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

+ **FAO 100/2024 & CM APPL. 16993/2024**

REMA R NAIR & ORS.Appellants

Through: **Mr. Ambu Raja RS, Adv.**

versus

RAKHEE BISWAS & ORS.Respondents

Through: **Mr. Samarth Tyagi and Mr.
Chetanya Singh, Adv. for R-4.**

CORAM:

HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

% **24.03.2025**

1. The appellants have preferred this appeal under Order XLIII of the Civil Procedure Code, 1908 [CPC], read with Section 104 of the CPC, assailing the impugned order dated 07.02.2024, passed by the learned ADJ, South West District, in a suit filed by them, whereby their application under Order XXXIX Rules 1 and 2 of the CPC has been partly allowed.

2. It appears that notice of the present appeal has already been served upon respondent Nos. 1 and 2. However, they have not preferred to file any reply. As for respondent No. 3, he has already been proceeded *ex parte* in the proceedings pending before the learned Trial Court. Respondent No. 4/MCD has been impleaded in the present matter to prevent any further unauthorized construction on the premises.

3. In a nutshell, the learned Trial Court *vide* the impugned order dated 07.02.2024, has found a *prima facie* case in favour of the appellants/plaintiffs, holding that they are the legal owners and residents of different floors and each have parking rights for one car in



the stilt parking area.

4. However, it appears that a temporary room was constructed in the stilt parking area, which has allegedly been usurped by respondent No. 2 allegedly on the strength of some fabricated documents.

5. Respondent Nos. 1 and 2, who are arrayed as defendant Nos. 1 and 2 in the suit, appear to acknowledge the ownership of the plaintiffs in the subject property. However, they dispute the allocation of the parking rights in the stilt area and claim that the disputed structure is a permanent construction with legitimate utility connections belonging to them.

6. Although the learned Trial Court has partly allowed the application under Order XXXIX Rule 1 and 2 of the CPC, thereby restraining the respondent Nos. 1 and 2/defendant Nos. 1 and 2 respectively in the suit, from creating any third-party interest in respect of the disputed structure in the stilt parking area, it appears that based on their plea that they required funds for meeting the education expenses of their daughter, the learned Trial Court has permitted them to lease out the disputed structure to any third party for a period of 11 months.

7. It has also been expressly provided that, subject to the outcome of the ongoing suit, there shall be no option for auto-renewal of the lease deed.

8. Unhesitatingly, the approach adopted by the learned Trial Court cannot be countenanced in law. Once it has been found that the appellants/plaintiffs have a *prima facie* legal right, title and interest in the disputed structure, the concessions afforded to respondent Nos. 1 and 2 cannot be sustained on the ground of equity or otherwise for any beneficial use of the property in question.



9. At this stage, learned counsel for the appellants/plaintiffs requests permission to withdraw the present appeal with liberty to move a fresh application before the learned Trial Court for ensuring that the subject property is vacated by the tenants inducted at the behest of respondent Nos. 1 and 2.

10. In the alternative, it is also claimed that in case the tenants do not vacate the disputed structure, they would seek a relief from the learned Trial Court that the entire rent be deposited in the Court instead of making the payment of the same to the respondent Nos. 1 and 2.

11. Accordingly, the present appeal is dismissed as withdrawn without prejudice to the rights and contentions of the parties. Pending application(s), if any, stand disposed of.

12. The appellants/plaintiffs shall be at liberty to move appropriate application before the learned Trial Court seeking appropriate relief in accordance with the law. Nothing contained herein shall tantamount to an expression of opinion on the merits of the case.

DHARMESH SHARMA, J.

MARCH 24, 2025/gunn/Ss