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

Date of Decision: 20th December, 2021

+ **RSA 45/2020 & CM APPLs. 8355-56/2020**

SHOBHA PATIL

..... Appellant

Through: Mr. Alok Gupta, Advocate.
(M:9810076539)

versus

HARISH GROVER & ORS

..... Respondents

Through: Ms. Anjali Dhingra, Advocate for Mr.
Puneet Bajaj, Advocate for R-1.
(M:9311071156)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done in physical Court. Hybrid mode is permitted in cases where permission is being sought from the Court.
2. The present second appeal has been filed challenging order dated 17th November, 2018 in ***RCA No.110/2017*** titled ***Ms. Shobha Patil v. Sh. Harish Grover & Ors.***, as also, order dated 7th December, 2019 in ***Misc. No.56/2019*** titled ***Shobha Patil & Ors. v. Harish Grover & Ors.*** passed by Ld. ADJ-07, South East District, Saket Courts, New Delhi (*hereinafter "Appellate Court"*). By the impugned orders, the Appellate Court has, in effect, confirmed the judgment and decree dated 24th May, 2017 passed by Ld. SCJ, Saket Courts, New Delhi (*hereinafter "Trial Court"*) in ***CS SCJ 83416/16*** titled ***Ms. Shobha Patil v. Sh. Harish Grover & Ors.***
3. The brief background of the case is that a suit for permanent and mandatory injunction was instituted by the Appellant/Plaintiff- Ms. Shobha Patil against Respondent No.1/Defendant No.1- Mr. Harish Grover. The

Plaintiff and the Defendants are neighbours, residing in the same block in Sarita Vihar, New Delhi-110025. The prayer in the suit was for permanent injunction in respect of ingress and egress to the terrace as also the common staircase. The reliefs sought in the suit are extracted below:

“1. Issue a writ of prohibition or any other appropriate writ order or direction thereby restraining the respondent No.5 from obstructing or in any manner preventing the petitioner or the tenant of the petitioner’s flat No. F-314, Sarita Vihar, New Delhi from accessing the terrace by using the stair case for the purposes of installing, replacing, maintaining the water tanks, antenna etc, and also from preventing the petitioner or her tenant or employee or servant or any plumber/meson etc. from installing the water tank at the designated original place where DDA had installed the water tank of Flat No. F-314, Sarita Vihar, New Delhi.

2. Issue a writ mandamus or any other appropriate writ order or direction thereby directing the respondent no.1 or 4 to take action against respondent No.5 for unauthorized construction over the balcony of flat of the petitioner i.e., Flat No. F-314, Sarita Vihar, New Delhi by extending the bed room and extending the balcony of his Flat No. F-314, Sarita Vihar, New Delhi and also for making additions and alterations to the stair case leading to the terrace by putting grill etc, unauthorizedly and consequently direct the demolition of unauthorized construction and/or removal thereof. Further, direct the respondent No.5 to allow free access to the petitioner to the terrace on regular basis for maintenance and installation of water tank, cable, antenna etc. and particularly for the present, to allow access to the petitioner and his labourers, her agents, tenant, servants or employees to the terrace for installation of the water tank at the originally designated place for the same for supply of water to petitioner’s flat bearing No. F-314, Sarita Vihar, New Delhi.

3. Grant any other relief which your lordship deem fit and proper in the circumstances of the case.

4. Award the cost.”

4. Vide detailed judgment and decree dated 24th May, 2017, the Trial Court, decreed the suit in the following terms:

“14. The defendants No.1 and 2, their servants, agents, assignees, associates, etc. are permanently restrained from any manner obstructing/ causing hindrances/ denying access to the plaintiff and her agents, servants, assignees, etc. to terrace over the defendant No.2’s Flat bearing No. F-315, Sarita Vihar, New Delhi for the purpose of having access to the terrace for maintenance and repair of cable TV connection and dish antenna, telephone lines, water tanks, etc. as well as ingress and egress through the staircase leading to the terrace for the purpose of having access to the terrace for maintenance and repair of cable TV connection and dish antenna, telephone lines, water tanks, etc.

14.1 Further, defendants No.1 and 2, their servants, agents, employees, assignees, etc. are permanently restrained from any manner causing threats to the plaintiff or damaging / tampering/ removing/ dismantling any of the plaintiff’s articles/ water tank/ dish antenna/ telephone- cable TV connections/ etc. installed or to be legally installed in the near future on the terrace in question.

14.2 Further, the defendants No.1 and 2, their servants, agents, assignees, associates, etc. are directed to remove the gate/iron grill door installed by the defendants No.1 and 2 on the common passage staircase leading to terrace over the flat of the defendant No.2 bearing No. F-315, Sarita Vihar, New Delhi within a month and the defendant No.3 shall ensure the compliance of the same as per law.

14.3 Further, the defendants No.1 and 2, their servants, agents, assignees, associates, etc. shall not cause any

hindrance or obstruction to the plaintiff and her agents, servants, employees, etc. from maintaining and repairing cable TV, Dish Antenna, telephone lines, etc. installed on the terrace in question.”

5. In respect of the water tank, which is the subject matter of the present appeal, the Trial Court in its judgment and decree dated 24th May, 2017 held as under:

“13.2 In fact, two sets of photographs [Ex.PW-1/4 (colly) and Ex.PW-1/9 (colly.)] have been relied upon by the plaintiff in support of his case. Ex.PW-1/9 (colly.) are the latest photographs of suit property and most important documentary evidence for adjudicating the present case. The photographs. [Ex.PW1-4 (colly.)] are old photographs of suit property. On juxtaposition of Ex.PW-1/3 and Ex.PW-1/4 (colly.), it is found that point D in Ex.PW-1/3, the designated place of overhead tank of plaintiff, is shown at point A in Ex.PW-1/4 (2nd photograph). Ex.PW-1/4 (2nd photographs) shows one black overhead tank placed just next to point A which is overhead tank of dependants. However, the latest photographs, seventh photograph in Ex.PW1/9 (colly.) is clearly showing that no overhead water tank of any flat occupant of the building is now placed at point D or E as was shown in the site plan (Ex.PW1/3) and the platform of the beams originally constructed by the DDA below the said designated cemented water tanks have been broken and from bare glance of the said photograph, it is apparent that the earlier designated place as shown at point D and E in Ex.PW1/3 is no longer suitable for putting any overhead water tank. So, the documentary evidence corroborate the evidence of DW1 as to why the water tank of plaintiff is changed to another place on the terrace. The photograph No.8 of Ex.PW-1/9 (colly.) shows the present place of the overhead water tank of the plaintiff, at point B. The said overhead water tank is placed at a small platform. Admittedly, the overhead water tanks of other occupants are also placed at the

same location as apparent from point A, B and C in site plan (Ex.PW-1/3). The plaintiff has not at all explained as to how his legal rights are being infringed or what adverse consequences are suffered by the plaintiff by change of location of overhead water tank of the plaintiff. So, the demand of plaintiff for installing the water tank at earlier designated place on the terrace is not legally tenable in view of the aforesaid reasons. ”

6. However, the Plaintiff had an outstanding grievance in respect of location of the said water tank on the terrace. The case of the Plaintiff was that the water tank was moved from its original position, and the said position ought to be restored. Accordingly, the Plaintiff preferred an appeal being RCA No.110/17 titled Ms. Shobha Patil v. Sh. Harish Grover & Ors. Against the judgment and decree dated 24th May, 2017 passed by the Trial Court. The Appellate Court perused the photographs placed on record and compared the two locations of the water tank. It was observed that the water tank of the Plaintiff was place at its right place. Vide judgment dated 17th November, 2018, the finding of the Appellate Court in this respect has been extracted below:

“11. On comparing both the places i.e. designated place at point D and point X in Ex. PW1/3 and on simultaneously seeing their location in photographs Ex. PW1/4 and Ex PW1/9, it is found that the water tank of the appellant/plaintiff is placed at a right place where there is no danger however there may be an apprehension with respect to the beam being damaged beneath the place at point D where the water tank was originally placed.

12. I do not find any merits in the contention of the Ld. counsel for appellant/plaintiff. Order of the Ld Trial Court is perfectly legal and does not suffer from any Infirmary. Appeal is dismissed.

13. Decree sheet be prepared accordingly. No order as to cost.

14. Appeal File be consigned to Record Room. Trial Court Record be sent back alongwith copy of this order.”

7. Thereafter, the Plaintiff moved a review application before the Appellate Court, seeking review of the judgment dated 17th November, 2018. Vide impugned order dated 7th December, 2019, the review application preferred by the Plaintiff was dismissed by the Appellate Court, with the following observations:

“15. Whether particular fact is material or not and is required to be pleaded by the parties depends upon the facts and circumstances of the each case. All the material facts must appear in the pleadings and necessary particulars should also be there so as to give chance to the opposite party to know and understand the case of the plaintiff which the opposite party is required to meet and put him on his guard. Applying this principle to the case in hand, the very fact that plaintiffs flat was a duplex and was located just below the portion of the terrace was very relevant in order to decide the issues and also for the defendants to file their written statement in view of the fact that dispute was with respect to water tanks placed on the terrace beneath the portions under the occupation of parties, Applicant herein states that this court had proceeded on the premise that entire terrace was above flat of the defendants. Had there been clarity in the facts, there could not have been any confusion and secondly the defendants would have got a fair opportunity to rebut those facts in their defence in respect of the water tanks put allegedly on the portion of the plaintiff. A clarificatory site plan has been filed for the first time alongwith review application. This court fails to understand under which provision said document has been filed and that too without leave of this court. This site plan cannot be considered at this stage. Straightway putting the facts in the affidavit of evidence

without bringing them into the notice of either the court or opposite party is unjustified. Therefore, these facts as stated in para no. 4 of affidavit cannot be considered as they would be termed as beyond the pleadings. Without mentioning these facts in the pleadings, plaintiff cannot take advantage of the fact that no questions were put to the plaintiff's witness on these facts during cross examination. These facts were beyond pleadings and the portion of the affidavit containing them cannot be read. In these facts and circumstances, I do not find it, appropriate to interfere with findings given in the judgment/decreed dated 17.11.2018 under the garb of reviewing the said order on the ground of mistake or error apparent on the face of the record. This court cannot sit over in appeal over its own order in the name of review. Application is not maintainable. Hence, dismissed.

16. Review file be consigned to Record Room. Appeal file be sent back to Record Room alongwith copy of this order. TCR be sent back to concerned court."

8. A perusal of the above impugned order shows that the Court clearly held that the Plaintiff failed to show as to why the present location of water tank is incorrect. In fact, the Court holds that the water tank has been found to be placed at the correct place. Hence, the Plaintiff has preferred the present second appeal.

9. In the present second appeal, notice was issued on 12th April, 2021. Initially, process fee was not filed and the matter was adjourned. Thereafter, the matter was listed before the Joint Registrar on 29th November, 2021, who put up the report that service is complete in this matter.

10. Mr. Gupta, Ld. Counsel has entered appearance on behalf of the Plaintiff, and submits that the fact that the Plaintiff's flat was a duplex flat was not initially mentioned in the plaint, but was thereafter mentioned in

evidence by way of an affidavit. This has not been considered by the Trial Court and the Appellate Court.

11. Even if it is considered that the Plaintiff's flat is a duplex flat, the findings of both the Trial Court as well as the Appellate Court, in appeal as well as also in review, are that the water tank has been fixed in a position which may not be disadvantageous to the Plaintiff in any manner. The said findings of the Trial Court as also Appellate Court are findings of fact, against which no second appeal ought to be entertained as it would not constitute a substantial question of law for consideration by this Court.

12. In the present case, the Appellant has had four rounds of litigations- first, before the Trial Court where the suit was originally decreed and thereafter, before the Appellate Court. The Plaintiff has also exhausted the remedy of review by filing an application seeking review of the judgment dated 17th November, 2018 passed by the Appellate Court, which was dismissed by the said Court.

13. In the opinion of this Court, the question as to the location of the water tank, which is the only issue which appears to be the grievance of the Plaintiff, is a question of fact. The question as to the location of the water tank cannot be a substantial question of law in a second appeal.

14. Accordingly, this Court does not find any merit in the present second appeal. The appeal, along with all pending applications, is dismissed.

PRATHIBA M. SINGH
JUDGE

DECEMBER 20, 2021/dj/ad