



\$~3

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

+ **RSA 136/2024, CM APPL. 43300/2024**

DINESH CHANDRA GUPTA

.....Appellant

Through: Mr. Suryanarayan Singh, Sr.
Advocate, Mr. Yogesh Gupta and Mr.
Aniket Patel, Advocates.

versus

TAJINDER PAL SINGH & ANR.

.....Respondents

Through: Mr. A.K. Kaushik and Mr. Subhash,
Advocates.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

%

25.08.2025

RSA 136/2024 & CM APPL. 43300/2024 (stay)

By way of the present regular second appeal under section 100 of the Code of Civil Procedure 1908 ('CPC'), the appellant impugns judgment dated 09.05.2023 passed by the learned Additional District Judge-06, South-East, District, Saket Courts, New Delhi in appeal bearing RCA No.71 of 2019.

2. Notice on this appeal was issued on 31.07.2024.
3. Subsequently, the matter was referred to mediation *vide* order dated 10.12.2024; but the court is informed that the respondents withdrew from the mediation.
4. The court has heard Mr. Suryanarayan Singh, learned senior counsel appearing for the appellant; as well as Mr. A.K. Kaushik, learned counsel appearing for the respondents at some length.



5. Since the dispute concerns neighbours residing in the same property, the court has briefly examined the true contours of the dispute.
6. The brief background of the matter is, that by way of a set of documents comprising an agreement to sell, a general power of attorney and a Will dated 17.02.1990, the original owner of the leasehold rights in the suit property Smt. Chattar Kaur had transferred rights in the terrace above the second floor to the appellant, with the following essential disposition:

“3. That the terrace over the second floor will remain in possession of the Second party with no right to raise any construction thereupon. However, the first party will have the right at any reasonable time to go to the terrace over the second floor for looking after the T.V. Antenna, Water tanks and likewise purposes .”

“4. That the first party has assured the second party at (sic) the entire terrace over and above the first floor hereby agreed to be sold, is free from all kinds of encumbrances such as prior sale, mortgage, gift, Will, court litigation, disputes, charges, liens, notices, etc., and if it is proved otherwise, then the First Party will be liable and responsible for all the losses and damages, if any, suffered by the second party.”

“5. That the second party will construct his respective portion that is the Second Floor with his own funds and resources and also be responsible for any damages, losses to the other portions of the building, if any.”

7. Furthermore, in Will dated 17.02.1990 also, Smt. Chattar Kaur had said the following:

“I willingly make this will that after my death, out of the above said property, the entire terrace measuring 1200 sq.ft. (excluding balcony) over and above the First Floor (to be named as Second Floor) subject to the restrictions and prohibitions to raise any construction whatsoever on the terrace over the Second Floor as and when built by the beneficiary under this Will) along with proportionate leasehold rights in the plot No. A-443, Defence Colony, New Delhi, shall become the property of aforesaid Shri Dinesh Chander Gupta, son of Shri Sri Ram Gupta,



who then shall get the said portion of the property transferred, mutated and substituted in his own name in the records of L&DO, MCD, DESU, or any other concerned authority, on the basis of this will or its certified true copy.”

8. The respondents’ complaint however is, that the appellant is depriving them of access to the *roof above the second floor*(which floor was constructed by the appellant) by installing an iron-gate/grill in the common staircase leading-up to the roof on top of the second floor.
9. In this behalf the respondents had filed a suit bearing CSNo.50822/2016, which suit was decreed in their favour; and the appeal bearing RCA No.71/2019 filed by the appellant before the learned first appellate court has also been dismissed.
10. Learned senior counsel appearing for the appellant argues, that as set-out in the Memo of Appeal, in effect therefore, in a suit seeking mandatory and perpetual injunction, the learned trial court has granted a declaration as to rights of the respondents to the roof above the second floor. It is submitted, that the claim for declaration was not within the scope of the prayers in the suit.
11. In this behalf, attention is drawn to the following portions of the judgment passed by the learned first appellate court:

*“18. In view of the above it is concluded that all the three parties i.e. plaintiff, defendant no. 1 and defendant no. 2 have equal rights in respect of the terrace over second floor in the property in question and defendant no. 1 is not the exclusive owner of the same. Accordingly, there is no illegality or infirmity in the impugned judgment and decree dated 25.03.2019 passed by learned trial court and same are hereby affirmed and the appeal filed by the appellants bereft of merit. Hence, **present appeal stands dismissed accordingly.**”*

(bold in original)



12. Attention is also drawn to the following extracts of the judgment of the learned trial court:

*“26. The Defendant no.1 has admitted in his pleadings that the other 'co-owners' would get visiting rights for 'reasonable reason' and installation of TV antenna, water tank etc. on the terrace of the second floor, though disputing absolute rights of theirs, in particular the Plaintiff herein to access and enjoy the terrace. There is clearly no basis for such a claim, to assert exclusivity of rights qua the terrace, when in the MSA, drawing strength from the admitted will dated 5.10.1994, the parties to the same, as also parties to the present lis, had agreed mutually that they would, inter-alia, each hold 1/3rd rights/share in the terrace over the 2nd floor of the property. The will dated 1994 does not give any exclusive rights in respect of the terrace to either of the beneficiaries thereunder. A settlement agreement, by its very tenor, recognising the will of 1994 and its import and effect, cannot be read as though creating new rights or extinguishing those already created by the said will. Each concomittantly, being a co-owner to the suit property would be entitled to 1/3rd undivided rights therein. It is also a settled principle, as was also reiterated in **Syed Shah Ghulam Ghouse Mohiuddin v. Syed Shah Ahmed Mohiuddin Kamisul Quadri** [(1971) 1 sec 597] that possession of one co-owner is the possession on behalf of all.”*

“27. Thus, for reasons as discussed above, the Plaintiff has discharged the onus upon him under issues (1) and (2), while the Defendant has failed to prove his exclusive rights over the terrace as cast upon him under issue (3).”

“28. The suit is therefore, for above discussed reasons, decreed in favour of the Plaintiff. The Defendant no.1 is directed to forthwith pull down the iron grill installed and locked in the common staircase leading upto the terrace on top of the second floor and allow free access to the Plaintiff and his family members to the said terrace. He is also restrained from interfering with or stopping the access of the Plaintiff and his family members to the terrace on top of the second floor.”

(bold in original)

13. However, without delving further into the matter, it is evident that the dispensation contained in the agreement to sell and in Will dated



17.02.1990 is clear, namely that the appellant was granted the right to construct a portion on the second floor, with a further stipulation that the roof (terrace) above the second floor would remain in the possession of the appellant, with the further stipulation that the appellant would grant access to the respondents “.....at any reasonable time to go to the terrace over the second floor for looking after the T.V. Antenna, Water tanks and likewise purposes.”

14. Clearly therefore, the respondents had access to the roof (terrace) above the second floor *for the aforesaid purposes.*
15. Learned senior counsel submits, that the appellant is not hindering the access of the respondents to the roof above the second floor for the above purposes; and in fact to that end, in the course of the execution proceedings in Execution No.131/2019, the following has come to be recorded in order dated 31.05.2024:

“The keys are handed over to the DH. A separate statement of the JD has been recorded to the effect that he will not obstruct the decree holder's right to access the terrace in any manner till the NDOH.”

16. In the circumstances, this court is of the view that the learned trial court and the learned first appellate court were remiss in deciding the shareholding/ownership of the contesting parties to the roof (terrace) above the second floor in a suit that had only sought the relief of mandatory injunction as regards access to the roof (terrace) above the second floor. In doing so, the learned trial court as well as the learned first appellate court have granted relief beyond the scope of the claim in the suit, which is impermissible.



17. The present appeal is accordingly disposed-of with a direction to the appellant that he shall not hinder the access of the respondents to the roof (terrace) above the second floor in terms of clause 3 of the agreement to sell dated 17th February 1990, viz.:

“3. That the terrace over the second floor will remain in possession of the Second party with no right to raise any construction thereupon. However, the first party will have the right at any reasonable time to go to the terrace over the second floor for looking after the T.V. Antenna, Water tanks and likewise purposes .”

18. Learned senior counsel appearing for the appellant, on instructions of the appellant who is present in court, submits, that the appellant has already handed-over a set of keys to the iron-gate/grill installed in the stairwell to the respondents, who (latter) is also present in court.
19. The appellant also confirms that if the lock to that gate/iron grill is ever changed, the appellant shall supply a duplicate of the new keys to the respondents forthwith.
20. The present second appeal is disposed-of in the above terms.
21. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

AUGUST 25, 2025

SS