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

+ **RSA 154/2024, CM APPL. 48197/2024 and CM APPL. 48199/2024**

SURESH KUMAR

.....Appellant

Through: Mr. Rishi Kumar and Mr. Jitender
Tanwar, Advs. with appellant in
person.

versus

MR RAKESH THAKUR AND ORS

.....Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER

% 19.11.2024

1. The appellant/defendant has filed the instant appeal being aggrieved by the judgment dated 07.02.2024, passed by the Addl. District Judge-02, South west, Dwarka Courts, New Delhi, partly allowing the Trial court Judgment dated 05.04.2023, whereby, the suit for permanent and mandatory injunction was decreed.

2. The facts of the case would demonstrate that the respondents/plaintiffs had filed a suit for permanent and mandatory injunction restraining the appellant/defendant from making any fresh construction including structural changes on roof of the third floor of the property in question and to allow the respondents/plaintiffs an unhindered and unrestricted access to roof at third floor. In addition, the respondents/plaintiffs had prayed for direction to remove illegal authorized



construction to the appellant/defendant.

3. The Trial Court had framed the issues for the purpose of adjudication, which read as follows:-

- (i) *Whether the plaintiff is entitled to decree of permanent injunction in his favour and against the defendants no. 1 &2, as prayed in para no.1 of prayer?*
- (ii) *Whether the plaintiff is entitled to decree of mandatory injunction in his favour and against the defendants no. 1, 2 &3, as prayed in para no. 2 of prayer?*
- (iii) *Whether the Plaintiff is entitled to decree of mandatory injunction in his favour and against defendant no.1 whereby, defendant no. 1 may be directed to rebuild/reconstruct the partially dismantled wall(s) at common stairs and repair the cracks at internal roof and bathroom of plaintiff, as prayed in para no. 3 of prayer?*
- (iv) *Whether the plaintiff is entitled to get unhindered and unrestricted access to roof at 3rd floor of the suit property, as prayed for?*
- (v) *Whether the suit of the plaintiff is not maintainable due lack of any cause of action?*
- (vi) *Relief. ”*

4. The Court has perused the findings rendered by the Trial Court with respect to issue Nos. 1 and 2, which unequivocally holds that the appellant/defendant has raised an unauthorized construction. The relevant findings rendered by the Trial Court read as under:

“As the issue no. (i) and (ii) are inter connected so both are taken up together. The onus to prove both the issues were upon the plaintiff and in order to discharge the onus plaintiff got examined himself as PW-1. PW-1 specifically proved the affidavit as Ex. PW1/A and deposed that construction at third floor is not sanctioned by defendant no. 3MCD. Therefore any construction based over the roof of top floor i.e. third floor is unauthorized construction. PW-1 has brought on record the house tax receipt Ex. PW-1/2. PW-1 also proved the photographs as Ex. PW-1/4 thereby showing the raising of columns by tying of fresh iron bars at already constructed roof surrounded by parapet and installation of already painted iron grill. The photographs also show the existence of ground plus three floors at the property in question which contains the painted iron grill on the front side roof of top floor i.e. the third floor. The defendant also failed to bring on record that he was having the sanctioned construction plan over the roof of third floor which further gives weightage to testimony of PW-1. On the golden scale of preponderance of



probability the plaintiff has brought on record that the defendant was raising the construction at roof of top floor/third floor of the property in question without having the construction Sanction plan to that effect. During cross examination of DW-1, the DW-1 himself has admitted that there is no reference of any construction upon fourth floor in the sale deed executed in his favour. DW-1 further stated that the property dealer assured him that the fourth floor is of defendant no. 1 and he can raise the construction upon same. DW-1 further admitted that he started construction at the top floor in July 2014 and gave the contract for said construction to defendant no. 2. DW-1 further admitted the suggestion that he had started the said construction at the roof of third floor and he did not ask the SDMC before starting the construction. He also not asked any other public authority before starting the construction. DW-1 further admitted that he not paid house tax regarding the floor in which he is residing or the floor above that where he is raising the construction. DW-1 further admitted that he do not have any written document to show that there was existing construction at the top floor when he purchased the said floor. Thus plaintiff has discharged his onus to prove both the issues. Accordingly, **issue no. (i) and (ii) are decided in favour of plaintiff and against defendant. Defendant no. 1 is hereby restrained permanently from making any fresh construction including structural changes, in the suit property i.e. on the roof of third floor of the property in question (though named as second floor by builder/erstwhile owner counting the floor as ground floor, upper ground floor, first floor and second floor) of the property in question namely D-1/30, Third floor, Mahavir Enclave Part-I, Gali no. 6, New Delhi-110045. The defendant no. 1, 2 and 3 are hereby directed to remove/demolish the entire illegal and unauthorized construction, including the newly fixed iron columns at the roof of third floor of the property in question.**”

5. The first Appellate Court, on an appeal filed by the appellant/defendant, vide judgment dated 07.02.2024, affirmed the findings of the Trial Court. However, the findings of the Trial Court with respect to issue no. 3 were set aside by the Court on ground that in absence of any report of the structural engineer and precise identification of the damage on the common wall or flat of the respondents/plaintiffs, the appellant/defendant could not be directed to repair the entire flat of the respondents/plaintiffs or the suit property. The relevant issue no. 3 reads as under:-



“ Whether the Plaintiff is entitled to decree of mandatory injunction in his favour and against defendant no.1 whereby, defendant no. 1 may be directed to rebuild/reconstruct the partially dismantled wall(s) at common stairs and repair the cracks at internal roof and bathroom of plaintiff, as prayed in para no. 3 of prayer?”

6. Learned counsel appearing for the appellant/defendant contends that the suit at the instance of the respondents/plaintiffs was not maintainable in view of the fact that the executants of the power of attorney holder were not examined.

7. Needless to state that the aforesaid aspect was never raised before the concerned court. The Court is also cognizant of the fact in the instant case, the subject matter of the adjudication is the legality of construction, which appears to have been raised unauthorisedly.

8. Under the facts and circumstances of the case, the Court does not find any substantial question of law and agrees with the findings of the first Appellate Court.

9. In view of the above, the instant appeal fails and is hereby, dismissed.

PURUSHAINDR KUMAR KAURAV, J
NOVEMBER 19, 2024/p/dp