



2024:DHC:3823



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of order: 25th April, 2024
+ RFA 316/2021 & CM APPL. 31018/2021

RAJENDER JAINA Appellant

Through: Mr. Rajesh Aggarwal, Advocate.

versus

SANJAY AGGARWAL & ANR Respondents

Through: Mr. Vinod Malhotra and Ms.
Jasleen Kaur, Advocates.

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J.(Oral)

1. The instant appeal has been filed by the appellant under Section 96 read with Order XLI of the Code of Civil Procedure, 1908 (hereinafter “CPC”) seeking the following reliefs:

“(i) Impugned Judgment dated 05.03.2020 (ANNEXURE 1), passed by the court of Ms. Vandana Jain, Additional District Judge, Saket Courts, Delhi in CS No.149/2017 title Rajender Jaina Vs. Sanjay Aggarwal & Anr. be set aside / quashed / appropriately modified / altered.

(ii) Such other and further orders which this Hon’ble court deems fit and proper in the interest of justice may also be passed.”

2. The relevant facts necessary for the adjudication of the instant appeal are reproduced herein below:



- a. The appellant owns and occupies the 3rd floor and terrace of the property bearing No. B-54-A in Greater Kailash-1, New Delhi (hereinafter “suit property”) as per the registered sale deed dated 18th May 2006.
- b. The aforesaid suit property is comprised of basement, ground floor, 1st Floor, 2nd floor, 3rd floor, and Terrace.
- c. The appellant filed the writ petition bearing No. W.P. (C) 14136/ 2006 before this Court seeking demolition of the car garage. The Coordinate Bench of this Court vide order dated 8th September, 2006 directed the Municipal Corporation of Delhi to inspect the suit property and take action warranted as per the circumstances.
- d. The respondent No. 1 acquired ownership of the 2nd floor of the suit property *vide* registered sale deed dated 1st February 2007.
- e. Thereafter, a lift was installed in the premises as per sanctioned plan for a total sum of approx Rs.5,95,000/- from M/s Schindler India Pvt. Ltd. vide agreement dated 16th May 2006.
- f. In the meantime, the respondent No. 1 started the demolition of a section of the intervening wall separating the lift wall from one of their rooms, resulting in damage to the lift. Subsequently, the appellant lodged a complaint on 17th January, 2008 after unsuccessful attempts to reach respondent No. 1 in order to stop the aforesaid demolition. Eventually, the respondent No. 1 proceeded to demolish the remaining portion of the wall, rendering the lift inoperative and then the security officer namely Sh. R.S. Dabas filed a complaint against the



same.

- g. Pursuant to the damage incurred by the appellant in getting the lift repaired, he installed a steel frame on the affected area.
- h. It is alleged by the appellant that the respondent no.1 remained persistent in their disruptive actions, further damaged the repaired portion with hammers. Aggrieved by the aforesaid action of the respondent, the appellant filed a civil suit bearing CS No. 149/2017 (new case number as the suit was originally filed on 8th February 2008) before this Court (eventually transferred to Saket District Court due to enhancement in the pecuniary jurisdiction of this Court) against the respondent No.1, seeking the following reliefs:

“1. A decree of perpetual injunction be issued in favour of the plaintiff and against the defendants thereby restraining the defendant No.1, his agents, employees etc. from causing any obstruction in the repair/ maintenance/ use/ operation of the lift in the premises No.B- 54A, Greater Kailash-I, New Delhi-110048.

2. The defendant No.2 be directed to ensure compliance and to take all preventive measures as may be necessary towards the peaceful functioning of the lift in premises No.B-54A, Greater Kailash-I, New Delhi-110048.

3. The Defendant No.1 be directed to share the proportionate expenses towards installing and regular maintenance of the lift, so as to avail the lift facility.

4. Decree for money be passed in favour of the plaintiff to the tune of Rs. 70,000/- for the damages caused, alongwith interest @ 18% p.a.

5. Such other and further order with this Hon'ble



Court deems fit may also be passed in favour of the plaintiff and against the defendants.”

- i. The respondent No. 1 filed a counterclaim before the learned Trial Court stating his position as the Managing Director of M/s Skyline Infrastructure Pvt. Ltd and averred that the company had acquired the entire second floor, along with a servant quarter on the top terrace and a covered car porch on the ground floor. This acquisition was formalized through a Memorandum of Understanding (hereinafter “MoU”) executed jointly by the company and the builder.
- j. In the written statement filed by the respondent No. 1, it was asserted that the appellant had committed multiple breaches of the contract. These breaches include actions such as locking the main staircase entry leading to the terrace and servant quarters, erecting a cell tower on the terrace of the third floor without obtaining the necessary No Objection Certificate (hereinafter “NOC”) from the relevant authorities and trespassing on the covered car porch area owned by the respondent No. 1. The appellant further intruded by excavating pits for earthing and cable connections for the cell tower installation on the terrace.
- k. Eventually the evidence was led in the aforesaid civil suit and accordingly, the learned Trial Court passed the judgment dated 5th March, 2020 holding that the respondent no.1 is allowed to use the elevator/lift installed at the cost of appellant without paying any cost of installation and further held that he is authorized to use the common staircase leading to the terrace;



and the claim of the appellant for the claim of damages was rejected.

1. Hence, the instant appeal has been preferred by the appellant seeking setting aside of the impugned judgment dated 5th March, 2020.

3. Learned counsel for the appellant contends that the learned Trial Court improperly adjudicated upon the respondent no.1's counterclaim, without verifying whether the requisite court fee had been paid, despite a specific plea made by the appellant in their written statement regarding the same.

4. It is submitted that the learned Trial Court should have awaited for the decision of this Court in the writ petition filed by the appellant and it wrongly proceeded with the matter in complete disregard of the aforesaid writ petition.

5. It is contended that the learned Trial Court failed to take into consideration the documents and correspondences by virtue of which it is evident that the appellant had solely paid the cost for the installation as well as the maintenance of the lift and the respondent did not contribute anything towards the installation costs and a proportionate share towards the operation and maintenance expenses.

6. It is further submitted that the learned Trial Court failed to appreciate that the appellant purchased the third floor and terrace rights of the suit property from the builder vide sale deed of the appellant which explicitly states that *"the expenses for the running of the lift in the said building such as salary of the lift man, periodic maintenance charges, electricity consumption charges etc. shall be paid by the owner/occupants"*



of the first floor, second floor, third floor (including terrace) proportionately. Under no circumstance the occupants of the lower floor be exempted from the proportionate charges for running the said lift and other common maintenance irrespective of the fact as to whether they are using or enjoying the said facilities or not.”.

7. It is further submitted that as per the subsequent sale deed pertaining to the second floor of the suit property, executed between the builder and the respondent no.1, expressly stated that "*the expenses for running the lift shall be borne/paid by the occupant/owners of the said building, if used by them.*". Hence, the respondent No.1 was liable to pay for the lift only if he uses the lift and the aforesaid clause has wrongfully prejudiced the right of the appellant to recover the amount paid by him for installation of the lift.

8. It is submitted that the learned Trial Court overlooked the fact that the appellant provided and substantiated the relevant repair bills (exhibit PW1/7), thereby, it was wrongfully held by the learned Trial Court that the appellant has not sought any relief pertaining to the installation/maintenance cost.

9. It is further submitted that the learned Trial Court ignored the statement of PW 1, wherein, it was testified that he got the steel frame fitted on the damaged portion costing approximately Rs.20,000/- and the bill of the same was exhibited as PW 1/7.

10. It is submitted that the learned Trial Court failed to take into consideration the factum that as per para 22 of the statement of PW-1, wherein it is stated that he got the repairs done himself and some of the repairs through M/s Schindler for which he paid Rs.10,000/- and as per



para 23, it is stated that he has spent a sum of Rs.30,000/- towards the repair of the lift, however he claimed only Rs.20,000/-.

11. It is submitted that it has been wrongly held by the learned Trial Court that despite the fact that the servant quarter of the respondent no.1 is not in existence at the terrace belonging to the appellant, he has right to approach his water tanks since, the staircase is common.

12. It is further submitted that the learned Trial Court failed to acknowledge that it is an admitted position of fact that the servant quarters were not permitted to be constructed since it was against the building byelaws, hence, were demolished.

13. In view of the aforesaid submissions, the learned counsel for the appellant submitted that the instant appeal may be allowed and the reliefs as sought may be granted by this Court.

14. *Per Contra*, learned counsel appearing on behalf of the respondent No. 1 vehemently opposed the averments of the respondent no.1 and submitted that the impugned judgment passed by the learned Trial Court has been passed rightly by taking into account the material on record as well as the averments advanced by both the parties.

15. It is submitted that pursuant to the installation of the lift, cheque No.39862 dated 24th April 2007 for Rs.5,000/- drawn upon Allahabad Bank was given to M/s Schindler (I) Pvt. Ltd. by the respondent No.1 towards the cost-of-service charges, etc.

16. It is further submitted that the appellant committed various breach of the sale deed executed between the appellant and the respondent no.1 such as blocking the main staircase to terrace, servant quarter, water tanks, lift machine, room, fire escape, etc. The appellant had disconnected



the water supply from the water tanks on the terrace, created hindrances and objections to the common passage, erected a cell- tower on the terrace of the third floor without obtaining NOC from the concerned RWA as well as installed heavy duty genset on the terrace which had been creating vibrations and effecting the stability and the strength of the building, thereby, creating nuisance.

17. It is contended that due to the appellant's illegal activities and nuisance, the respondent No. 1 couldn't relocate his family to Delhi. The appellant obstructed the use of the property, aiming to force a sale at an unfair price.

18. It is submitted that the appellant filed a false affidavit before the learned Trial Court alleging damages to the lift on specific dates. However, during those dates the respondent No. 1 had been residing in Jammu and never visited Delhi, hence, they never occupied their portion on the second floor due to the appellant's breaches and illegal activities.

19. It is contended that the suit of the appellant is liable to be dismissed on the ground that there has been a non-joinder of parties i.e., the builder of the suit property M/s Tirupati Builders, the lift-maker M/s. Schindler (P) Pvt. Ltd. and M/s. Skyline Infrastructure Pvt. Ltd.

20. It is submitted that the appellant had been filing false complaints with the authorities which led to the demolition of constructions, causing significant loss to the respondent No.1.

21. In view of the aforesaid submissions, the learned counsel for the respondent submitted that the instant appeal is without any merit and the same be dismissed.

22. Heard the learned counsel appearing on behalf of both the parties



and perused the material on record.

23. It is the case of the appellant that whilst passing the impugned judgment, the learned Trial Court failed to take into consideration that the respondent had been wrongfully using the lift without paying any charges for the installation as well as operation and maintenance of the lift. It is further averred that the learned Trial Court erred by not taking into consideration the fact that the terrace rights have been purchased by the appellant and the respondent no.1's servant quarter on the terrace was built in contravention to the statutory laws was demolished, thereby, the respondent No.1 does have the right to access the terrace area.

24. In rival submissions, the respondent no.1 has averred that there is no illegality or infirmity in passing of the impugned judgment. It is further submitted that the appellant has wrongly contended that the respondent No.1 damaged the lift since he was not present in Delhi during the period when the lift was allegedly damaged. It is contended that the respondent No.1 had been paying for the operation and maintenance of the lift.

25. In the above said civil suit, the following issues were framed vide order dated 20th January, 2009 for adjudication :

- “1. Whether the defendant is entitled to the use of the elevator installed at the cost of the plaintiff and if so in what proportion are the cost of the plaintiff and if so in what proportion are the costs of installation and the costs of operation/ maintenance are to be borne by the parties? OPP*
- 2. Whether the passages claimed to be common by the defendant are for the common use of the plaintiff and the defendant? OPP*
- 3. Whether the defendant has any right to access to water tanks on the terrace above the 3rd Floor and if so in what*



manner?

OPP

4. Whether there is any car garage in the property and if so where and whether the defendant is entitled to any relief with respect to the same.

5. Whether the defendant is entitled to object to the installation of the genset and cell tower by the plaintiff on the terrace above the 3rd floor?"

26. The learned Trial Court has reproduced the sale deed executed between the appellant and builder as well as the sale deed executed between the respondent no.1 and the builder. This Court deems it apposite to peruse the same before adverting to the merits of the instant appeal. The relevant extracts of the aforesaid sale deeds have been reproduced herein below:

"49. Before dwelling upon the issues framed in the present case, it is necessary to reproduce certain covenants in the sale deed of the plaintiff and that of the defendant in order to determine the issues.

<i>Page & Para No.</i>	<i>Sale Deed of Plaintiff</i>	<i>Page & Para No.</i>	<i>Sale Deed of Defendant No. 1</i>
<i>Para continued from Page No. 21 to 22</i>	<i>The Vendors have also executed a General Power of Attorney dated 15/9/04 in favour of Shri Ajay Bharti, Shri Sanjay Bhatia, Shri Ashwini Anand and Shri Abhinav Anand, in respect of entire third floor with terrace excluding the area of servant quarters with right to</i>	<i>3rd para of internal page No.11</i>	<i>AND WHEREAS the Vendors, through attorney, for their bonafide needs and requirements have agreed to sell, convey, transfer and assign to the Vendee to which the Vendors hereby confirm and the Vendee</i>



	<i>construct and own any area/floor on the third floor of the main building and terrace thereupon and subsequent terraces thereupon and there above up to the limits of sky along with proportionate undivided, indivisible and impartible ownership rights in the said plot of land measuring 1000 Sq Yds bearing No.B-54A, situated at Greater Kailash Part-1, New Delhi which has been duly registered as document No.112798, in Addl. Book No. IV, Vol. No. 6159 on pages 184 to 190, on 15/9/04, in the office of Sub Registrar, Pitampura, New Delhi.</i>		<i>has agreed to purchase the Entire Second Floor with common lift facility along with one servant quarters (8'x6' each) on the top terrace and one covered car porch on Ground Floor (Garage located at Ground Floor along with Terrace Rights up to sky as per plaint annexed) (duly sanctioned vide C.C. No. File No. 44/CC/B/ 52/05 dated 17.11.2004) along with proportionate, undivided, indivisible and impartible ownership rights in the said plot of Land measuring 1000 Sq Yds, bearing No.B-54A situated at Greater Kailash Part-</i>
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2024:DHC:3823



			<i>1, New Delhi, with all rights, title and interest, easements, privileges and appurtenances thereto, with all fittings, fixtures, connections, structure standing thereon, with all rights in common entrances, passages, staircase and other common facilities including common lift facility and amenities provided therein, hereinafter referred to as 'The said Portion' of the said property for a total consideration of Rs. 71,00,000/- (Rupees Seventy One Lacs only)</i>
<i>Para continued from Page No. 23 to 24</i>	<i>AND WHEREAS Vendors/have the represented that the Vendors/have full right and absolute</i>		



	<i>authority to sell and transfer the portion under sale in any manner AND WHEREAS the Vendor through attorney for their bonafide needs and requirements have agreed to sell, convey, transfer and assign to the Vendee to which the Vendor hereby confirm and Vendee has agreed to purchase the entire third floor with complete terrace and terrace rights (excluding the area of servant quarters) with right to construct and own any area/floor on the third floor of the main building and subsequent terraces there upon and there above up to the limits of the sky, along with proportionate undivided, indivisible and impartible ownership rights in the said plot of land measuring 1000 Sq Yds bearing no B-54A situated at</i>		
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	<i>Greater Kailash Part-1, New Delhi with all rights, title and interest, casements, privileges and appurtenances thereto, with all fittings, fixtures, connections, structures standing thereon, with all rights in common entrances, passages, staircase and other common facilities and amenities provided therein, hereinafter referred to as 'The said Portion' of the said property for a total consideration of Rs. 1.36 crores.</i>		
<i>1st para of internal page No.37</i>	<i>That no common parts of the building will be used by the Vendee or other owners/occupants of the said building for keeping/chaining pets, dogs, birds or for storage of cycles, motorcycles except for parking of vehicles wherever specified nor the common passage shall be blocked in</i>	<i>Para No.9 of internal page No.17</i>	<i>That no common parts of the building will be used by the vendee or other owners/occupants of the said building for keeping/chaining pets, dogs, birds or for storage of cycles, motorcycles except for parking of</i>



	<i>any manner.</i>		<i>vehicles wherever specified nor the common passage shall be blocked in any manner.</i>
<i>Para continued from internal Page No. 38 to 39</i>	<i>That the staircase, bore-well, jet-pump, passages and other common services in the said portion of the said property shall remain common. The Vendee shall use and enjoy these services and shall also proportionately share the expenses incurred from time to time for the maintenance or the said common services with the other occupants of the said building.</i>	<i>Para No.12 of internal page No.18</i>	<i>That the staircase, bore-well, jet-pump passages and other common services in the said portion of the said property shall remain common. The Vendee shall use and enjoy these services and shall also proportionately share the expenses incurred from time to time for the maintenance of the said common services with the other occupants of the said building.</i>
<i>2nd para of internal page No.39</i>	<i>That the Vendee shall have, as a matter of right, the right to use all entrances, passages; staircases; his own servant quarters and toilet; driveway; parking;</i>	<i>Para No.13 of internal page No.19</i>	<i>That the Vendee shall have, as a matter of right, the right to use all entrances, common lift facility, passages, staircase – up to</i>



	<i>and other common facilities as are available in the said building.</i>		<i>terrace, their own servant quarters and toilet, driveway, parking, and other common facilities as are available in the said building.</i>
<i>3rd para of internal page No.42</i>	<i>That there shall be no interference on the terrace of any occupants, excluding the area of three servant quarters of lower floors (each having approx. area of 8'0"* 6'-0"), if constructed by Vendors/Confirming Party.</i>	<i>Para No.21, 22 and 23 of internal page No.22</i>	<i>One servant quarter space (of size approx. 8'-0"x6'-0" each) along with common toilet has been provided on the terrace of the Third Floor (as per map annexed) by the confirming party for the exclusive use of the Vendee. That no occupant of the Lower Floor shall have any right to put or install any genset etc. on the terrace of the said portion of the said property. That the expenses for running of the lift shall be borne and paid by the occupants/owners</i>



			<i>of the said building if used by them.</i>
<i>3rd para continued from Page No.43 to 44.</i>	<i>That the expenses for the running of the lift in the said building, such as salary of the liftman, periodic maintenance charges, electricity consumption charges etc shall be paid by the owners/occupants of the first floor, second floor and third floor (including terrace) proportionately. Under no circumstances, the occupants of the lower floor be exempted from the proportionate charges for running the said lift and other common maintenance, irrespective of the fact as to whether they are using or enjoying the said facilities or not. The Vendee have placed order for the lift which shall be subsequently</i>		



	<i>installed.</i>		
<i>1st Para of Page No. 46</i>	<i>That the Confirming Party has provided spiral staircase in the rear side of the building from Ground Floor to top floor for access to all Servant Quarters on Terrace and the access to the same shall not be from the main entrance.</i>	<i>Para No.28 of internal page No.24</i>	<i>That the Confirming party has provided spiral staircase as fire escape and emergency exist in the rear side of the building from Ground Floor to Top Floor which shall also be used as an access to all Servant Quarters on Terrace in addition to the access provided from the main/common staircase.</i>

27. Now adverting to the first issue i.e., “whether the defendant is entitled to the use of the elevator installed at the cost of the plaintiff and if so, then in what proportion are the costs of the plaintiff and if so in what proportion are the costs of installation and the costs of operation/ maintenance are to be borne by the parties”. The relevant portion of the learned Trial Court’s findings with regard to the above stated issue is reproduced herein below:

“50. It is a matter of record that car porch/garage on the ground floor, servant quarters on the terrace and spiral staircase at the rear side of the property has been demolished/removed by MCD and there is no dispute to the said fact in view of the replies to the RTI which are Ex PW1/15, Ex PW1/19, Ex PW1/20. It is also proved on record



by the aforesaid replies that no permission is required to construct a gate in the rear boundary wall provided there exists service lane. This is clearly mentioned in RTI reply Ex PW1/20. It is not disputed that there is a back lane.

51. With this background of facts, I shall proceed to decide the issues before me.

52. Issue No. 1. Whether the defendant is entitled to the use of the elevator installed at the cost of the plaintiff and if so in what proportion are the costs of installation and the costs of operation/maintenance are to be borne by the parties? OPP

53. Plaintiff has filed the documents on record to show that cost of lift was borne by him and further lift license is in his name. Original license of the lift showing that it is in the name of the plaintiff is Ex PW1/12. Even in the clause at internal page No.43 of sale deed of plaintiff, it is specifically mentioned that vendee (plaintiff) have placed order for the lift which shall be subsequently installed. It is pertinent to mention here that witness from the lift company i.e. M/s Schindler (P) Pvt Ltd has deposed in the present case and had clearly proved that lift was installed by plaintiff. However, at the same time in the entire sale deed of the plaintiff, it is not mentioned that expenses incurred in the installation of the lift have to be shared by the occupants of other floors. It is only mentioned in the same clause on page No.43 of the sale deed of plaintiff that expenses for running the lift such as salary of liftman, periodic charges, electricity consumption charges shall be paid by the occupants of all the floors irrespective of the fact that whether they are using or enjoying the said facility or not. Though, plaintiff in the plaint has alleged that defendant had neither paid anything towards cost nor towards maintenance despite having several correspondences between each other, however, during the cross examination of PW-1, it has clearly come on record that PW-1 has admitted having received some payments towards the maintenance from the defendant No.1 as and when asked for. It has also come in the evidence that no separate invoice has been filed on record which could show that plaintiff had raised any demand from defendant



No.1 towards running expenses of the lift and defendant failed to pay the same. Since the lift license is in the name of the plaintiff, the maintenance charges and the electricity consumption charges would certainly be in the name of the plaintiff only and it is plaintiff who would be making further demands from the defendant No.1 thereafter regarding these running expenses. However, since no such invoice is on record, plaintiff is not entitled to recover anything as of now either towards the cost of the installation of the lift or towards maintenance for the periods prior to the filing of the suit or during the pendency of the suit. It is also pertinent to mention here that in the sale deed of the defendant, it is mentioned that defendant is liable to pay only if he is using the lift. In the written submissions filed by defendant, it has come on record that he is paying the electricity consumption charges for the lift regularly and is ready to pay the same in future. Even otherwise, it is clarified that sale deed of the plaintiff is prior in time wherein his rights were crystallized and, therefore, any conflicting covenants in the sale deed of the defendant to that of the plaintiff cannot be read in a manner which is prejudicial to the rights of the plaintiff. It is also pertinent to mention here that defendant had failed to seek any declaration qua sale deed of the plaintiff to the extent of existence of conflicting covenants in both the sale deeds. Therefore, it is held that defendant is entitled to use the lift, however, he is not liable to pay the cost of installation and cost of maintenance which has not been sought. Defendant is only liable to pay as and when demand for running expenses of the lift are made by plaintiff. Therefore, issue No.1 is decided accordingly.”

28. Upon perusal of the aforesaid findings of the learned Trial Court, it is made out that the learned Court below observed that the plaintiff had filed certain documents in support of its contention that the cost of the installation of lift was borne by him and the lift license was also granted in his name. Further, the sale deed executed between the appellant and the



builder specifically stated that the cost of installation of lift has to be borne by the occupants of the other floor. The aforesaid sale deed merely states that the expenses for running the lift shall be borne by all the occupants of the floors irrespective of the fact whether they use the lift facility or not.

29. The learned Trial Court further observed that the appellant during cross – examination admitted that he had received certain payments on account of maintenance from the respondent No.1 as and when asked for and there is nothing on record to demonstrate that any demand was raised by the appellant and that the respondent No.1 failed to pay for the same.

30. Therefore, it was held by the learned Trial Court that the respondent No.1 is not liable to pay for the installation of the lift since as per the sale deed, the appellant alone was liable to pay for the installation of the lift. Moreover, the respondent No.1 had categorically admitted in its written statement, that he is paying the electricity bill.

31. It was further held that the right of the appellant in the suit property was prior in time hence, there is no conflicting covenants in the sale deed of the respondent no.1 in comparison to the sale deed of the appellant.

32. In view of the aforesaid discussions, the learned Trial Court held the respondent No.1 liable to pay the running expenses of the lift whenever a demand is raised by the appellant regarding the same.

33. Now advertent to the merits of the instant issue.

34. As per the Sale deed of the appellant, it is stated that the appellant will bear the cost of the installment of the lift and the cost of the maintenance of the lift shall be borne by all the floor occupants of the suit property irrespective of the fact whether they use the lift or not. The Sale



Deed of the respondent no.1 states that the respondent no.1 shall be liable to pay for the lift in case they use the same.

35. Hence, there is an existence of conflict in the two agreements, pertaining to occupants of the suit property being liable to pay for the maintenance of the lift however, since the respondent No.1 has been duly paying for the operations and maintenance of the lift. Therefore, the conflict does not survive.

36. The learned Trial Court has correctly held that there is no conflict between the two sale deed in view of the fact that the respondent No.1 had been paying for the maintenance of the lift as and when demanded by the appellant.

37. It is further held that upon perusal of the aforesaid Sale Deeds, it is crystal clear that there was no liability of the respondent no.1 to pay in respect of the installation of lift since the sale deed executed between the appellant and the builder stipulated that the appellant is liable for the same.

38. Accordingly, the learned Trial Court correctly held that the appellant is not liable to be paid by the respondent No.1 for installation of the lift.

39. In view of the aforesaid discussion, this Court is of the view that the learned Trial Court has correctly adjudicated upon issue No.1.

40. Now advertent to the adjudication of issue No.2 and 3: *which have been dealt together by the learned Trial Court which are whether the passages claimed to be common by the respondent no.1 are for the common use of the appellant and the respondent no.1 and whether the defendant has any right to access to water tanks on the terrace above the*



3rd floor and if so, in what manner. The findings of the learned Trial Court pertaining to issue no.2 and 3 has been reproduced herein below:

“55. Issue No.2 & 3 being inter-related are taken up together.

56. In first paragraph on internal page No.37 of the sale deed of the plaintiff, it is clearly mentioned that no common passage shall be blocked by plaintiff in any manner. On page No.38 in the last paragraph, the area which have been termed as common have been clearly mentioned and they are staircase, bore-well, jet-pump, passages and other common services in the said portion. Similarly in the sale deed of the defendant, clause No.9 & 12 imposes same restriction and give some facilities to the defendant No.1 and clearly shows that staircase was to remain common. In view of these clauses, it is clear that staircase is common, however, Ld counsel for plaintiff has argued that servant quarters on the terrace have already been demolished by MCD and now plaintiff is having the ownership right on the full terrace and defendant has no business to access terrace except for cleaning water tanks. As per para No.1 of internal page No.46 of the sale deed of the plaintiff :-

“That the confirming party has provided spiral staircase in the rear side of the building from Ground Floor to top floor for access to all Servant Quarters on Terrace and the access to the same shall not be from the main staircase.”

57. However, in the sale deed of the defendant, a contrary clause no 28 has been given wherein the access from the spiral staircase is given in addition to the main/common staircase.

58. Ld counsel for plaintiff has argued that since his sale deed is prior in time, therefore, conflicting covenants of the sale deed of the defendant No.1 cannot be implemented and the plaintiff's right cannot be prejudiced.

59. In this regard, it is stated that all the clauses of the sale deed have to be read together and in harmony and none of the clause in the sale deed of any of the parties cannot be read in isolation to the exclusion of other covenants in the



sale deed of the both parties. It is very much clear that staircase is common facility for all the occupants as discussed above and, therefore, clause on page No.46 of the sale deed of the plaintiff shows that access to the servant quarters shall be only from spiral staircase and not from common/main staircase cannot be read in a manner that the occupants of the lower floor are denied access to the common staircase eventually leading to the terrace. The reading of the said clause clearly shows that said clause was put for the servants to access their servant quarters on the terrace through the spiral staircase and not from the common staircase. It is pertinent to mention here that spiral staircase has already been removed by MCD which has come in the evidence of the plaintiff himself. Therefore, the defendant being the legal owner of the 2nd floor of the same building cannot be denied access to the terrace even though the servant quarter is not in existence but he has right to approach his water tanks. In sale deed of the plaintiff himself, it is clearly mentioned that plaintiff shall have full ownership right on the terrace except for the area earmarked for the three servant quarters meant for lower floors and it is also clearly stated that occupants shall be having a right to access their water tanks. Even the lower floor occupants were given right to put dish-antenna on their servant quarters. Therefore, by no stretch of imagination, plaintiff can claim exclusive rights over the staircase from third floor of the leading to the terrace. Though, he is owner of 3rd floor and as well as substantial part of the terrace but staircase shall remain common. PW-1 has admitted during his cross examination that he had installed the concrete staircase from inside the 3rd floor to the terrace. It is pertinent to mention here that entire sale deed of the plaintiff is silent about this fact that at the time of execution of the sale deed by builder in favour of the plaintiff, staircase from 3rd floor leading to the terrace was personalized. He stated during his cross examination that he did not remember whether at the time of purchasing the third floor, the said staircase was not a part of sanction plan. There are certain



photographs on record though they have not been exhibited but they are in tune with testimony of PW-1 himself showing that how a channel gate has been installed at the third floor obstructing the access of the staircase from 3rd floor till terrace which is already admitted by plaintiff in his cross examination. Even in his written submission, plaintiff has stated that he is ready to give permission to access to the defendant to the terrace through common staircase for cleaning of water tank subject to prior notice/permission of plaintiff. Since this is common staircase, it is meant for the common use of the plaintiff and the defendant and he has no right to install such a gate over it. Therefore, it is held that passages claimed to be common i.e. staircase herein is available for the common use of both the plaintiff and the defendant. Since the obstruction has been created during the pendency of the suit itself, plaintiff is directed to remove the same.

60. In view of the discussion made above, it is also opined that defendant has a right to access the water tanks on the terrace above the third floor without seeking any prior permission from the plaintiff. In case plaintiff is found to have locked the door/gate, a duplicate key shall be handed over to defendant to access the terrace or else there shall be no lock on the same. Accordingly, issue No.2 & 3 are decided accordingly.”

41. Upon perusal of the above, it is made out that the learned Trial Court observed that the aforesaid Sale Deeds states that the “common passage” includes bore-well, jet-pump, passages and other common services thereby, includes common staircase in the suit property and that the common passage shall not be blocked by any party.

42. The learned counsel for the appellant had averred that since the servant quarter on the terrace had been demolished therefore, the respondent No.1 shall not have access/right to the terrace except for



cleaning the tanks. In this regard, the learned Trial Court referred to the Sale Deed of the appellant which states that the builder has provided a spiral staircase in the rear side of the building from the ground floor to the top floor to provide access to the servant quarter and it can't be accessed from the main staircase.

43. On the other hand, as per the Sale Deed of the respondent no.1 executed with the builder, the spiral staircase has been used in addition staircase to the common staircase.

44. In view of the aforesaid conflict in the Sale Deeds, the learned Trial Court held that the Sale Deeds have to be read harmoniously and further held that the spiral staircase was meant for the servant to access the servant room and not from common staircase, however, it is an admitted position that the spiral staircase has been removed by the Municipal Corporation of Delhi, therefore, the respondent No.1 is entitled to access the common staircase for the purpose of accessing his water tankers.

45. Moreover, as per the Sale Deed executed between the appellant and the builder, the appellant is the owner of the terrace except for the portions of the terrace which have been marked as servant quarters of the lower floor occupants. Hence, the appellant cannot claim full ownership over the terrace and the staircase is a common area.

46. It was further held by the learned Trial Court that the appellant has no right to install any gate/obstruction on the way and the respondent no.1 has the right to access his water tankers without any permission from the appellant.

47. Before advertng to the merits of the issues, this Court deems it germane to refer to the law pertaining to the accessibility of common area



by the residents of the property.

48. In this regard, it is first and foremost important to reiterate the meaning of the term “easement” as defined under Section 4 of the Indian Easement Act, 1882 and the same is reproduced herein below:

“4. “Easement” defined.—An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Dominant and servient heritages and owners.—The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation.—In the first and second clauses of this section, the expression “land” includes also things permanently attached to the earth; the expression “beneficial enjoyment” includes also possible convenience, remote advantage, and even a mere amenity; and the expression “to do something” includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.

Illustrations (a) A, as the owner of a certain house, has a right of way thither over his neighbour B’s land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(b) A, as the owner of a certain house, has the right to go on his neighbour B’s land, and to take water for the purposes of his household out of a spring therein. This is an easement.

(c) A, as the owner of a certain house, has the right to conduct water from B’s stream to supply the fountains in the garden attached to the house. This is an easement.

(d) A, as the owner of a certain house and farm, has the right



to graze a certain number of his own cattle on B's field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E's land. These are easements.

(e) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.

(f) A is bound to cleanse a water course running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement."

49. Section 4 of the said Act defines an easement as a right which is possessed by the owner or occupier of a specific land, for the purpose of the beneficial enjoyment of that land, in order to continue with an act or to prevent from an act to happen and continue in preventing the act from being done, in or upon regarding the certain other land which is owned or possessed by the owner or occupier of the specific land.

50. As illustrated by the examples provided in the aforesaid provision, in cases where there is a person who has to cross certain path/way to get access to a certain place, then the aforesaid path to which a person has to cross is called an easement.

51. The explanation of the aforesaid provision defines the phrase "*to do something*" as doing an act for the beneficial enjoyment of the dominant heritage such as removal and appropriation by the dominant owner of any part of the soil of the servient heritage or anything growing or subsisting thereon.

52. Furthermore, the term "beneficial enjoyment" has been defined as dominant owners' possible convenience, remote advantage, and even a



mere amenity.

53. It is also pertinent to define two key terms, i.e., dominant heritages and servient heritages. Dominant heritages and owners is the land pertaining to which beneficial enjoyment of the land exists, and the owner of the said land is called dominant owner. Servient heritages refer to the specific land on which there is a liability imposed, and the owner or occupier thereof is the servient owner.

54. The provision which is relevant to the instant dispute is Section 22 of the Indian Easement Act, 1882 wherein there is a restriction imposed upon the dominant owner such that he/she shall exercise his/her right in such a way that it is least inconvenient to the servient owner and the servient owner shall also exercise the right in such a way that it is least harmful/determinant to the heritage owner as well as the right must be confined to a determinate part. Relevant portion of the abovesaid provision is as under:

“22. Exercise of easement Confinement of exercise of easement.—The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

Illustrations (a) A has a right of way over B's field. A must enter the way at either end and not at any intermediate point. (b) A has a right annexed to his house to cut thatching-grass in B's swamp. A, when exercising his easement, must cut the grass so that the plants may not be destroyed.”

55. The aforesaid provision has been discussed by the Bombay High Court in the judgment of ***Dhundiraj Balkrishna Phalnikar v.***



Ramchandra Gangadhar Kale, 1922 SCC OnLine Bom 12 and the relevant extract of the same is as follows:

“MACLEOD, C.J.:— The question in this second appeal is whether the order of the lower appellate Court restraining the defendant from obstructing the plaintiffs' Bhangi and Bhisti from entering by the door X in the map, Exhibit 20, and thence passing over the defendant's back-yard and entering the plaintiffs' privy at point A is right.

Defendant's house adjoins the plaintiffs' house to the west. There is a lane to the west of the defendant's house and it is admitted that the plaintiffs have a right of way over the defendant's back-yard, so that the sweeper may have access to the plaintiffs' privy. The defendant bought his house in 1915. Until then the sweeper had passed through the door X but in 1916 the defendant made certain alterations. He opened a door at the southern end of his wall and after reserving a passage of about three feet he built a wall to the north, so as to reserve for himself the rest of the back-yard. It cannot be said that it would be in any way more inconvenient for the sweeper to pass along this passage to-the plaintiffs' privy than to go in by the door X as he used to do, but the plaintiffs contend that they are entitled to stand on their strict right, that, the right of way from the door X to their privy having once been acquired, the servient owner cannot substitute any other way between the lane and the plaintiffs' privy. The trial Judge appears to have admitted this proposition of law to be correct, but considered that the plaintiffs were agreeable to the new arrangement when he visited the spot. Because the second plaintiff had adduced no evidence to show that the defendant had made the alterations against his will or without his consent, the learned Judge appears to have held that there was acquiescence on the part of the plaintiffs, and that it was owing to other disputes having arisen between the parties relating to the ownership of the party wall and certain windows in the plaintiffs' house that the plaintiffs began to object to the obstruction at door X. If an issue had been raised on the point of acquiescence



this finding might have been entitled to consideration, but the Judge, seems to have thought that the plaintiffs, even if the issue had been raised, ought to have called evidence to prove that they had not acquiesced, and, as the appellate Court has pointed out, the defendant never pleaded consent, no issue was raised, and the evidence was not directed to it. It would, therefore, be dangerous to assume that consent had been given. I do not think that section 22 of the Indian Easements Act can assist the defendant. Its provisions can only apply when the exact way to be taken over the premises of the servient owner has not been ascertained. Whether the servient owner, when once the right of way has been defined, can substitute a new way is a question which does not seem to have been provided for by the Indian Basements Act and therefore we must have recourse to the Common Law: Lovell v. Smith [(1857) 3 C.B.N.S. 120.] ; Hulbert v. Dale [[1909] 2 Ch. 570.] ; and Young v. Kinloch [[1910] A.C. 169.] . No doubt the general rule is that a right of way once defined cannot be altered Deacon v. The South-Eastern Railway Company [(1889) 61 L.T. 377.] and the dominant owner is entitled to exert his strict rights unless he can be induced to consent to a deviation. The defendant was aware of the existing right of way when he bought his premises, and unless he can prove acquiescence in the new way the plaintiffs must succeed. The appeal must be dismissed with costs.

COYAJEE, J.:— *I concur, and would add that Courts in this country have given effect to the general rule that when once the line of way has been definitely set out, neither the dominant nor the servient owner can compel the other to give or to accept a different and a substituted way. In Hamid Hosseih v. Gervain [(1871) 15 W.R. 496.] Norman C.J. observed: "We think it is clear that if any person has a right of way from one place to another over a particular line, if he and his ancestors, have been accustomed to use that way from a long time past, he has a right to go over it and cannot be compelled to use a different and substituted way." Similarly, in Varajlal Parbhudas v. Moti Kuber [(1893) P.J.*



473.] , where the facts were not widely different from those in this case, this Court held that: “If the defendant's right of way was directly from the door in plaintiff's osri to the defendant's osri, the plaintiff cannot obstruct that right of way and offer him another way through his chowk.” In my opinion, therefore, the decision of the lower appellate Court is right.”

56. In the aforesaid judgment, it was held that Section 22 of the Indian Easement Act, 1882 is not applicable in those cases where the exact way to be taken over the premises of the servient owner has not been ascertained, hence, in case the servient owner had been using a specific way for years then the aforesaid provision is not applicable on the servient owner. The aforesaid provision provides for a situation where there is uncertainty pertaining to right of way which the servient owner can use.

57. The Coordinate Bench of this Court in the judgment of **Aneil Kumar Bhalla & Anr. V. B.R Gambhir & Ors. CS (OS) 1062/2005 dated 5th September 2006** while adjudicating upon with the easementary right under Section 22 of Indian Easement Act, 1882 held as follows:

“24. As per the Indian Easement Act, 1882 even otherwise plaintiffs would have an easementary right to access the under ground water tank on the ground floor as also the roof above the second floor assuming defendant No.1 to be the dominant owner. Defendant No.1 cannot violate Section 22 of the Indian Easement Act, 1882. Needless to state, as defined, an easement is a right which the owner or occupier of immovable property possesses for beneficial enjoyment of that property. It is not pleaded by defendants 1 and 2 that plaintiffs can have access to the under ground water tank on the ground floor or to the overhead water tank above the roof of the second floor through any other means or through any other place, other than what is claimed by the plaintiffs.”



58. Further, the Division Bench of this Court in the judgment of *Anupama Malik and Ors. vs. Sudershan Malhotra and Ors.* MANU/DE/9698/2007 held that the occupants and owners of the lower floors are entitled to use the staircase and the mumty to access their water tankers on the terrace. The Court had categorically held that the occupants/owners of the lower floor have easementary rights to the staircase pertaining to the top floor and the top floor owner cannot install any gate/obstruction on the same without providing a duplicate key thereof. The relevant extracts of the judgment is reproduced herein below:

“2. Sudarshan Malhotra owned property No. 1/14 Ramesh Nagar, New Delhi. The property consists of a ground floor, a first floor and a second floor. A staircase leads up to the floor above from the ground floor and is covered by a mumty. Water tanks are installed on the mumty which serves the entire building. Sudarshan Malhotra executed an agreement to sell, power of attorney and a will in favour of Anupama Malik and her husband Chander Mohan Malik pertaining to the second floor of the property. These are the usual documents being executed in Delhi to transfer rights in immovable property. Recital in the agreement to sell recorded that the staircase and the mumty would be common together with proportionate rights in the land.

3. The second floor has a terrace in front. To reach to the roof of the mumty an iron monkey staircase has been installed at the terrace in front of the second floor. Meaning thereby he who has to access the water tanks at the roof of the mumty has to come up to the staircase and through the door opening on to the terrace in front of the second floor has to enter the terrace and therefrom use the iron ladder to climb up to the monkey ladder to reach the roof of the mumty.



4. *Dispute started when a gate was installed cutting access from the floors below to the second floor and the gate/door opening on to the terrace at the second floor came to be locked by the purchasers of the second floor. Sudarshan Malhotra retaliated by cancelling the agreement to sell, power of attorney etc.*

5. *A suit was filed by Sudarshan Malhotra praying, amongst others, issuance of permanent injunction restraining Anupama Malik and her husband from affixing any locks on the doors marked 'A' and 'B' in the site plan filed along with the plaint. She claimed a mandatory injunction that the gates marked 'A' and 'B' should be permanently removed.*

6. *Considering an application under Order 39 Rule 1 and 2 CPC filed by Sudarshan Malhotra, and in view of the sale documents in favour of Anupama Malik and her husband, learned Trial Judge held that the staircase and the mumty and the right to go to the roof of the mumty was a common right and hence nobody could lock the gates marked 'A' and 'B'. A limited injunction has been issued in favour of Sudarshan Malhotra which reads as under:*

XXX

7. *In view of the title documents relied upon by the respective parties and in view of the admitted position that the staircase and the mumty is expressly stated to be common areas for use by all occupants of the building as also the fact that water tanks are installed on the roof of the mumty and access to the water tanks has to be through the terrace in front of the second floor, (even easementary rights flow in favour of Sudarshan Malhotra) the impugned order cannot be faulted.*

8. *Accordingly the application of plaintiff under Order 39 Rules 1 & 2 read with Section 151 CPC is hereby allowed and defendants are restrained from locking the gates A and B situated on the second floor of property bearing No. 1/14, Ramesh Nagar, New Delhi without providing plaintiff the duplicate keys of the locks of the said doors and also not to*



change the locks of the said gates without her consent during the pendency of the suit.

9. I find no merits in the appeal.”

59. The Coordinate Bench of this Court in the judgment of ***Keshav Aggarwal vs. Sudarshan Kumar Banga and Ors.***, MANU/DE/275/ 2010 has given a similar finding stating to the effect that the occupants of the top floor cannot claim exclusive ownership/right over the common staircase especially when the water tank and water pumps of the resident on the ground floor are on the terrace. The relevant portion of the findings of the Coordinate Bench is reproduced herein below:

“2. Brief facts of this case are that petitioner and his wife are the joint owner of the entire third floor of property bearing No.B-365, Chitranjan Park, New Delhi. Respondent nos. 1 and 2 are the owners of the ground floor. On the ground floor, there is a front setback, east side common passage and rear setback for common usage of the occupants so as to facilitate the common facilities. There are water pumps installed for each floor adjacent to the underground water tank. Respondent nos. 1 and 2 in violation of the terms and conditions contained in the sale deed, have debarred the petitioner and other occupants from operating, maintaining and cleaning the water pump as well as groundwater tank. Aggrieved by their illegal action, petitioner filed a suit seeking permanent injunction against the respondents. Trial court after considering the pleadings, allowed the application of the petitioner under Order 39 rule 1 and 2 of the Code of Civil Procedure (for short as „Code”), vide order dated 11th February, 2010.

XXX

12. Since First Appellate Court has also held that staircase and other amenities are for common of all occupants and the water tank of petitioner is installed in the courtyard of the ground floor and no doubt it leave the occupants at the mercy



of respondent nos. 1 and 2, then by no stretch of imagination it can be said that respondent nos. 1 and 2 have full proprietary rights of the entire ground floor of the premises. Under these circumstances, petitioner cannot be denied access to his water tank and water pumps situated on the ground floor.

13. Thus, the findings of the First Appellate Court are totally perverse and against the pleadings of the parties.

14. Petitioner has a prima facie case in its favour and balance of convenience also lies in his favour and it is the petitioner who will suffer irreparable loss if injunction prayed for, is not granted.

60. The Bombay High Court recently in the judgment of ***Farhad Ginwalla v. Zenobia R. Poonawala***, 2018 SCC OnLine Bom 1264 adjudicated upon a dispute wherein the lower floor occupants were not allowed access to the terrace wherein their water tankers were placed, to check the issue with the water tankers as there was no water supply to the ground floor. It was held by the Court that obstruction or hindrance of the access of the ground floor occupants to their water tankers by the top floor occupants is wrongful and the ground floor occupants are duly entitled to access the same through the common staircase. The relevant extract of the said judgment is reproduced herein below:

“4. The two other grievances made on behalf of the Plaintiffs on 25 April, 2018 were that in the first week of April-2018 without the consent of the Plaintiffs, the Defendants have installed CCTV cameras over the entrance doors of Flat Nos. 5 and 6 on the 2 Floor of Rutton Manor, in which Plaintiff Nos. 2 to 4 are residing and are monitoring who is coming in or out from the said flats thereby invading the privacy of the Plaintiffs and further that the Defendants have locked the access door to the common terrace of the building Rutton Manor, because of which the Plaintiffs are unable to have



access to the common terrace and the water tanks and lift room, which are located on the terrace. The Plaintiffs also made a grievance that the Defendants are stopping the water supply from the water tanks to their respective flats. In view thereof, this Court suggested that Shri Samir Pandit, Advocate from Wadia Ghandy and Company appearing for the Plaintiffs and Shri Amin, Advocate from B. Amin and Company appearing for the Defendants, should visit the Suit premises along with a person dealing in the business of installing and maintaining CCTV's to find out a way to amicably resolve the disputes qua the said two issues between the Plaintiffs and the Defendants.

11...The Defendants shall upon receipt of an hour's notice (except in case of emergency) allow access to Plaintiff Nos. 2 and/or 3 along with their plumbers, technicians, etc. to have access to water tanks/lift room on the terrace. In view of the conduct of the Defendants recorded hereinabove and in view of the extreme animosity between the parties, it is possible that the implementation of this order qua access to the water tanks/lift room may become difficult. In view thereof, if the Defendants do not allow the Plaintiffs and their plumbers/technicians etc., to gain access to the terrace as directed herein, the respective Advocates for the parties shall intervene and ensure the compliance of this order. ”

61. This Court has also referred to the judgment passed by the Bombay High Court in the judgment of **Jagdish Brothers Agrawal v. Gayasuddin Abdul Kadar Konkani, 2004 SCC OnLine Bom 466**, wherein, it was held that a resident/occupant of the house cannot be denied access to the common staircase. It was further held by the Court that such denial of the common staircase amounts to nuisance and annoyance. The relevant extracts of the judgment is reproduced herein below:

"5...In view of the decision in Second Appeal No. 424 of



1990, it cannot be disputed that the staircase in the suit property is meant for the common use of the landlords and tenants. If the staircase was meant for the common use of the landlords and the tenants, the tenants could not have obstructed the landlords from using of the staircase and could not have prevented the landlords from having access to the premises on their occupation on the eastern side of the first floor. Mere fact that the landlords had access to their premises on the first floor from the staircase in another property not belonging to them was no ground for the tenants to prevent the landlords from using the common staircase. This illegal prevention by the tenants preventing the landlords from using the staircase per se amounts to nuisance and annoyance. In (Gulam Husain Mirza v. Laxmidas Premji Sagar Premji) reported in 1984 (1) Bom. C.R. 520 : 1984 Mh. L.J. 215, this Court considered what amounts to nuisance and annoyance. In that case, the landlords of the building were occupying second floor while the tenants were occupying third floor and on the top of the building there was a terrace belonging to the landlords and a water tank. The tenants used the entire terrace on the top floor for keeping the flower pots and also used the water tank for the purpose of watering the plants and they did this to the exclusion of the landlords and did not allow the landlords to use the top floor. It was held that this act of the tenants in preventing the landlords from using the top floor/terrace amounted to nuisance and annoyance. The present case is similar in which the landlords have been prevented from using the staircase which they had a right to use. More recently in (Major D.V. Panse v. Laxminarayan Khar) , reported in 2003 (1) Bom. C.R. 714 : 2002 (4) Mh. L.J. 3873 : 2003 (1) All. M.R. 21, this Court again had an occasion to consider what amounts to nuisance and annoyance. In that case, the tenants were let out two rooms a kitchen and a sanitary block but, they falsely claimed a right over the open area, garden and passage and obstructed the landlords and their family from the peaceful enjoyment of the same. The Appellate Court held it amounted to causing nuisance. The



view of the Appellate Court was affirmed by this Court. In my opinion, excluding or preventing the landlord from the enjoyment of the property or premises to which he is entitled to per se amounts to nuisance and annoyance.

6. It is not disputed before me that the tenants had obstructed the landlords from using of the common staircase and therefore, the landlords were required to file a suit for an injunction apart from filing a suit for possession. In the suit for injunction, it was held that the staircase was meant for the common use and the tenants were restrained from preventing the landlords from using of the said common staircase belonging to the landlords. As stated, this finding has become final. Therefore, the very fact that the tenants prevented the landlords from using of the common staircase belonging to the landlords amounts to a conduct on the part of the tenants which amounts to nuisance and annoyance. The trial Court therefore rightly passed a decree for possession on that ground and the first Appellate Court erred in law in refusing to pass a decree on that ground."

62. In view of the aforesaid judgment, it is observed by this Court that as per the settled position of law any of the occupants of the property cannot restrict the other occupants of the property from accessing the common areas since the said occupants have easementary rights over the same. Common areas such as common staircase, lift, etc., are for common use, therefore, any occupant of the property cannot exercise his/her monopoly over the same. The owners/occupants of the lower floor of the property have easementary rights to use the common staircase attached to the property of the top floor in order to access the water tanks on the terrace or access the terrace itself.

63. Now advertent to the matter at hand.

64. In the present appeal, it is observed by this Court that the



respondent no.1 cannot access his water tankers without using the staircase and hence, he has easementary rights over the common staircase as well as the terrace wherein his water tankers are located.

65. Therefore, the appellant is the dominant owner being the owner of the third floor of the property and the respondent no.1 is the servient owner being the owner of the second floor of the property. Accordingly, the servient owner has easementary rights of way through the staircase attached to the house of the dominant owner in order to access the portion of the terrace to access his water tankers.

66. It is pertinent to point out that the respondent No.1 is also entitled to access certain part of the terrace which has been earmarked for his servant quarter irrespective of the fact that the servant quarter cannot be constructed due to statutory limitations and the ownership of the aforesaid servant quarter space on the terrace vests with the respondent no.1.

67. The learned Trial Court whilst interpreting the Sale Deeds of the parties has rightly observed that since the spiral staircase which connected the ground floor to the terrace has been demolished by the Municipal Corporation of Delhi, therefore, the only way for the respondent no.1 to access his property is by way of the common staircase installed inside the suit property.

68. It is observed by this Court that the appellant cannot restrain the respondent no.1 from accessing the terrace by way installing any hindrance especially, in the absence of any other way to access the terrace as well as top floor of the suit property.

69. Accordingly, the learned Trial Court correctly held that the respondent no.1 is entitled to use the common staircase as well as the



terrace for the purpose of accessing his water tankers. Moreover, the appellant cannot restrain the respondent No.1 from accessing the terrace.

70. In view of the aforesaid discussions, this Court is of the view that the learned Trial Court has correctly adjudicated upon issue No.2 and 3.

71. Now advertng to issue no.4 i.e., *whether there is any car garage in the property and if so, where and whether the defendant is entitled to any relief with respect to the same.*

72. The learned Trial Court in the aforesaid issue held that there is nothing left for adjudication in the issue since the car garage has already been demolished by the Municipal Corporation of Delhi.

73. Accordingly, this Court shall also not comment upon the issue no.4.

74. Now advertng to issue No.5 i.e., whether the respondent no.1 is entitled to raise objection to the installation of the genset and cell tower by the appellant on the terrace above the 3rd floor. The relevant portion of the aforesaid issue is reproduced herein below:

“64. Plaintiff has installed the genset and cellular tower on the terrace above 3rd floor, however, defendant has objected to the same on the ground that cellular tower emits electromagnetic radiations which are harmful for the residents and further genset installed therein is dangerous to the stability of the building and, therefore, plaintiff be restrained from using the genset and cellular tower and same be removed. Along with documents, defendant has filed a copy of letter of purportedly issued by Residents Welfare Association (RWA) of the said area though, it has not been proved or exhibited, but since this is a document of the defendant, same can be relied upon. It appears from reading of said letter that clarification was sought by defendant No.1 from RWA regarding seeking of any permission by plaintiff



for installation of the cell tower. The body of the letter issued by RWA to defendant No.1 is reproduced herein as under:-

*“Sub: Clarification regarding permission given to Mrs. Rajender Jaina for installing cell tower and a generator over the terrace
Sir,*

We are in receipt of your above-said communication and we would like to apprise you that Mr. Rajender Jaina has not sought any permission for installation of cell tower or generator set in the property bearing No.B-54, Greater Kailash-I, New Delhi. As regards permission by MCD, you may kindly approach the Municipal Corporation of Delhi for the said information.”

65. The reading of the contents of the letter clearly shows that they had asked the defendant to approach the MCD to check whether any permission has been sought from the MCD or not. Defendant failed to produce further evidence on record or to call any witness from MCD to show that any such permission was not sought. On the contrary, plaintiff has produced certified copy of order dated 04.02.2010 of Hon'ble High Court of Delhi wherein Hon'ble High Court had given opportunity to MCD to issue show cause notice clearly pointing out the requirements/permission which plaintiff herein or cellular operator is required to fulfil and thereafter MCD was given opportunity to take appropriate action. Alongwith this order, plaintiff has filed photocopy of application given by Idea Cellular to the MCD South Zone seeking permission to erect a tower alongwith DD of Rs. 1,00,000/-, this photocopy of which is also annexed herein. Same is also accompanied by office order issued by MCD dated 20.11.2003. This documents have been exhibited as ExPW1/23. The photocopy of a certificate regarding structural stability of the said premises has also been issued by IIT department of Civil Engineering regarding the stability of the building. Though, these documents have not been proved by calling the concerned person, however, it



appears that during the exhibition of these documents they were not objected by defendant. Even otherwise, relief of removing cell tower was sought by defendant and defendant was duty bound to show that same was installed without any authority. As far as permission of occupants are concerned, defendant No.1 has failed to put forth any rules or bye-laws showing that the consent of occupants was required for installing cell tower at the time of its installation. As far as genset is concerned, defendant had stepped into witness box and he stated that he is still living in Jammu. He has given his address of Jammu in his deposition though he has stated that vibration comes to his floor also but his testimony shows that he has not been residing there. He has not been able to prove any other complaint of any of the other resident of the same building showing that anyone is having any difficulty with the genset put on the terrace of the third floor, therefore, this issue is decided against the defendant and in favour of plaintiff. “

75. With regard to the above stated issue, the learned Trial Court observed that the genset and cellular tower installed by the appellant is not against any statutory provision since the respondent no.1 failed to produce any document against the same. Moreover, there were certain documents attached by the respondent no.1 to corroborate the fact that the tower erected on the roof was in accordance with the structural stability of the said suit property.

76. The learned Trial Court further observed that the respondent No.1 had averred that he is still living in Jammu, therefore, the contention raised by him that his peaceful occupation of the property was hindered by the vibrations is wrong especially since the other residence of the suit property have not complained against the aforesaid genset. Accordingly, it



was held that the appellant is entitled to install the genset as well as the cell tower on the terrace.

77. This Court is of the view the learned Trial Court has correctly observed that the respondent no.1 failed to establish that the genset as well as the cell tower installed on the third floor is in violation of the statutory provisions. Moreover, the contention of the respondent no.1 that the genset installed on the terrace causes vibration holds no water since he has been residing in Jammu as per his testimony and no other resident of the suit property has complained regarding the same which factum has rightly been recorded by the learned Court below.

78. Accordingly, it is held that the issue No.5 has been correctly decided by the learned Trial Court.

79. It is pertinent to note here that the learned Trial Court has further adjudicated upon reliefs sought by the appellant pertaining to which no issue was framed. The relevant portion of the same is as follows:

“66. Apart from these issues, suit plaint contained some reliefs which are not mentioned herein and they are also being dealt herein as under:-

67. Relief No.1 & 4 sought in plaint.

(1) A decree of perpetual injunction be issued in favour of plaintiff and against the defendants thereby restraining the defendant No.1, his agents, employees etc from causing any obstruction in the repair/maintenance/user/operation of the lift in the premises No.B-54A, Greater Kailash-1, New Delhi-110048.

And

(4) Decree for money be passed in favour of the plaintiff to the tune of Rs. 70,000/- for the damages caused along with interest @ 18% p.a.

68. Plaintiff has alleged that when the lift was installed, employees of defendant at his instructions, demolished the



portion of the intervening wall between lift well and one of his rooms, causing damages to the lift well on the 2nd floor (in his own portion) in order to stall the functioning of the lift. It is stated that lift stopped and complaint dated 17.01.2008 was given to the SHO which is Ex PW1/16. It is stated that thereafter repair was temporarily done, however, on 23.01.2008, defendant No.1 demolished the balance portion of the wall while security officer of the plaintiff namely R.S. Dabas was using the said lift and complaint was again made by him on 24.01.2008 which is Ex PW1/16-A. Thereafter, it was again repaired and cost of Rs.20,000/- was incurred in fitting steel frame on the damaged portion and on 31.01.2008 it was also broken and proceedings were initiated before Ld. MM. In this regard, it is stated that first of all these complaints were not proved in accordance with law as no witness was summoned from police department to prove whether these complaints were received or not by concerned police station. Secondly, author of these complaints (Sh. R.S. Dabas) had not entered into witness box to prove these complaints. It is pertinent to mention here that R.S. Dabas who was allegedly the security officer of the plaintiff had made complaint. Neither it is alleged that he is not available nor any document has been shown to prove that he was employee of the plaintiff. Further plaintiff has relied upon video recording/photographs in order to prove damage, however, it is pertinent to mention here that said videorecording is also not proved. It is not shown as to how representative of the plaintiff entered the 2nd floor of the defendant which does not belong to the plaintiff. CD cannot be believed in order to show that the damage was caused by defendant No.1. However, at the same time, during the pendency of this suit, Local Commissioner was appointed and he filed his report. As per report, at the time of visiting premises by Local Commissioner, the lift well was found to be damaged and repairing work of the lift well was done from inside the premises of the defendant and, therefore, it can be said that certain repairs were done in lift well, in the portion of the defendant, in the presence of the Local



Commissioner. There is no objection to report of Local Commissioner by defendant. Since some damage was found which was inside the premises of the defendant to which plaintiff had no access, therefore, in order to secure the rights of the plaintiff to use the lift uninterruptedly, defendant No.1 or his employees are : restrained from causing any obstruction in the repair/maintenance/user/operation of the lift.

69. At the same time, decree of money has been sought for recovery of Rs. 20,000/- towards installation of steel fitted frame and Rs. 50,000/- towards mental agony. As far as recovery of Rs. 20,000/- is concerned, bill has been filed on record which is filled by hand but same has not been proved by the supplier who allegedly supplied the same. The said supplier was not summoned as witness to prove the said bill of Rs. 20,000/- and, therefore, this amount cannot be awarded. Further no evidence has been led by plaintiff to show that mental harassment was caused to the plaintiff or his family at hands of the defendant No.1 and, therefore, relief sought for recovery cannot be granted.

70. As far as relief No.2 regarding defendant No.2 (SHO) is concerned, concerned SHO cannot be expected to ensure the compliance or peaceful function of the lift in a private property. His duty is to discharge sovereign functions and not to keep a constant vigil over private disputes. Therefore, this relief cannot be granted.

71. Relief No.3 has already been dealt with in issue No.1 framed on 20.01.2009 as discussed above and need not be decided separately.”

80. Upon perusal of the aforesaid extracts, it is evident that the learned Trial Court held that upon visit of the Local Commissioner to the suit property, it was found that the lift was damaged and the repairing of the same was done from the area inside the premises of the respondent no.1 in the presence of the Local Commissioner and the respondent No.1 did not dispute the said findings of the Local Commissioner.



81. Accordingly, the learned Trial Court held that the defendant No.1 and its representatives are restrained from hindering or causing any harm to the operation, maintenance and repairing of the lift.

82. Since, the appellant did not summon the supplier of lift and established the fact that he paid Rs. 20,000/-, the learned Trial Court held that appellant is not entitled to recover an amount Rs. 20,000/- from the respondent no.1 in light of the amount paid by the appellant for repairing the lift due to the damages caused by the respondent no.1.

83. It was further observed by the learned Trial Court that the respondent No.2 (SHO) cannot be expected to ensure the compliance or peaceful function of the lift in a private property and hence, no relief was granted against the respondent no.2.

84. This Court is of the view that upon perusal of evidence, the appellant has produced on record the bill pertaining to the amount of Rs. 20,000/- paid by him towards repairing of the lift towards the damages caused by the respondent no.1 in the operation of the lift, however, the original copy of the aforesaid bill is not produced on record and the appellant has merely placed the certified copy of the aforesaid bill on record and not the original copy. Hence, the appellant is not entitled to claim the aforesaid amount of Rs. 20,000/- .

85. Moreover, since there is no evidence produced on record by the appellant with regards to the mental harassment suffered by him, he is not liable for any amount for the mental harassment.

86. It is further held by this Court that the respondent no.2 is a public servant imparting sovereign functions of the State and it cannot be made to overlook a private matter to merely ensure the operation and



maintenance of the lift. Therefore, no relief can be granted against the respondent No.2.

87. In view of the aforesaid discussions, this Court is of the view that the learned Trial Court has rightly held that as per the Sale Deeds of the appellant and the respondent, the common staircase shall be accessible to all the occupants of the suit property.

88. The learned Trial Court has correctly held that the Sale Deed of the appellant with the builder envisages that the lift shall be installed by the appellant and that the appellant shall pay for the charges accrued upon the installation of the lift and that the respondent no.1 is liable only towards the expenses for operation of the lift and not for its installation. The appellant has not been able to produce any material on record to prove the quantum of damages suffered by him, hence, the appellant seeking damages for repairing the lift has been rightly rejected.

89. It is further observed that since the genset and cellular tower installed by the appellant on terrace is not against any statutory provision and the respondent No.1 has not been able to prove any inconvenience caused due to the same, therefore, the appellant is entitled to install the aforesaid genset and cellular tower. Moreover, no relief can be granted against the respondent No.2 since he had been conferred with a duty to perform sovereign functions and overlook a private matter.

90. This Court is of the view that the appellant has failed to put forth any propositions to make out a case in his favour and the learned Trial Court has rightly passed the impugned judgment after taking into consideration the entire facts and circumstances available on its record.

91. In view of the aforesaid discussions, it is held that the impugned



2024:DHC:3823



judgment dated 5th March 2020 passed by ADJ in CS No.149/2017 does not suffer from any illegality or error of law and the instant regular first appeal is bereft of any merits, thereby, liable to be dismissed.

92. Accordingly, the instant appeal is dismissed alongwith pending applications, if any.

93. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

APRIL 25, 2024
rk/db/ryp