



\$~28

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

+ **CS(OS) 840/2024 & I.A. 42697/2024 (u/o II R-2), I.A. 42698/2024
(u/o XXXIX R 1 & 2)**

ASHISH KUMAR

.....Plaintiff

Through: **Mr. Sujeet Kumar Mishra, Advocate**

versus

SMT.KAMINI KUMAR & ORS.

.....Defendants

Through: **Ms. Jaya Goyal, Advocate for D-1
Mr. Ashim Vachher, Mr. Vaibhav
Dabas, Mr. Kunal Lakra, Mr. Vinayak
Uniyal and Ms.Saiba M. Rajpal,
Advocates for D-2**

CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

ORDER

%

21.10.2024

1. The captioned suit has been filed seeking a declaration in favour of the plaintiff that the plaintiff has absolute right, title and interest in 50% portion of the roof over the second-floor admeasuring about 3641 sq. ft. in the property bearing no. 35, Anand Lok, New Delhi 110049 ('terrace').
2. The plaintiff seeks a perpetual injunction restraining the defendants from interfering in peaceful possession and enjoyment of the said terrace.
3. The plaintiff also seeks a mandatory injunction restraining the defendants from interfering in the title and possession of the plaintiff by creating any third-party interest in the suit property and/or dispossessing the



plaintiff from the suit property.

4. The plaint states that plot no. 35, Anand Lok, New Delhi admeasuring 793.3 sq. yds. was allotted to late Sh. Ved Mitra, i.e., the grandfather of the plaintiff herein. It is stated that late Sh. Ved Mitra executed a Will dated 23.07.1985 bequeathing the said Plot to his two sons namely late Sh. Arun Kumar (the father-in-law of defendant no. 1) and late Sh. Sushil Kumar (the father of the plaintiff) in equal shares of 50% each.

5. The plaintiff relies upon the partition deed dated 10.03.1997 executed between late Sh. Sushil Kumar (the father of the plaintiff) and late Sh. Arun Kumar (the father-in-law of defendant no. 1) for development of the plot bearing no. 35, Anand Lok, New Delhi, whereunder 50% front portion fell to the share of late Sh. Arun Kumar and 50% rear portion fell to the share of Sh. Sushil Kumar.

6. The plaint discloses that late Sh. Arun Kumar and late Sh. Sushil Kumar, during their life time jointly executed sale deed with respect to the second floor. The plaint discloses that late Sh. Sushil Kumar executed a sale deed with respect to the rear portion of the first floor. The plaint disclosed that late Sh. Arun Kumar executed sale deeds with respect to front portion of the ground floor and the front portion of the first floor. It is stated that the sale deeds were executed acting upon the partition deed dated 10.03.1997.

7. It is stated that late Sh. Sushil Kumar (the father of the plaintiff) retained the ownership of the flat on the rear portion of the ground floor and 50% co-ownership rights in the terrace. The plaintiff asserts that he is the sole surviving legal heir of late Sh. Sushil Kumar and is in actual physical possession of the said portions of the property.

8. It is stated that there exists servant quarters, common toilets and



common baths for the use of servant on the terrace and this duly find mention in the sale deeds executed by late Sh. Arun Kumar and late Sh. Sushil Kumar in favour of the vendees; however, the order dated 02.11.2018 of the MCD records the same were constructed unauthorizedly at the relevant time without municipal sanction.

9. It is stated that there are disputes between defendant no. 1 and defendant no. 2 qua the terrace rights and the same are subject matter of the suit¹ pending adjudication in the Saket District Court. It is stated that the plaintiff as well has filed a suit for permanent injunction restraining defendant no. 2 from interfering in the use of common lift. The details of the said suit filed by the plaintiff are not disclosed in the plaint.

10. It is stated at paragraphs 14 and 15 of the plaint that the cause of action for filing the plaint arose on 25.08.2024 when the plaintiff learnt that defendant no. 2 has made a proposal to defendant no. 1 to purchase her 50% co-ownership rights qua the terrace. It is stated that the plaintiff apprehends that such a transaction would cause losses to the plaintiff. It is averred that since the terrace is undivided between the plaintiff and defendant no. 1 the proposed sale may cause prejudice to the rights of the plaintiff.

11. It is averred that plaintiff has appropriate rights to construct on the terrace as per available Floor area ratio ('FAR') and this right of further construction shall be hindered by the sale between defendant nos. 1 and 2. It is stated that however no relief for carrying out further construction as per available FAR is being sought in the present suit and right to seek relief for construction is being reserved under Order II Rule 2 the Code of Civil

¹ CS DJ 632/2023 titled Kamini Kumar v. Capt. Avinash Chander Malhotra & Ors.



Procedure, 1908 ('CPC').

12. Ms. Jaya Goyal, learned counsel for defendant no. 1, who appears on advance service states that the plaintiff has no cause of action for maintaining the present suit. She states that plot no. 35, Anand Lok, New Delhi already stands partitioned between late Sh. Arun Kumar and late Sh. Sushil Kumar vide partition deed dated 10.03.1997. She states that the front portion of the plot fell to the share of late Sh. Arun Kumar and rear portion of the plot fell to the share of late Sh. Sushil Kumar.

12.1 She states for the terrace as well the front portion has fallen to the share of late Sh. Arun Kumar and rear portion has fallen to the share of late Sh. Sushil Kumar. She states that the site plan annexed with this paper book as document no. 1 shows the 'dividing line' of the terrace demarcating the terrace into front portion and rear portion. She states that thus the terrace is a divided property. She states that defendant no. 1 is the sole surviving legal heir of late Sh. Arun Kumar and being the absolute owner of the front portion of the divided terrace cannot be restrained from dealing with her share. She states that defendant no. 1 does not intend to interfere in any manner with the title rights of the plaintiff.

12.2 She states that defendant no. 1 has filed a suit for mandatory injunction against defendant no. 2 for recovery of possession of the front portion of the terrace in his possession and mesne profits. She states that the suit filed by the defendant no. 1 against defendant no. 2 is at an advanced stage of recording of evidence

13. Mr. Ashim Vachher, learned counsel for defendant no. 2 states that defendant no. 2 is in rightful occupation of the front portion of the terrace. He states that the terrace stands divided as is evident from the site plan filed



by the plaintiff as document no. 1. He states that the plea in the plaint that the terrace is undivided is incorrect.

13.1 He states that the present suit filed by the plaintiff for the relief of declaration of title without seeking the consequential relief of partition is not maintainable.

13.2 He states that defendant no. 2 does not dispute plaintiff's 50% co-ownership rights in the terrace.

14. This Court has considered the submissions of the parties and perused the record.

15. The gravamen of the cause of action for filing the suit is to injunct defendant no. 1 from selling her 50% ownership rights in the terrace floor of plot no. 35, Anand Lok, New Delhi to defendant no. 2.

16. In the captioned suit the plaintiff at prayer clause (iii) of the plaint and in I.A No. 42698/2024 seeks a restraint against defendant nos. 1 and 2 from creating any third-party interest in the terrace of plot no. 35, Anand Lok, New Delhi. The plaintiff admits that defendant no. 1 is owner of 50% rights of the terrace. However, the plaintiff seeks a restraint against defendant nos. 1 and 2 from entering into any transaction for the sale and purchase of the said 50% ownership rights. The said restraint sought by the plaintiff has no basis in law as under Section 44 of the Transfer of Property Act, 1882 a co-owner is legally competent to transfer his/her share in an immovable property. The said relief in the plaint is therefore without any basis in law and hence without any cause of action. In this regard it would be appropriate to refer to the Judgment of Supreme Court in **Gautam Paul v. Debi Rani**



Paul² whereby the Supreme Court opined that a co-sharer is free to sell its share to anyone.

17. During the course of arguments, the plaintiff sought to contend that the restraint is being sought as the plaintiff's right to construct a third floor on the terrace in future may get jeopardized and until the issue of proportionate allocation of FAR between plaintiff and defendant no. 1 is not ascertained, defendant no. 1 ought to be restrained from selling her rights.

18. The said plea of the plaintiff is without any merit, as in this suit the plaintiff has not sought any relief against defendant no.1 for joining the plaintiff for applying to Municipal Corporation of Delhi for sanction for construction of a third floor. On the contrary the plaintiff has sought to reserve his right qua FAR for filing a separate proceeding. Further, during the course of arguments, counsel for the plaintiff admitted that presently the plaintiff does not intend to construct a third floor on the terrace. In these admitted facts, the plaintiff cannot restrain defendant no. 1 from exercising her proprietary rights qua 50% of the terrace, which include the right to sell.

19. In the plaint, the plaintiff has averred that the terrace is undivided and plaintiff as well as defendant no. 1 hold 50% share each in the terrace. However, as rightly pointed out by counsel for defendant nos. 1 and 2 the site plan filed by the plaintiff shows a 'dividing line'. Defendant no. 1 has contended that the dividing line corresponds to the partition deed dated 10.03.1997 and is acceptable to her. Similarly, defendant no. 2 as well relies upon the dividing line shown in the site plan. In these facts, since plaintiff, defendant nos. 1 and 2 admit the dividing line shown in the site plan, the

² (2000) 8 SCC 330



plea of the plaintiff that the terrace is undivided is not borne out from the record.

20. Moreover, assuming that the terrace was undivided, the plaintiff in the suit having failed to seek the relief of partition of the terrace cannot simplicitor maintain the present suit for declaration of title as legal position is clear that a suit for mere declaration without consequential relief where the plaintiff can seek other relief would mandate the court to refuse to grant relief of declaration. The relief of partition is the consequential relief, which ought to have been sought by the plaintiff. The suit is therefore liable to fail as per the mandate of Section 34 of the Specific Relief Act, 1963 due to the failure of the plaintiff to seek the relief of partition. [**Dinesh Gupta & Ors. v. Rajesh Gupta & Ors.**³]

21. In the plaint, there is no averment that defendant nos. 3, 4 or 5 have at any point disputed the plaintiff's co-ownership rights in the terrace or interfered in his possession of the terrace. The plaint therefore fails to disclose any cause of action against defendant nos. 3, 4 and 5 for the reliefs sought in the plaint.

22. In the prayer clause (ii) of the plaint the plaintiff seeks a declaration that he has 50% ownership rights in the terrace floor of the plot no. 35, Anand Lok, New Delhi. In the plaint there is no averment that defendant nos. 1 and 2 has disputed the plaintiff's co-ownership rights. The defendant nos. 1 and 2 have appeared through their counsel and stated that they have not disputed the said rights of the plaintiff. The defendant nos. 1 and 2 are bound down to their statement.

³ 2018:DHC:7300



23. For the reasons recorded hereinabove, the plaint is hereby rejected and for lack of cause of action under Order VII Rule 11 (a) CPC and for being barred in law under Order VII Rule (d) CPC. The applications stand disposed of.

MANMEET PRITAM SINGH ARORA, J
OCTOBER 21, 2024/hp