
(2013) 08 DEL CK 0095

In the Delhi High Court

Case No : Regular First Appeal 193 of 2009

Tahil Naraindass Vazirani and Others

APPELLANT

Vs

Ravinder Kaur Sandhu and Another

RESPONDENT

Date of Decision : 08-08-2013

Acts Referred:

Delhi Apartment Ownership Act, 1986 — Section 2, 2(j), 3(c), 3(s), 4

Citation : (2013) 08 DEL CK 0095

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Nikhil Singhvi and Mr. Arjun Syal, for the Appellant; Ankit Jain, for R-1 and 2, for the Respondent

Final Decision : Disposed Off

Judgement

Rajiv Sahai Endlaw, J.—The appeal impugns the judgment and decree dated 18th February, 2009 of the Addl. District Judge, Delhi in Suit No. 104/2004 filed by the appellants/plaintiffs to the extent it denies the reliefs claimed by the appellants/plaintiffs in the suit filed by them. Notice of the appeal was issued and the Trial Court record requisitioned. The respondent no. 3 Dr. Jagdish Singh Teja failed to appear inspite of service through publication and though there is no formal order proceeding ex parte against him till now, he is now ordered to be proceeded against ex parte.

2. Attempts made at amicable settlement of the disputes during the pendency of the appeal failed. The appellant/plaintiff no. 2 Shri Mahesh Vazirani died during the pendency of the appeal and his wife Ms. Shanti Vazirani was substituted in his place. The appeal was admitted for hearing on 22nd September, 2011 and on the same date the counsel for the respondents/defendants made a statement that the respondents/defendants have no objection to the appellants/plaintiffs parking two cars in the driveway till the disposal of the appeal.

3. The disputes concern rights to and usage of certain portions of the property

No. C-4/37, Safdarjung Development Area, New Delhi constructed over land measuring 500 sq. yds. and comprising of ground floor, first floor, second floor and a open terrace above. The respondent no. 3 Dr. Jagdish Singh Teja was the owner of the said property and has vide Agreements to Sell, all dated 12th April, 1991, sold the ground floor thereof to the respondent no. 1 (respondent no. 2 Col. G.S. Sandhu is her husband) and vide separate Agreements to Sell the first floor and second floor with open terrace, in favour of the appellants/plaintiffs no. 1 & 3 (M/s. Hilldee International of which the deceased appellant/plaintiff no. 2 Shri Mahesh Vazirani was the sole proprietor).

4. The appellants/plaintiffs instituted the suit from which this appeal arises for the reliefs of:-

(a) mandatory injunction directing the respondents/defendants no. 1 & 2 to open the garage (at the end of the driveway) and to allow the appellants/plaintiffs and their servants to use the garage as passage for going to the servant quarters (access whereto is from spiral staircase in the rear open courtyard) and to check electricity meters installed in the garage;

(b) to restrain the respondents/defendants no. 1 & 2 from obstructing the appellants/plaintiffs from installing separate booster pump in the pump room in the rear open courtyard for smooth water supply to the first and second floors from the underground tank in the rear open courtyard;

(c) a direction to the respondents/defendants no. 1 & 2 to allow the use of the garage as a passage to the rear open courtyard where the underground water tank and water meters are installed;

(e) a direction to the respondents/defendants for removal of the obstructions depriving the appellants/plaintiffs from the use of front lawn and the open space on the right hand side (i.e. opposite side to the driveway) for going to the rear open courtyard for checking the underground water tank;

(f) prohibiting the respondents/defendants from interfering with the appellants/plaintiffs use of the front open lawn which was claimed to be common property; and,

(g) for restraining the respondents/defendants no. 1 & 2 from parking their cars in the open driveway on the left hand side of the property which was claimed to be meant exclusively for the use of the owners/occupants of the first and the second floor.

5. The learned Addl. District Judge has partly allowed the suit of the appellants/plaintiffs and has:-

(i). directed the respondents/defendants no. 1 & 2 to allow limited access to the appellants/plaintiffs, their servants and representatives to the rear open courtyard for the purposes of repairing and cleaning the underground water tank and for obtaining the water meter readings;

(ii). restrained the respondents/defendants no. 1 & 2 from causing any obstruction to the installation of a separate booster pump by the appellants/plaintiffs at their own costs and expense; and,

(iii). allowed the appellants/plaintiffs to park two cars in the driveway.

6. The respondents/defendants no. 1 & 2 had also preferred a counter claim and in that, (a) directions have been issued to the appellants/plaintiffs to shift their electricity meter from the garage to a convenient place on the first floor; (b) directions have been issued to the appellants/plaintiffs to restore the water tanks on the terrace and to allow limited access to the respondents/defendants no. 1 & 2 and their servants and representatives to the terrace for checking the water tanks; (c) the appellants/plaintiffs have been restrained from causing any obstructions in the same; (d) the appellants/plaintiffs have been restrained from use of the front lawn and right side passage as a thoroughfare and from parking more than two vehicles in the driveway as they were found to be having a right to park two vehicles only.

7. The first contention of the counsel for the appellants/plaintiffs is that the appellants/plaintiffs as owners of the first and second floors and terrace above also have a right to the front lawn of the property which is claimed to be a common area.

8. It has been enquired from the counsel for the appellants/plaintiffs whether according to the appellants/plaintiffs the property is governed by the Delhi Apartment Ownership Act, 1986 in as much as the said law introduces into the title/rights to immovable property, the concept of common areas defined in Section 2(j) thereof inter alia as roofs, yards, gardens, parking spaces and by Section 4 thereof confers on every apartment owner an undivided interest in the said common areas; Section 24 makes the provisions of the said Act applicable to all apartments, notwithstanding anything contained in any other law or in any contract.

9. The counsel for the appellants/plaintiffs states that he has not considered the matter from the said aspect.

10. The Apartment Act by Section 2 thereof makes the said Act applicable to every apartment in a multi-storeyed building constructed by any group housing co-operative society or any other person or authority, before or after the commencement of the said Act and on freehold land or leasehold land if the lease of the land is for a period of more than thirty years. Section 3(s) defines a multi-storied building as one containing four or more apartments or a building containing two or three apartments in respect of which a declaration has been made under proviso to Section 2. Section 3(c) defines apartment as a part of any property intended for any type of independent use and either with a direct exit to a public street or to a common area leading to such street. The proviso to Section 2 states that where the building contains only two or three apartments, the owner of such building may, by a declaration duly executed and registered

under the provisions of the Registration Act, 1908, indicate his intention to make the provisions of the Apartment Act applicable to such building and it is only on such declaration being made that the Apartment Act becomes applicable to the said apartments.

11. As per the argument of the counsel for the appellants/plaintiffs, the property subject matter of this appeal has only three apartments i.e. the residential units on the ground, first and the second floors and in the absence of a declaration within the meaning of the proviso to Section 2 being made, the Apartment Act would not be applicable thereto. It is not the case of the appellants/plaintiffs that any declaration within the meaning of the proviso to Section 2 of the Apartment Act was made with respect to the property. The conclusion is therefore inescapable that the Apartment Act has no applicability to the subject property.

12. The rights in the property would thus be governed by the documents of title in favour of each of the parties.

13. The Agreement to Sell in favour of the respondent/defendant no. 1 conveys to her "rights, interests, liens and titles in respect of entire ground floor including covered garage and servant quarter above garage (but with right of upper floor owners to the driveway) with all fittings, fixtures and installations and the proportionate leasehold rights in the land underneath".

14. The two Agreements to Sell in favour of the appellants/plaintiffs convey to them the first and the second floors respectively "including servant quarter above garage and with right of use of driveway for parking of one car with all fittings, fixtures, amenities, installation and the proportionate impartible leasehold rights in the land underneath....".

15. It would thus be seen that while under the document of title in favour of the respondent no. 1, the property conveyed would include the front lawn, the same would not be included in the property conveyed under the documents of title in favour of appellants/plaintiffs.

16. The contention of the counsel for the appellants/plaintiffs is that though there is no mention in the Agreements to Sell in favour of the appellants/plaintiffs of the front open lawn but since there is no express mention thereof in the Agreement to Sell in favour of the respondents/defendants also, the rights in front open lawn are to be enjoyed by the appellants/plaintiffs as well as the respondents/defendants. Reliance in this regard is placed on the judgment dated 20th September, 2007 of the Division Bench of this Court in RFA No. 34/2006 titled Kanwal Krishan Vs. Raj Kumar Gupta, in para 6 whereof it was held that since the Will under which the property in that case had devolved did not make any specific mention of the roof rights, they could not be claimed exclusively by the person to whom the floor immediately below the roof had been bequeathed and the roof had to be used in common.

17. It is further the contention of the counsel for the appellants/plaintiffs that

since the appellants/plaintiffs have proportionate rights in the land underneath and which would include the front open lawn also, the appellants/plaintiffs have a right to use the said front open lawn.

18. Per contra, the counsel for the respondents/defendants has contended that the transfer of rights in the front open lawn in favour of the respondent/defendant no. 1 is implicit from the conveyance to the respondent/defendant no. 1 under the Agreement to Sell of the entire ground floor which would include the front open lawn also, save the rights given to the owners of the upper floors under the documents in their favour with respect to the use of the driveway for parking of cars. He thus contends that the front open lawn belongs exclusively to the respondents/defendant.

19. A site plan of the ground floor of the property is filed at page 211A of the appeal paper book and which shows the front open lawn to be appurtenant to the built-up portion of the ground floor. The same is the portion of the open space on the right side of the property leading up to the rear open courtyard. It can safely be assumed that the doors and windows of the ground floor open in the said front open lawn and the side open space and allowing use of the said front open lawn and right side open space to the occupier/owners of the upper floors of the property would lead to absolute loss of privacy to the ground floor. Moreover such floor-wise ownerships are very common today in the city of Delhi and the general rule of which judicial notice can be taken is of the front open lawn if at the same level as the construction on the ground floor belonging to and going with the ground floor only. It is only where there is a basement and the front open lawn or space is used for parking that the same is not generally conveyed along with the ground floor. The judgment relied upon by the counsel for the appellants/plaintiffs has no application to the facts of the case. In that case different floors of the property were being inherited by different persons under Will and since there was no mention in the Will as to whom the open terrace at the top was bequeathed, it was held to be meant for the use of all under the general law of inheritance in the absence of a Will. In the present case, the appellants/plaintiffs acquired rights in the first and second floors with full knowledge that no rights in the front open lawn were being conveyed to them and had the agreement of the appellants/plaintiffs with their seller been otherwise, it is incomprehensible as to why the same would have not found mention in the documents in favour of the appellants/documents.

20. The matter can be looked at from another aspect also. As aforesaid, since the Apartment Act does not apply, the rights are to be governed by the document of title in favour of each of the parties; once the appellants/plaintiffs in their documents are not found to have any right to the front open lawn or in the right side open space, the question of granting any relief with respect thereto to the appellants/plaintiffs does not arise irrespective of whether the same was conveyed to the respondents/defendants or not. The appellants/plaintiffs also have approached the Courts with the claim of a right therein under the

documents and under which documents no right with respect thereto were conveyed to them.

21. As far as the contention of the counsel for the appellants/plaintiffs of the appellants/plaintiffs having right in the front open space owing to the appellants/plaintiffs having been given proportionate rights in leasehold rights in the land underneath the property is concerned, the said clause is only to assure that in the event of the property being destroyed, the owners of the upper floors would have a right to re-construct their respective floors on the land and the said clause can by no stretch of imagination be deciphered as conveying rights in the open spaces which have not been conveyed in the documents in favour of the owners of the upper floors. If the said logic were to be applied then it has been asked from the counsel for the appellants/plaintiffs as to why the appellants/plaintiffs are not claiming the rights in the entire ground floor including the covered area. No plausible answer has been forthcoming from the counsel for the appellants/plaintiffs.

22. I therefore do not find any error in the judgment in so far as declining the relief with respect to the front open lawn and right side open space on the ground floor of the property to the appellants/plaintiffs.

23. The next challenge by the appellants/plaintiffs is with respect to the number of car parking spaces to which the appellants/plaintiffs are entitled in the driveway in the property. On enquiry, both counsels state that excluding garage, there is space for parking four cars in the driveway. The respondents/defendants do not dispute the right of the appellants/plaintiffs to park two cars in the driveway. The dispute only is whether the appellants/plaintiffs have right to all the four car parking spaces.

24. Each of the Agreements to Sell, of the first and the second floors in favour of the appellants/plaintiffs, though in the typed form mention two car parking spaces as conveyed thereunder but the word "two" has been cancelled in each of the Agreements and has been substituted by the word "one" under the signatures of the seller. The contention of the counsel for the appellants/plaintiffs is that the said change was unilaterally made by the seller and is without the signatures of the appellants/plaintiffs. However the counsel for the respondents/defendants has pointed out that neither was any such pleading made nor any evidence to the said effect led. The counsel for the appellants/plaintiffs has not been able to contend otherwise. No relief also for correction of the said Agreements to Sell was claimed. It has also been enquired from the counsel for the appellants/plaintiffs whether the appellants/plaintiffs had at any time taken any steps for rectification of the said error if any in the Agreement to Sell. The answer is in the negative. Thus the said argument is now not open to the appellants/plaintiffs.

25. Though the right to additional two car parking spaces was also agitated on the basis of the General Power of Attorneys in favour of the appellants/plaintiffs

with respect to the two floors each being in relation to two car parking spaces but the counsel for the appellants/plaintiffs on further consideration has not pressed the said aspect further.

26. The next contention of the counsel for the appellants/plaintiffs with respect to the car parking spaces is that there is no mention in the Agreement to Sell with respect to the ground floor of the right to any car parking space in the driveway.

27. The counsel for the respondents/defendants has controverted the aforesaid contention by stating that the entire driveway was under the Agreement to Sell conveyed to the respondents/defendants subject to the rights conveyed with respect thereto to the owners of the upper floors; that once it is found that the owners of the two upper floors were given rights to one car parking space each, the right to the remaining driveway is in any case of the respondents/defendants.

28. Merit is found in the aforesaid contention of the respondents/defendants. The appellants/plaintiffs under their Agreement to Sell have clearly been conveyed the right to park one car parking space only in conjunction to each of the first and second floors and cannot claim any further rights.

29. I am therefore unable to find any error in the impugned judgment and decree holding the owner/occupier of the first floor and the second floor of the property to be having right to park one car each only in the driveway.

30. I may notice that on enquiry it has been informed that the garage at the end of the driveway does not have a opening towards the rear and the only access thereto is from the said driveway only. For this reason, another argument lightly addressed by the counsel for the appellants/plaintiffs, of the respondents/defendants having no right to park any car in the driveway owing to having been conveyed the garage, also has no merit in as much as without the use of the driveway, garage cannot be used for parking vehicle.

31. The third challenge by the appellants/plaintiffs is that the passage to the rear spiral stair case if not given to the appellants/plaintiffs through the garage, the domestic helps of the appellants/plaintiffs, to approach their servant quarter would have to go around the block to reach the rear opening through the service lane to the said spiral staircase and which is inconvenient.

32. A garage is a covered space, found to be used in large number of households as a habitable space or as a storage space and providing access to the appellants/plaintiffs therefrom would render it unusable by the respondents/defendants. The rights in the garage have been exclusively conveyed to the respondents/defendants. The inconvenience even if any faced by the appellants/plaintiffs cannot be redressed by depriving the respondents/defendants of their valuable property, without finding a right in favour of the appellants/defendants in law.

33. However, to find a solution to the inconvenience faced by the appellants/plaintiffs in this regard, it has been enquired whether the rear spiral staircase is

till the open terrace above.

34. It is informed that it is not.

35. The counsel for the respondents/defendants has offered to have the said rear spiral staircase extended till the terrace either in masonry form or in a metal frame at the cost and expense of respondents/defendants so that the domestic help etc. of the appellants/plaintiffs can approach their servant quarter through the open terrace above the main block and the said spiral staircase.

36. The same be done within two months of today.

37. The counsel for the respondents/defendants has also stated that the respondents/defendants have given a key to the lock on door opening in the service lane to the rear open courtyard (where the underground water tank is installed). With the same having been done, the grievance of the appellants/plaintiffs of accessibility to the rear underground water tank for the purposes of cleaning etc. dissipates. Moreover, the said underground water tank is common to the parties and to keep it clean is in common interest of the parties.

38. The counsel for the respondents/defendants also states that if the concerned electricity agency does not permit the shifting of the electricity meter of the first and the second floors from the garage to the stair hall at the level of the first floor and/or the second floor, the respondents/defendants would amicably arrive at a suitable place for installation thereof.

39. It has also been agreed that the respondents/defendants, if so desire, may at their own expense shift the overhead water tank/s meant for supply to the ground floor, from the place of present installation at the top of the servant quarter block, to the terrace above the main block at the place to be earmarked by the appellants/plaintiffs; the respondents/defendants while so shifting the tanks will ensure that the load thereof does not effect the structural stability of the building.

40. No other argument is addressed by either of the parties. The appeal is disposed of in above terms, leaving the parties to bearing their own costs.

Decree sheet be prepared.