff vide sale deed dated 17.11.2000 had purchased the suit property. The certified copy of Sale Deed and site plan Ex. PW1/2 and Ex. PW1/3 are not disputed by the defendants. It is also not in dispute that the defendant no. 2 had purchased a portion on the first floor (front side) of the said property bearing Municipal Corporation No. 101, Gali Krishna, Pahar Ganj, New Delhi from the previous owners as informed to the plaintiff by the previous owners. It is also admitted by DW1 Sanjay Rana that when he purchased the front side of property no. 101, the staircase was common between himself and Harbhajan Singh, which situates in the property no. 101. It is also admitted by DW1 Sanjay Rana in his cross examination that on the date of purchase of the property they were provided

access to the said property through staircase shown yellow in Ex. PW1/4 by previous owner and this was common staircase. It is admitted case of the parties that no rights, title or interest were conferred on the defendant no. 2 for constructing the staircase within and from the suit property for having independent access to the portion purchased by him. It is the case of the defendant no. 2 that a dispute had arisen with Harbhajan Singh Kohili and pursuant to that dispute a suit was filed and decided by the court of Sh. Raj Kumar Tripathi, the then learned Civil Judge in which MCD was also a party and it was shown from the record of that suit that staircase was in existence at that time. Since the plaintiff was not party to that suit, so the findings of that suit are not binding upon the plaintiff. What was decided in that suit in absence of the plaintiff cannot be forced upon the plaintiff. It is also contended by the defendant no. 2 and 3 that the staircase was constructed in the suit property in October, 1999 as per mutual understanding between the defendant no. 2, the previous owner of the defendant no. 1. The defendants no. 2 and 3 have failed to explain under which law the previous owner can agree mutually with the defendant no. 1 for construction of staircase in the suit property. Any right, title or interest in respect of immovable property of value of Rs.100/- upward can only be conferred by way of registered instrument as per provision under Section 54 of the Transfer Property Act, 1882. But, there is no such document produced on behalf of the defendants no. 2 and 3 for proving the right to construct the staircase in the suit property. Admittedly, the plaintiff has purchased the suit property after the purchase made by the defendants no. 2 to 3. Had the previous owner ever permitted the defendants no. 2 to 3 to construct the staircase in the suit property it would have been mentioned in the sale deed when the plaintiff purchased the suit property. There is no evidence

to prove on behalf of the defendants to prove that the suit property was in existence prior to its purchase by the plaintiff. There is no evidence on behalf of the defendants to prove that the staircase was constructed in the suit property in October, 1999.

31. It is stated by the DW1 Sanjay Rana in his affidavit that the present suit without impleading Sh. Jasbir Singh and his brother Sh. Balbir Singh, the predecessor in interest of this property is not maintainable and more so when they had already sold the said property and had permitted him to raise construction of the staircase in question which only enabled him to obtain the license for running the guest house. As I have already observed while deciding the issue no. 1 and 1A, it has been proved that the defendants no. 2 and 3 were provided access to their property through the common stair case, it means that the staircase constructed in the suit property were not in existence at that time.

32. It was not stated in the Sale deed produced by the defendants no. 2 and 3 in respect of their portion that they shall have right to construct staircase within and from the suit property. The Sale Deed through which the plaintiff purchased his property including the suit property and the Sale Deed through which the defendants no. 2 and 3 purchased their property are not disputed by the either party. When the documents itself speak that there arise no question of impleading the predecessor in interest in the present suit and I am of the considered opinion that the predecessor in interest are neither necessary nor proper parties in the present case.

33. But for the aforesaid discussion, on the one hand, the defendants no. 2 and 3 raised the objection that the plaintiff

have not impleaded the predecessor-in-interest of the suit property as a party in the present case and on the other hand, they have even not examined the predecessor in interest of the property in question as a witness in the present case to prove that it was mutually agreed between by them as defendants no. 2 to 3 shall have right to construct the stair case within the suit property.

34. Second legal objection on behalf of the defendants no. 2 to 3 is of res judicata. The principle of res judicata applies to all suits when parties in the present suit as well as in formal suit were same. As I have already observed that the plaintiff was not a party to the former suit decided by the court of Sh. Raj Kumar Tripathi, the then learned Civil Judge, Delhi, therefore, he is not bound by the decision of former suit and the present suit is not barred by the principle of res judicata.

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36. In view of the findings of issue no. 1 and 1A the suit of the plaintiff is decreed. The defendants no. 1, 2 and 3 are directed to restore the suit property in its original position by removing/ demolishing the staircase shown in red colour in the suit property bearing no. 103, Gali Krishna, Pahar Ganj, New Delhi as well as from Gali/Public Street and any other unauthorized and illegal construction additions and alterations therein and to restore the same to its original condition as shown in the site plan.

37. While deciding the issues no. 1 and 1A, it has been proved that the plaintiff is the landlady in respect of the suit property and the defendant no. 1 was the tenant, now represented by his legal representatives. In the present suit, it is alleged by the plaintiff that the defendant no. 1 has not paid any rent to the

plaintiff w.e.f 17.11.2000 at the rate of Rs.100/- per month and now a sum of Rs.750/- is due as arrears of rent from the defendant no. 1 to the plaintiff till the end of 30th June, 2001; that the defendant no. 1 has failed to pay the said arrears of rent despite service of notice dated 19.03.2001 and accordingly he is liable to pay the said arrears of rent along with interest @ Rs.15 % per month thereon which comes to Rs.70/- and in all the defendant is liable to pay a sum of Rs.820/-. In written statement, the legal representatives of the defendant no.1 have not specifically denied these facts and the same are deemed to be admitted by them. In view of the above, the relief qua recovery of amount is decreed in favour of the plaintiff and against the legal representatives of the defendant no.1. The legal representatives of the defendant no. 1 shall pay Rs.820/- to the plaintiff. The plaintiff shall also be entitled for costs of the suit.

Decree sheet be prepared accordingly.”

7. The aforesaid judgment was unsuccessfully challenged by the appellant before the First Appellate Court. The appellant contends that the learned Trial Court did not appreciate the fact, that plaintiff/respondent no.1 was to prove that the said staircase was not in existence at the time of purchase of the suit property, but the learned Trial Court erred in asking the appellant to prove that the said staircase was built as per the settlement/ oral agreement between him and the previous owner.

8. The learned counsel for plaintiff/respondent no.1 contends, that the appellant has illegally constructed the staircase from inside shop no. 103 which was under the tenancy of respondent no.2, but without having any rights or authority in the said shop. Therefore, the said construction was

unauthorized and illegal. It is in these proven facts that the learned Trial Court rightly decreed the suit.

9. The appellant had also moved an application for adducing additional evidence, to the effect that: (i) he was running a Guest House, for which necessary permissions were required from the DCP (Licensing); (ii) since there was no proper access to the Guest House, the staircase was constructed with the permission of the previous owner, through shop no. 103; (iii) the said construction had been done prior to the aforesaid purchase by respondent no.1 and (iv) that an application for grant of license for running the Guest House was moved by the appellant on 30.06.1998, followed by another application after the construction of the staircase on 01.11.1999. It is only thereafter, that the requisite license was granted to the appellant on 21.09.2001. However, respondent no.1 opposed the said application as not being maintainable, because (i) it did not cite the provision of law under which that evidence could be led; and (ii) the appellant failed to disclose as to how the proposed evidence would help in deciding the real issues framed in the appeal.

10. While dismissing the appeal the learned First Appellate Court held that (i) the appellant failed to aver anything in his Written Statement about the grant of licence qua the said property; this contention being beyond the pleadings, evidence apropos non-pleaded/non-averred facts and circumstances could not be allowed to be led; (ii) that the said application was not covered under the provisions of Order 41 Rule 27 (1)(a) and (aa) CPC; (iii) nor was the evidence required by the Court, under clause (b) of

the said provision, as the proposed evidence could not prove the ownership of the appellant to the suit property in which the said staircase was built.

11. The learned counsel for the appellant contends that the license to run a guest house was granted on 21.09.2001 after the staircase was constructed by the mother of the appellant, as was directed by the Licensing Authority. It was so constructed because the earlier staircase was too narrow. It is further contended that the First Appellate Court wrongly rejected the application under Order 41 Rule 27 of the CPC, by assuming that the evidence was all along available with the applicant and should have been led by him while the trial was in progress; that the learned Court had failed to take into account the fact that respondent no.1 is the next door neighbour, who would not have permitted the construction of the said staircase after his purchase of the suit property; that neither was any complaint made in this regard nor was any interim injunction sought by her. The learned counsel further argues that in lieu of grant of decree of mandatory injunction, liberty can always be granted to the plaintiff to seek damages, especially considering the fact that the staircase stood already constructed, without which, the entire business of the appellant is likely to be jeopardized; that the plaintiff herself did not appear in the suit and her attorney failed to answer as to who scribed the Sale Deed.

12. At this stage the appellant has raised a new ground, of easement rights having been bestowed upon him, on an oral understanding/agreement with the previous owner and the appellant. The Court would note that there is no mention in his pleadings that any easement right was granted to the appellant. The issue of easement has been raised for the first time in this second appeal. Since this contention was never made before, on corollary

issue to determine easement rights was not framed by the learned Trial Court. Therefore, this Court can not consider this contention in the second appeal.

13. In *Bachhaj Nahar v. Nilima Mandal*, (2008) 17 SCC 491 : (2009) 5 SCC (Civ) 927, the Supreme Court has held as under:

10. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are:

(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.

(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal. (emphasis supplied)

14. Order 41 Rule 27 of the CPC reads as under:

“Order 41 Rule 27. Production of additional evidence in Appellate Court—

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

15. The Court refers with benefit to the decision of the Supreme Court in ***Jagdish Prasad Patel (dead) through LRs and Another Vs Shivnath and Others***, (2019) 6 SCC 82 wherein it was held that:

“29. Under Order XLI Rule 27 CPC, production of additional evidence, whether oral or documentary, is permitted only under three circumstances which are:

(I) Where the trial Court had refused to admit the evidence though it ought to have been admitted;

(II) the evidence was not available to the party despite exercise of due diligence; and

(III) the appellate Court required the additional evidence so as to enable it to pronounce judgment or for any other substantial cause of like nature. An application for production of additional evidence cannot be allowed if the appellant was not diligent in producing the relevant documents in the lower court. However, in the interest of justice and when satisfactory reasons are given, court can receive additional documents.

30. In *Union of India v. Ibrahim Uddin & Another*, (2012) 8 SCC 148, this Court held as under:-

“36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide *K. Venkataramiah v. A. Seetharama Reddy* AIR 1963 SC 1526, *Municipal Corpn. of Greater Bombay v. Lala Pancham* AIR 1965 SC 1008, *Soonda Ram v. Rameshwarlal* (1975) 3 SCC 698 and *Syed Abdul Khader v. Rami Reddy* (1979) 2 SCC 601.

37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as

the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co. (1978) 2 SCC 493)

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a “substantial cause” within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed.” (emphasis supplied)

CONCLUSION:

16. It is the appellant's case that after settlement/oral agreement with the previous owner of the suit property, the staircase was constructed from and within shop no. 103 on or before 16.10.1999. The Court would note that no evidence has been led by the appellant to prove that he had the right to construct it; also there is no proof that the said staircase was constructed on or before 16.10.1999. The appellant also failed to examine the previous owner in this regard and prove that any right was bestowed upon him for the construction of the staircase. It stands proven that respondent no.1 had purchased the suit property vide Sale Deed dated 17.11.2000 and there is also no receipt on record issued by the previous owner in favour of the

appellant, regarding the construction of the said suit property. It is also to be noted that if the said staircase was built before the purchase of the suit property by respondent no.1, then the same would have been a part of the site plan which is annexed with the Sale Deed. The site plan clearly marks the said staircase from the inside of shop no. 103 in red colour as it was not part of the original site plan. The contention that respondent no.1 did not appear herself in the suit and the Attorney could not answer as to who scribed the said Sale Deed is not relevant, as the Sale Deed and ownership of the suit property by respondent no.1 stands proven. No substantial questions raised were left unanswered by the Attorney of respondent no.1.

17. In the present case, neither did the learned Trial Court refuse to admit any evidence which ought to have been admitted, nor was the evidence not available to the party despite exercise of due diligence, nor did the learned Appellate Court require any additional evidence. Hence, the application under Order 41 Rule 27 seeking permission for leading additional evidence was rightly rejected by the learned First Appellate Court. Also, the construction of staircase in 1999 which is sought to be proved by leading additional evidence is immaterial, as that piece of evidence will not make the appellant owner of the said staircase. Neither the Sale Deed has been disputed nor has any evidence been brought on record to show that the site plan annexed with the Sale Deed is incorrect.

18. There is no merit in this appeal. It is accordingly dismissed.

NAJMI WAZIRI, J.

AUGUST 02, 2019