

(2001) 05 DEL CK 0111

In the Delhi High Court

Case No : F.A.O. (OS) No. 275 of 2000 with CM.S. 1258 and 1259 of 2001

Shri Akesh Kumar Jain and Another

APPELLANT

Vs

Shri Harmeet Singh Bakshi and Another

RESPONDENT

Date of Decision : 25-05-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 41 Rule 27, 151

Registration Act, 1908 — Section 49

Citation : (2001) 59 DRJ 734

Hon'ble Judges : Sanjay Kishan Kaul, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Mr. Vipin Sanghi, for the Appellant; Mr. Neeraj Malhotra and Mr. Kamal Mehta, for the Respondent

Judgement

Sanjay Kishan Kaul, J.

CM No.1259/2000

----- 1. The application has been filed by the appellants under order 41 rule 27 read with Section 151 of the CPC 1908 for filing an additional document on record for purposes of hearing the present appeal. The document in question is the will dated 6.4.93 alleged to have been executed by Late Shri Bakshi Shamsheer Singh in favor of Mr. S.S.Sahni in respect of the first floor of property bearing No.D-1059, New Friends Colony, New Delhi. It has been stated in the application that since the appellants were not parties to the present document, they could not obtain copy of the same on an earlier date. It has been further averred that the document in question is of an unimpeachable nature and the same may be considered for purposes of hearing the present appeal.

2. In view of the averments made in the application, we are of the view that no harm or prejudice is likely to be caused to the other party in case the application filed by the appellants is allowed. The document is taken on record and will be considered in the appeal.

----- 3. This application has been filed by the appellants u/s 151 of the Code of Civil Procedure, 1908 seeking exemption from filing certified copies of documents and typed copies of annexures which form a part of the record before the learned single Judge and are stated to have been filed for purposes of reference.

4. The application is allowed subject to just exceptions.

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----- 5. The appellants in the present appeal filed a suit against the respondent seeking decree for declaration and permanent injunction in respect of use and enjoyment of the first floor of property bearing No.D-1059, New Friends Colony, New Delhi.

6. It has been stated in the plaint that lease agreement dated 31.5.1980, was executed by late Shri Bakshi Shamsher Singh in favor of appellant No.1 Shri Akesh Kumar Jain and Shri K.C.Jain at a monthly rent of Rs.2,300/- per month for a period of three years with effect from 1.6.1980 in respect of the first floor of the property.

7. Shri K.C.Jain passed away in December 1984 and upon his death and tenancy rights devolved on all the appellants herein, which was recognised by the landlord. Late Shri Bakshi Shamsher Singh passed away towards the end of 1983 and defendant No.1 being the grand son of late Shri Bakshi Shamsher Singh from his only predeceased son succeeded as the landlord. It is also been averred that late Shri Bakshi Shamsher Singh transferred the second floor of the property of the building to Shri Ajit Singh Sahnii a tenant of the said floor in the year 1992. Disputes and differences arose between the appellants and respondent No.1, in respect of the use and enjoyment of tenanted premises as also various other services like electricity, water etc. There has also been subsequently two increases in the rent in accordance with Delhi Rent Control Act, 1958.

8. Respondent No.1 is stated to have shifted from the ground floor of the property being the house in question in and around 3rd February, 1996 and the possession was handed over to respondent No.2. There has been constant disputes, thereafter, resulting in even police intervention. The appellants have further stated in the suit that since the inception of tenancy late Bakshi Shamsher Singh allowed and consented to the parking of the vehicles of the appellants in the drive-way and in fact no such objection to the user was over raised either by late Bakshi Shamsher Singh or by respondent No.1. Drive-way is stated to be about 9 feet wide and widens to about 12 feet towards entrance gate of the building. The appellants have further claimed easementary rights to use the common drive-way passage not only for purposes of accessing their tenanted premises but also for purposes of parking their vehicles. The appellants have claimed a number of injunction reliefs in view of their apprehension about

the conduct of the respondent to create hindrances in the enjoyment of the first floor flat and the essential service required for the same.

9. The respondents have contested the suit of the appellants and filed their written statement. The respondents have denied that they have ever obstructed in the essential services required for the enjoyment of the first floor flat. It is, however, contended that apart from the said first floor flat which has been described in the lease agreement dated 31.5.1980, the appellants have no right to use or occupy any other portion of the property including the right of parking in the drive-way.

10. The appellants had filed applications for interim reliefs bearing is No. 6616/96 and 7503/96 under Order 39 rule 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908. The said applications have been dismissed by the learned single Judge, in terms of the impugned order dated 1.8.2000 and the present appeal has been preferred against the said order.

11. The learned Single Judge has considered the issue of the right of parking claimed by the appellants in the drive-way of the property in question as the main dispute. It has been further recorded that in so far as the relief relating to supply of electricity, water, working of sewerage system etc. are concerned, there has really not been any contest on behalf of the respondents. It has further been recorded by the learned Single Judge that in view of the earlier assurance by the defendant, these prayers are infructuous. In the course of the arguments when these aspects were pointed out to the learned counsel for the respondents, it was assured that the respondents would adhere to these assurances. The respondents through their counsel have assured this court in the following terms:

1. There will be no obstruction to the ingress and egress of the plaintiff, their agents, relatives, friends etc. to and from the tenanted premises situated on the first floor.

2. The appellants will be granted unobstructed access from time to time to the electricity meter/MCD's fuses situated in the garage of the property in question for inspecting, repairing and operating the same or for taking meter readings.

3. The appellants, their agents, servants or the relatives will be granted access to the tube-well and the water pump situated in the Eastern corner in the backyard of the premises in question for operating, inspecting and repairing the same.

4. There will be no obstruction or interference with the supply of electricity to the appellants in the tenanted premises.

5. The appellants or their representatives will be granted access to the terrace floor at all reasonable times for the purposes of maintenance and cleaning of the overhead water tanks.

6. The appellants will be free to get the sewerage lines cleaned and no obstruction will be caused to the same.

11. The assurance given by the counsel for the respondents are accepted and are taken on record. The respondents will abide by the said assurance given to the court. It may be added that since the additional room constructed on the ground floor court-yard has been demolished, the appellants are not pressing any reliefs in respect of the right of the user of the terrace on the same. Thus no grievance of the appellants survive other than the issue of the right of parking of cars in the drive-way.

12. It is not disputed before us, and as is also apparent from the record, that there is no mention, of the right of parking of vehicles in the drive-way, in the lease agreement dated 31.5.1980. Even though the lease agreement is unregistered, the issue of relying on this document is not in dispute as both parties have relied on the said document for collateral purposes of nature of possession and description of the accommodation stated in the lease agreement and it can be so done in view of Section 49 of the Registration Act.

13. It is also not disputed that there is no document filed on record whereby this right of car parking has been granted to the appellant by either of the respondents or by the predecessors in interest other than a bare allegation in the plaint that late Bakshi Shamsheer Singh permitted the same which factum is specifically disputed by the respondents., The appellant, however, filed certain photographs taken immediately prior to and soon after filing of the suit to show that they were parking the cars in the drive-way. This cannot be of much use of the appellants as what has to be examined is whether there was any right created in favor of the appellants to park their cars in the drive-way either expressly or impliedly.

14. Mr. Vipin Sanghi, learned counsel for the appellants has submitted that even though there is no mention of the right of car parking in the drive-way in the lease agreement dated 31.5.1980, the same is an implied term of the lease and further this being so, car parking has been allowed and consented to by the predecessor in interest of respondent No.1 and thereafter, by respondent No.1 himself. It has been argued that the real dispute arose after respondent No.2 came into the picture, who is stated to have purchased the complete ground floor of the property in question from respondent No.1 including the car parking area. It is stated that right to park car in the drive-way is a right reasonably necessary for enjoyment of the tenancy rights of the first floor. This is also supported by the counsel for the appellants from the fact that even occupants of the second floor have been permitted to park their cars. Learned counsel of the appellants also sought to rely on the will filed as an additional document for the submission that in terms of the same undivided share in the land has been granted and this implies that all the occupants have undivided share in the land and no one can have exclusive use of the ground floor area. It was further contended that the right to park in the drive-way forms a part of the rights of easement in favor of the appellant under Indian Easements Act, 1882.

15. Mr. Vipin Sanghi, learned counsel for the appellants has sought to rely on the

Treatise of Hill and Redman's of Law of Landlord and Tenant (Sixteenth Edition) to support his contention that the user of the drive-way for parking of the car is an interest related to and an implied term of the tenancy. Learned counsel for the appellant invited our attention to Rule 48 in Sub Section 3 thereof under the heading "Premises included in the Demise" at page 134 of the aforesaid Treatise which reads:-

The precise extent of the property demised is a question of fact to be settled by reference (a) to the wording of the lease, including any plans and measurements, (b) to the surrounding circumstances at the time of the demise, (c) to certain principles of interpretation such as the rule requiring rejection of a "false demonstratio."

16. Learned counsel for the appellant contended that the issue of the precise boundary or extent of the property demised, referred to as parcel or no parcel, is a question of fact, and it may be shown by parol evidence what was, and what was not, included in the description, such evidence being always admissible to prove all the circumstances necessary to place the Court in the position of the parties, thus enabling it to judge of the meaning of the instrument.

17. The contention raised on behalf of the appellants is that the lease would include lands usually occupied with the demised premises and since the car parking was continuously enjoyed and used, it would form a part of the leased premises. The question whether any particular property is included in the lease depends on words of the lease as applied to circumstances of the property.

18. It was further contended by the learned counsel for the appellant that a lease of property includes any easement as pertaining to that property if the grant of the easement appears expressly or by necessary implication in the lease and reference was made to Rule 49 of the said Treatise. The contention is that apart from any statutory provision, a grant will be implied on all "continuous and apparent" rights used with the demised property at the date of the lease. In support of this submission the learned counsel for the appellant sought to rely on the judgment of the Court of Appeal in *Wright and Anr. Vs. Macadam* (1949) 2 All.E.R.565 where the question of use of coal shed by the tenant was considered as implied grant of the tenancy agreement, the said coal shed being used by the tenant with the permission of the landlord on the date of the agreement. It was held that it was immaterial that the use and enjoyment have hitherto been enjoyed by permission only but the right must be one which is necessary for enjoyment of the property.

19. Learned counsel for the appellant further sought to rely on the Halsbury's Laws of England, Volume 27 para 135 (4th Edition) which reads:-

There will also pass to the tenant of one of two tenements both belonging to the landlord all those continuous and apparent quasi-easements which are required for the reasonable enjoyment of the demised tenement and which, at the date of the lease, are used for its benefit over the other tenement. If the landlord

intends to reserve to himself any such right over the demised tenement, he must do so expressly in the lease, except in the case of a continuous easement of necessity, such as a necessary right of way."

20. Learned counsel for the appellant urged that those continuous and apparent easement which are necessary for the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted must form a part of the leased premises for which he relied upon the observations of Thesiger, LJ in *Wheeldon Vs. Burrows* (1879) 12 Ch. 31.

21. Learned counsel for the appellant further contended that the suit was at the interim stage and only a prima facie view has to be taken at this stage for purposes of disposal of the application filed under Order 39 rule 1 and 2 read with Section 151 CPC and in this behalf relied upon decision of the Patna High Court in *Brajendra Nath Ghosh and Ors. Vs. Smt Kashi Bai and Ors.* AIR 1946 Pat 177. It was further contended that the non grant of the injunction would result in irreparable injury to the appellants if they are not able to utilise the car parking. Reliance is also placed on the judgment of the Supreme Court in *M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others*, where the ingredients for the grant of interlocutory injunction which are required to be considered during the pendency of legal proceedings have been set out. It is otherwise well established that on the settled principles of law it has to be seen whether the requirements of (i) prima facie case (ii) balance of convenience (iii) irreparable injury are made out in the present case?

22. Mr.Kamal Mehta, learned counsel for respondent No.2 on the other hand has contended that a bare reading of the lease agreement dated 31.5.80 would show that car parking did not form a part of the demised premises and the right of parking cars cannot be implied in the lease agreement. It was contended that this is a valuable right which would have been specified, if it was so granted. He relied on the judgment of the Supreme Court in *Orient Distributors Vs. Bank of India Ltd. and Others*, , where the court declined to entertain the request of the tenant for a common access from the front side in view of the tenant having an alternative access through the side lane. The passage giving common access was held to be a bare license and its user could not be held as right of easement. Mr.Kamal Mehta further contended that in a prior litigation between the parties where issue was of the appellants wanting to dig a separate well for supply of water, the same was declined by this court. The order is reported as *Akesh Kumar Jain and Others Vs. Shri Harmeet Singh Bakshi and Another*, Learned Counsel for the respondent No.1 also adopted the submissions of the counsel for respondent No.2.

23. The analysis of the aforesaid legal position would show that the tenant would be entitled only to such rights that would be reasonable necessary for enjoyment of the tenancy. The question is -- Can the requirement of parking a car in the drive-way be considered as an implied term or a right necessary for enjoyment

of the tenancy? In our view the answer to the same is in the negative.

24. The right of parking a vehicle is a valuable right and even if the original date of execution of the lease agreement is taken into consideration, it would not be possible to conclude that such a right forms an integral part of the right of enjoyment of the tenanted premises. If it was so then the same would have been specifically provided in the lease agreement.

25. It is also relevant to state that the case set up by the appellants in para 23 of the plaint is that the landlord "allowed and consented" to the parking of vehicles by the appellants in the drive-way. In view of this averment the appellants cannot contend that it is their easementary right since they themselves have stated that it was only a permission granted by the landlords. It may be added that in the written statement the factum of such permission is specifically disputed and this disputed question of fact will have to be finally settled after trial in the suit since admittedly there is neither any written document or other circumstances evidencing such permission.

26. If the allegation of the appellants of the permission by the landlord to park cars is even taken into consideration at its face value the same cannot be characterised as one which can be said to have matured into any right in favor of the appellants.

27. The problem is also compounded by the fact that the common drive-way is of such a nature that if a person would park his car behind another's car, the same cannot be taken out without the car behind being removed. In fact in the suit certain interim directions were issued for removal and re-parking of the cars. In view of the relationship between the parties there can be no smooth arrangement without the orders of the court. In the absence of any right in favor of the appellants it will neither be proper nor desirable that any such directions for permission to the appellants to use the car parking be granted.

28. We are thus of the view that the appellants have failed to make out a prima facie case of any right to park car in the drive-way. Any arrangement in respect of the second floor cannot ipso facto apply to the first floor. Mutual courtesy between co-occupants cannot be classified in the category of rights. The fact that there is undivided share in the land, on the basis of the document of will sought to be relied upon by the appellants, cannot imply that the other parties have a right on the surface of the ground floor and more specifically of car parking.

29. Thus there is no infirmity in the reasoning and the conclusions of the Learned Single Judge in so far as the claim of the appellant for right to park car in the drive-way is concerned and to that extent the appeal deserves dismissal.

30. The present appeal is accordingly disposed of in terms aforesaid and the order of the learned Single Judge is modified to the extent of the assurances given on behalf of respondents which have been accepted by this court. Ordered accordingly. Parties are left to bear their own costs.

31. Needless to add that observations made by us are only for the purposes of deciding the appeal and will not prejudice the trial of the suit on merits.