

(2011) 07 DEL CK 0215

In the Delhi High Court

Case No : FAO No. 456 of 2010 and CM No. 22352 of 2010

Dhruba Dasgupta and Others

APPELLANT

Vs

Surjendu Shekhar Ghosh and Others

RESPONDENT

Date of Decision : 21-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1
Delhi Apartment Ownership Act, 1986 — Section 3, 4, 4(1), 4(2), 4(3)
Easements Act, 1882 — Section 15

Citation : (2011) 07 DEL CK 0215

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Naresh K. Thanai, for the Appellant; S.K. Bhaduri and K. Kumar for R-1 and R-2, Sudhir Kathpalia and Suparana Srivastava for R-3/MCD, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.—The challenge by means of this first appeal under Order XLIII Rule 1 of the Code of Civil Procedure, 1908 (Code of Civil Procedure), is to those portions of the impugned orders dated 13.10.2010 and 26.11.2010, which have restrained the Appellants/Defendants from constructing a lift to the third floor of the suit premises.

2. The only issue which arises for determination is as to whether the Plaintiffs/ Respondents have any right title or interest in the area where the lift is being constructed by the Appellants/Defendants. If the Respondents/Plaintiffs have any right to the area where the lift is being constructed, then the Appellants/Defendants cannot construct the lift. If, however, there is No. right of the Respondents/Plaintiffs in the area where the lift is being constructed, the Appellants can construct the lift, subject of course to the necessary permissions as required in law being obtained.

3. The Respondents/Plaintiffs claim ownership to the rear side flat of second floor

of the property I-1747, Chittranjan Park, New Delhi. The rights are claimed by virtue of an Agreement to Sell and Purchase dated 20.3.2008. A reference to the agreement shows that what has been transferred in favour of the Respondents/Plaintiffs is the following:

AND WHEREAS in the manner aforesaid First Party became the sole and absolute owner of said portion of the said property i.e. REAR PORTION of SECOND FLOOR (TOWARDS EAST) WITHOUT TERRACE RIGHTS, CONSISTING of THREE BED ROOMS, THREE BATHROOMS, ONE DRAWING CUM DINING ROOM, ONE KITCHEN, REAR BALCONY, along with proportionate undivided, indivisible and impartible leasehold parts in the land underneath of Property bearing No. - I-1747, situated at Chittranjan Park, New Delhi-110019, measuring 307 sq. yards and WHEREAS first party for their bonafide needs and requirements have agreed to sell, transfer convey all their rights in respect of the said portion of the said property i.e. REAR PORTION of SECOND FLOOR (TOWARDS EAST) WITHOUT TERRACE RIGHTS, CONSISTING of THREE BEDROOMS, THREE BATHROOMS, ONE DRAWING CUM DINING ROOM, ONE KITCHEN, REAR BALCONY, along with proportionate undivided, indivisible and impartible leasehold rights in the land underneath of Property bearing No. I-1747, situated at Chittranjan Park, New Delhi-110019, measuring 307 sq. yards. to the second party for a consideration of Rs. 15,60,000/- (Rupees Fifteen lakhs sixty thousand only) to be paid in the manner hereinafter appearing:

4. A reference to the aforesaid Clause of the Agreement to Sell in favour of the Respondents/Plaintiffs shows that there is No. right of the Respondents/Plaintiffs in the rear set back where the lift is being constructed. If, therefore, there are No. rights of the Respondents/Plaintiffs in the area where the lift is being constructed, I fail to understand as to how the Respondents/Plaintiffs can seek injunction against construction of the lift. The impugned order is therefore clearly bound to be set aside. I may note that unless and until a person has a right to an area as a common area as per an agreement by which the property is purchased, such common area does not vest with the person purchasing a particular portion only rights in the other areas. Reference in this behalf is invited to the decision of the learned Single Judge of this Court in the case of M/s Virmani Roy and Kutty v. Ansal Properties and Industries Ltd. and Anr. 102 (2003) DLT 539. The relevant portions of the said judgment is contained in paras 9 and 10 which read as under:.

9. Coming to the question as to whether the Plaintiff has established or not a prima facie case in its favor, this Court finds that the Plaintiff is claiming its ownership rights in the terrace in question on the basis of the provisions of Delhi Apartment ownership Act, 1986. Section 3(j) of the said Act defines "common areas and facilities" and Sub-clause (ii) thereof covers the "roofs" also within the definition of common areas. It is contended that Section 4 of the Act lays down that every person who becomes entitled to the ownership and possession of an Apartment u/s 4 (1) or (2) of the Act is entitled to such percentage of undivided

interest in the "common areas and facilities" as may be specified in the Deed of Apartment. Sub-clause (4) of Section 4 further says that such percentage of undivided interest of each apartment owner in the common areas and facilities shall have a permanent character and shall not be altered without the written consent of all the apartment owners. It is asserted that the Plaintiff who is an owner of one of the apartments in the building in question is vested with undivided interest in the roof in question on which proposed tower is coming up. The Defendants on the other hand contend that although Section 3(j) of the Act covers the "roofs" also within the definition of "common areas and facilities" in relation to a multi storeyed building Sub-clause(3) to Section 4 of the Act categorically says that an apartment owner is entitled to only such percentage of undivided interest in common areas and facilities as may be specified in the Deed of Apartment. It is submitted that the Act does not envisage any automatic interest in favor of a flat owner in a common area for the reason that in every building there are numerous common areas like roofs, halls, corridors, lobbies, stairway etc. which may or may not be made available to every apartment owner. The promoter/ owner of building may keep some of the areas for his Own use or may plan equitable distribution and division of common areas between different occupants. Every apartment, therefore, owner cannot claim an undivided interest in every part of common area in a building. It is argued that in a multi-storeyed building the promoter or builder of the building may provide different common areas to different segments of Apartment owners so that they may use those areas without interference from others. If it is not done and everybody is allowed to claim interest in every part of common area in the building multifarious problems and disputes may arise between the flat owners themselves and for this reason Section 4 of the Act specifically says that a person who becomes entitled to the ownership and possession of an apartment in terms of Sub-section (1) or Sub-section (2) of Section 4 shall be entitled to undivided interest in only those common areas and facilities which may be specified in the Deed of Apartment in his favor. It is also submitted that in a multi storeyed building, which is not fully constructed or in which the builder or promoters expects chances of further constructions on the terrace or any open area, he may specifically reserve his ownership rights over such area so that in case he gets permission from the concerned authorities he may raise further constructions as per the building byelaws. It is pointed out that Section 4(3) of the Act does not confer any automatic right in favor of all the Apartment owners in respect of all the common areas defined in Section 3(j) of the Act and as such one has to look to the Agreement between the parties to find out as to in which common area or facility an apartment owner has undivided interest.

10. After considering the submissions made by learned Counsel for the parties and examining the provisions of the Delhi ownership of Apartments Act, this Court is of the considered view that the Act certainly creates valuable rights in respect of the "common areas and facilities" in multi-storeyed buildings in favor of the apartment owners so that they may enjoy their portions comfortably, but

these rights are controlled by and are subject to the provisions of Section 4(3) of the Act which entitles the promoter/builder of a multi-storeyed building to specify common areas which he wishes to transfer to the flat owners. It entitles him to earmark different common areas and facilities for different occupants in the building so that different groups of the flat owners in different parts of the building may enjoy separate "common areas and facilities" without interference from other occupants of the building. This can be done by the promoter/builder of the building by incorporating appropriate Clauses regarding common areas in the Deeds of Apartments executed in favor of the purchasers of the flats in terms of Section 4(3) of the Act. Had the Legislature intended not to permit, the promoter/builder of a building to earmark or apportion such areas Section 4(3) of the Act would have simply stated that every person who becomes entitled to the exclusive ownership and possession of an apartment under Sub-section (1) or Sub-section (2) of Section 4 of the Act shall become entitled to undivided interest in all the common areas and facilities in the building and there was No. need to use the words "as may be specified in the Deed of Apartment". A purchaser of the Apartment may opt out of the deal in case he finds that common areas and facilities required by him are not being provided to him by the promoter. Learned Counsel for the Defendants rightly contends that the roof in question still remains exclusively with Defendant No. 1 in as much as Clause 11(a) of the Agreement between the parties specifically provides that the promoters shall continue to have a right to make additions or put up additional structure etc. as may be permitted by the local authorities on the terrace of the complex and the terrace and parapet walls shall continue to be the property of the promoter who shall be entitled to use the same for any purpose whatsoever.

5. I may note that the learned Counsel for the Appellants states that when the Appellants will construct the lift, the same will be constructed after taking the necessary permissions from the requisite authorities and by construction of the lift, No. door or window or any other means of ventilations of light and air of the Plaintiffs/Respondents as presently existing, will be closed by the Appellants. I must however note that normally an easementary right to light and air would arise under the Easement Act, 1882 by virtue of Section 15, if the right to the light and air is enjoyed for a period of 20 years. However, learned Counsel for the Appellants states that he is not taking advantage of any provision of the Easement Act, 1882 and while constructing the lift, the Appellants will not cause complete blockage of the light and air of the Respondents/Plaintiffs.

6. Learned Counsel for the Respondents/Plaintiffs states that the construction of the lift should not damage the property of the Respondents/Plaintiffs. Surely, that is the legal position and need not be reiterated by me that the Appellants when they will construct the lift, they will not cause any damage to the property of the Respondents/Plaintiffs.

7. With the aforesaid observations, the appeal is allowed. The impugned orders are set aside and the Appellants are permitted to construct the lift, subject

however to obtaining of the requisite permissions from the appropriate authorities and also ensuring that No. doors /windows or other ventilations as existing of the Respondents/Plaintiffs in their property at present are blocked by the Appellants/Defendants.

8. Nothing contained in the impugned order will tantamount to any expression on merits of the case and trial court will decide the case on merits uninfluenced by any observations made in the present order.