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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 3rd December, 2020
+ **RSA 75/2019 & CM APPL. 17261/2019**
SUSHIL KUMAR JAIN Appellant
Through: Mr. N.S. Dalal, Advocate. (M:
9999814755)
versus

GAJENDER CHOPRA Respondent
Through: Ms. Ashu Arora, Advocate.
(M:9910800124)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done by video conferencing.
2. The present second appeal has been filed challenging the order dated 5th February, 2019 upholding the original judgment and decree dated 28th February, 2017 with some modifications. The original suit was filed by Shri Gajender Chopra i.e., the Plaintiff/Respondent (*hereinafter*, "Plaintiff") against Shri Sushil Kumar Jain i.e., the Defendant/Appellant (*hereinafter*, "Defendant") for permanent and mandatory injunction along with damages.
3. The Plaintiff is resident of SFS Flat No.59, Second floor, Pocket-D, Mayur Vihar Phase-II, New Delhi-110091. The Defendant is resident of SFS Flat No.60, which is located on the third floor of the same building. The problem of seepage arose in the Plaintiff's flat, leading to the filing of the present suit.
4. Written statement was filed by the Defendant and evidence was led. Both parties also filed their respective technical reports of civil engineers, along with their estimates. Cross examination was conducted. Vide the trial

court judgment dated 28th February, 2017, the relief of permanent injunction was granted in favour of the Plaintiff and a total sum of Rs.70,000/- was directed to be paid to the Plaintiff towards damages and an additional Rs.50,000/- was awarded on account of mental harassment and agony. The operative portion of the trial court judgment reads as under:

“Relief

44. In view of the above discussion, suit of the plaintiff stands decreed in the following terms-

1. Plaintiff is held entitled to the relief of permanent injunction, whereby the defendant is restrained from damaging the property of the plaintiff.

2. In respect of the relief of mandatory injunction, defendant is to pay a sum of Rs.70,000/- to the plaintiff towards the estimated cost of correcting/repairing the problem of seepage. This amount is to paid within one month of this order. Upon payment, the plaintiff would have two months to undertake all necessary repairs to fix the problem of seepage, as required. During these two months, the defendant is directed to give access to the plaintiff to the affected portions of his flat at all reasonable times of the day (Flat no.60, Pocket D, Mayur Vihar Phase II, New Delhi-110091) The defendant should facilitate the plaintiff to inspect and conduct repairs in the flat of the defendant, if required and suggested by the plumber/contractor, for fixing the problem of seepage, so that the necessary repairs can be completed in the minimum time possible. The plaintiff however will mandatorily give a prior notice in writing to the defendant before any inspection is to be done in the flat of the defendant. The plaintiff is also directed to take in writing from the contractor/plumber all work suggested and undertaken towards correcting the seepage. Any

cost incurred towards repair above Rs.70,000/- shall be borne by the plaintiff himself.

3. *The defendant is to also pay damages to the tune of Rs.50,000/- to the plaintiff towards the mental harassment, agony and loss suffered by him.”*

5. The Defendant appealed against the said judgment, which was upheld vide the judgment dated 5th February, 2019, with slight modification of the mandatory injunction, in the following terms:

“17. Conclusion

In view of findings of this court on the aforesaid points of determination, the judgment and decree of Ld. Trial Court dated 28.02.2017 is upheld, with slight modification that instead of plaintiff carrying out repairs in the flat of defendant which may result in future litigation between the parties, a decree of mandatory injunction is passed in favour of the plaintiff against the defendant thereby directing the defendant to carry out the necessary repair works and waterproofing in his property so that seepage may be avoided in the premises of the plaintiff. The appeal is decided accordingly and suit of plaintiff/respondent is decreed in his favour. Cost is also awarded in favour of the plaintiff/respondent. Decree sheet be prepared accordingly.”

6. The present second appeal was thereafter preferred by the Defendant. In the present appeal, the trial court record was called on the first date. Vide order dated 20th May, 2019, the impugned order was stayed and no substantial question of law was framed. On 12th September, 2019 the Id. Single Judge directed release of the sum of Rs.65,000/- out of the amount deposited by the Defendant before the Appellate Court in order to enable the

Plaintiff to carry out the repairs. Further, directions were issued on 20th October, 2020 in order to enable the Plaintiff to carry out the repairs. Today, the matter is listed for examining if there are any questions of law in the matter.

7. Mr. N.S. Dalal, Id. Counsel for the Defendant has vehemently submitted that awarding damages in this matter is completely baseless as there is no proof of actual damage. He relies upon the judgment of the Supreme Court in *Fateh Chand v. Balkishan Dass, AIR 1963 SC 1405*. He submits that both the Trial Court and the Appellate Court have failed to appreciate the fact that the amounts, which have been awarded are mere estimates and there was no proof or evidence which was filed on record to prove that there was any damage caused due to seepage. It is further submitted that there was also illegal construction, which could have been the cause for the seepage. According to him, the effect of illegal construction is the question of law which arises, therefore, the present second appeal deserves to be admitted.

8. This Court has examined the judgment of the Trial Court and the Appellate Court. The Trial Court clearly arrived at the finding that both the parties are neighbours and there was enormous seepage in the Plaintiff's flat. Insofar as the cause for seepage is concerned, the Trial Court observed that the Plaintiff had served a legal notice subsequent to which the Defendant, in fact, stated that he had carried out repairs in his bathroom. This itself showed the Trial Court that the Defendant admitted that there was some sort of seepage in the Plaintiff's flat caused due to the condition in the Defendant's bathroom. Thereafter, the Trial Court relies upon the reports of the civil engineers to support awarding the cost for repairs. Paragraphs 33

and 34 of the Trial Court judgment read as under:

“33. As to the extent of damages, there are two different reports, which have been produced before the Court. The plaintiff has produced a report of the architect Ex.PW1/5 who has estimated that the repairing the damage done due to seepage in flat no.59 would atleast cost of Rs.69,069/-. Whereas, the civil engineer DW-2, had suggested Rs.10,000/-. However as discussed in issue no.1, the report of DW-2 is fraught with weaknesses and strong reliance cannot be placed on it.

34. Furthermore, the defendant himself during his cross examination states that he has spent around Rs.1,00,000/- in repairing his bathroom after the legal notice was sent. The estimate of DW-2 appears to be significantly undervalued. Furthermore nothing in the cross examination of the architect Sh. Gyanender Singh Bamore calls into question the estimation so reached.”

9. After recording the engineers’ estimate, the Trial Court observed in paragraph 36 that the sum of Rs.70,000/- would be a reasonable estimate for correcting the problem of seepage. Insofar as damages for mental harassment and agony is concerned, as against the amount of Rs.2,50,000/- claimed, Rs.50,000/- has been awarded by the Trial Court.

10. The law on award of damages is well settled. The same has to be real and proximate and not remote. Compensation in the case of a tortious claim can be granted if ‘causation’ is established. Even negligence by a party could result in grant of compensation/damages for loss suffered. In cases like the present one, where some damage has been caused to the Plaintiff’s property, and when from the facts, it can be easily gleaned that the seepage was caused due to the Defendant’s negligence or callousness, a reasonable

measure would be to determine the cost of repair for the damage that has been caused. Of course, if the Defendant's acts were deliberate or motivated, even punitive damages can also be awarded. However, that is not the case here. The principles laid down in *Fatehchand (supra)* which dealt with damages due to breach of contract are on similar lines i.e., that the court has to adjudge the reasonable compensation payable to the Plaintiff on the facts of each case.

11. Insofar as the damages granted for mental agony is concerned, almost a century ago in *The Mediana (1900) A.C.113*, Lord Halsbury L.C. observed as under:

“How is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by arithmetical calculation establish what is the exact sum of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident. But nevertheless, the law recognises that as a topic upon which damages may be given.”

12. The above judgement of the House of Lords was cited with approval by the Supreme Court in *Rekha Jain v. National Insurance Co. Ltd. (Civil Appeal Nos. 5370-5372/2013)*, where the Supreme Court observed:

“24. In re the Mediana, the plaintiffs were deprived of the use of their own lightship, but sustained no pecuniary loss as another lightship was kept in reserve. Yet, it was held that the plaintiffs were entitled to substantial damages for the loss of the use of their ship for a period, and Lord Halsbury L.C. answered the objection that assessment was too uncertain by observing that:

"Of course, the whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless, it is remitted to the jury, or those who stand in place of the jury, to consider what compensation in money shall be given for what is a wrongful act. Take the most familiar and ordinary case: how is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident ... But, nevertheless, the law recognises that as a topic upon which damages may be given. In personal injury cases, the Court is constantly required to form an estimate of chances and risks which cannot be determined with precision. It is because, the law will disregard possibilities which are slight or chances which are nebulous; otherwise, all the circumstances of the situation must be taken into account, whether they relate to the future which the plaintiff would have enjoyed if the accident had not happened, or to the future of his injuries and his earning power after the accident. Damages are compensation for an injury or loss, that is to say, the full equivalent of money so far as the nature of money admits; and difficulty

or uncertainty does not prevent an assessment.” (emphasis laid by the Court)”

Thus, the full equivalent of money can be granted as compensation or damages in such cases.

13. It ought to be borne in mind that the suit was originally filed in 2015 and even as of 2020 there was difficulty which the Plaintiff had faced for carrying out the repairs. This led to the passing of order dated 20th October, 2020. Thus, the Plaintiff has suffered for almost 5 years due to seepage. The assessment of damages has been made on the basis of the reports filed by the engineers/architects’ evidence. The seepage caused in the Plaintiff’s flat is admitted. The amount of damages to be awarded depends on the amount that may be required for repairing the said seepage. The Defendant himself claimed that he spent Rs.1 lakh for repairing his own bathroom. The reports of the Engineers were at variance. The Plaintiff’s expert estimated the amount at Rs.69,069/- and the Defendant’s report estimated the amount at Rs. 10,000/-. By applying the principle of compensatory damages, the trial court has awarded the sum of Rs. 70,000/- was a reasonable estimate for the repair of the seepage as per the engineer’s report. This assessment is a factual one.

14. The fact that the Plaintiff had to litigate such a small matter for five long years itself is proof of the pain and suffering he must have undergone. Merely because such pain and suffering cannot be measured in terms of money does not mean that no amount is to be awarded on this count. The award of Rs. 50,000/- on this count is reasonable and on sound footing. The approach of the trial court cannot be faulted. Thus, the findings arrived at by

the Trial Court and the Appellate Court's observations do not deserve to be interfered with.

15. This Court is of the opinion that no substantial question of law arises in this appeal. The present appeal is, accordingly, dismissed. All pending applications are also disposed of. Remaining amount deposited with the Appellate Court be released to the Plaintiff within four weeks. No orders as to costs in the present appeal.

**PRATHIBA M. SINGH
JUDGE**

DECEMBER 3, 2020

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