

(2014) 10 DEL CK 0014

Delhi High Court

Case No: CS (OS) No. 1804/2012

Veena Seth

APPELLANT

Vs

Rajshree Trivedi

RESPONDENT

Date of Decision: Oct. 16, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 12, Order 7 Rule 13, Order 8 Rule 1

Hon'ble Judges: G.P. Mittal, J**Bench:** Single Bench**Advocate:** Kamlesh Mahajan, Advocate for the Appellant; C.S. Rathore, Advocate for the Respondent

Judgement

G.P. Mittal, J.

This suit for possession, recovery of damages and mesne profits was initially filed by the Plaintiff against the Defendant in the District Court on 14.03.2011. The plaint was ordered to be returned to the Plaintiff as the suit was held to be within the pecuniary jurisdiction of the High Court.

2. The case of the Plaintiff is that she is the absolute owner of the first floor with terrace rights in respect of property no.106, M Block, Greater Kailash, Part-1, New Delhi by virtue of a registered Gift Deed dated 24.09.2004 (Ex.PW-2/1) whereas the rear portion of the second floor of the suit property with one servant quarter on terrace and common servant toilet on terrace was sold by Late Mrs. Tara Seth (Plaintiff's mother-in-law) to the Defendant and her husband by virtue of a registered Sale Deed dated 07.03.2001 (Ex.PW-1/2). The ground floor of this very property along with one servant quarter and common servant toilet was sold to Mrs. Shahnaz Hussain and the front portion of the second floor of the property was gifted by Late Mrs. Tara Seth in favour of her daughter Mrs. Reetu Kapoor by virtue of a registered Gift Deed dated 23.03.2005.

3. The Plaintiff applied for mutation in respect of the first floor as well as terrace floor in her favour and the mutation was allowed by mutation letter dated 30.09.2010 (Ex.PW-1/4).
4. The grievance of the Plaintiff is that the Defendant is residing on the second floor of the property. In the month of May-June, 2007, the Defendant started putting flower pots and put tiles, etc. on the terrace floor of the rear portion of the property no.M-106. The Plaintiff issued a legal notice dated 23.07.2007 (Ex.PW-1/6) requiring the Defendant to remove the enclosures and for criminal trespass on the property belonging to the Plaintiff. The Defendant, however, refused to desist the same on the ground that the Defendant was co-owner of the property. The Defendant admitted having made small enclosures on the terrace for the purpose of hanging her clothes. It was stated that the tiles had been affixed on the terrace in view of the constant seepage problems faced by the Defendant and that the flower pots/plants were put in the portion of the terrace above the portion purchased by her, in such a way so as not to cause any interference with the rights of other occupants of the building including the Plaintiff. By reply (Ex.PW-1/7) to the legal notice the Defendant through her counsel required the Plaintiff to desist from intimidating or threatening the Defendant.
5. An application under Order VII Rule 13 of the Code of Civil Procedure, 1908 (CPC) moved by the Defendant for rejection of the plaint was dismissed by this Court by order dated 11.09.2013.
6. The Defendant failed to file the written statement within the stipulated period as provided under Order VIII Rule 1 CPC. By an order dated 03.12.2013, defence of the Defendant was ordered to be struck off because of not filing the written statement even after a delay of 90 days and not even bothering to remove objections in the application for condonation of delay, despite imposing costs of Rs.10,000/- on the Defendant.
7. During evidence, the Plaintiff filed her Affidavit and corroborated the averments made in the plaint. She testified that the Defendant started occupying rear portion of the terrace in May-June, 2007. The Plaintiff proved photographs Ex.PW-1/5 (collectively), to show as to how the terrace had been occupied by the Defendant. The Plaintiff also proved the legal notice served by her through counsel (Ex.PW-1/6) upon the Defendant and the reply received from the Defendant (Ex.PW-1/7). The Plaintiff deposed that there was a seepage problem on the first floor beneath the rear portion of the second floor owned by the Defendant. On account of seepage, bed room, lobby and bathroom on the Plaintiff's floor have been damaged. Plaintiff testified that a Local Commissioner was appointed by the Additional District Judge who submitted his report (Ex.PW-1/8). The Plaintiff claimed damages/mesne profits at the rate of Rs.30,000/- per month for a period of three years before filing of the suit and at the rate of Rs.50,000/- per month from the date of filing of the suit till the recovery of possession.

8. In cross-examination, the Plaintiff agreed that she had knowledge of the Bayana Agreement dated 21.02.2001 executed between her mother-in-law Mrs. Tara Seth and the Defendant. In cross-examination, the Plaintiff further admitted that the front portion of the terrace was in her possession, whereas the rear portion of the terrace was in possession of the Defendant. She stated that the front portion of the terrace of the second floor is about 1700-1750 sq. ft. She also admitted that there were six servant quarters attached with each other in the front portion of the property and that one servant quarter with common servant toilet on terrace belonged to the Defendant. The Plaintiff admitted that in para 1 of the plaint filed by her before the Additional District Judge, she had stated that she was the absolute owner and was in possession of the entire first floor and half terrace floor on the first side of the property. She deposed that it was a typing error. The Plaintiff denied that she had never raised any objection since time of purchase of the rear portion of the second floor flat by the Defendant with regard to the use of the rear terrace by her. The Plaintiff admitted that she did not raise any objection prior to 2007 as there were just 4-5 pots kept on the terrace by the Defendant. The Plaintiff denied the suggestion that her mother-in-law Late Mrs. Tara Seth, (who sold the second floor rear portion flat to the Defendant) had authorised the Defendant to use the rear portion of the terrace.

9. The Plaintiff denied that the Defendant was the owner of one servant quarter with common bathroom and rear portion of the terrace. She stated that she was the owner of the entire terrace and all occupants were entitled to use the servant quarters and the common servant toilet. In further cross-examination, the Plaintiff admitted that her sister-in-law, Reetu Kapoor used the terrace on second floor as and when she required. She, however, denied that Mrs. Shahnaz Hussain also used the terrace floor for commercial purposes. On the quantum of rent to the extent of Rs.30,000/- per month as claimed by the Plaintiff, in cross-examination the Plaintiff deposed that going rate of rent of the rear portion of the terrace was Rs.30,000/- per month as disclosed by the property dealer. She, however, could not disclose the name of the property dealer who disclosed the rental of the terrace to be Rs.30,000/- per month.

10. PW-2 Manish Kumar Jangir, Assistant Manager, State Bank of India produced the original Gift Deed in favour of the Plaintiff and its copy was proved as Ex.PW-2/1. Although, the Defendant was represented during the time when the initial evidence of two witnesses of Plaintiff was recorded, however, none appeared on behalf of the Defendant after 15.03.2014. The Defendant has failed to produce the original Sale Deed and certified copy of the Sale Deed was proved by PW-3 UDC from Sub-Registrar-V as Ex.PW-3/A.

11. I have heard Ms. Kamlesh Mahajan, learned counsel for the Plaintiff and have perused the record.

12. Placing of a large number of flower pots and occupying the rear portion of the terrace is not only proved from the photographs Ex.PW- 1/5 (collectively) but the same has not even been disputed by the Defendant either in reply to the legal notice or even during cross- examination of the Plaintiff as PW-1.

13. From the cross-examination of the Plaintiff what can be inferred is that the Defendant claimed user of the rear portion of the terrace because of the permission being given to her by the Plaintiff and her mother-in-law Late Mrs. Tara Seth (vendor of the suit property). The same was, however, denied by the Plaintiff. There are documents in the shape of Sale Deed (Ex.PW-3/A), in favour of the Defendant and her husband and the Gift Deed dated 24.09.2004 (Ex.PW-2/1) in favour of the Plaintiff. The Sale Deed (Ex.PW-3/A) clearly discloses that the Defendant was sold and transferred the second floor rear portion flat in respect of property No. 106, M Block, Greater Kailash, Part-1, New Delhi along with right to use common facilities and amenities in the property. The common facilities were also specified in the Sale Deed. It will be appropriate to extract the relevant portion of the Sale Deed hereunder:-

"And Whereas the vendor for her legal needs of funds and bonafide requirements has agreed to sell, convey, assign and transfer their legal rights, titles, claims and interests in the Rear Portion of Second Floor (2ND Floor) unfurnished incomplete flat of the said property consisting of three bed rooms with three attached bath rooms, drawing dining, kitchen, lobby, rear open balcony, side open balcony adjoining with drawing dinning, one servant quarter on terrace, common servant toilet on terrace, out of the aforesaid Free-hold built up property bearing No. 106, Block-M, total measuring 500 sq. yards, situated in the residential colony known as Greater Kailash Part-I, New Delhi-110048 alongwith the proportionate undivided, indivisible and impartible ownership rights in the land beneath the same, with all easements, rights, Title and interest in the Free-hold land beneath the same "as is where is basis" and with right to use common facilities and amenities provided in the aforesaid property viz., staircases, common entrances, passages, overhead water tank, submersible pump, corporation water line and all other common facilities and amenities provided therein, etc. (hereinafter collectively referred to as "THE SAID PORTION OF THE SAID PROPERTY", for a total consideration of Rs.11,00,000/- (ELEVEN LAKHS ONLY)."

14. At the same time, a perusal of the Gift Deed dated 24.09.2004 (Ex.PW-2/1) clearly discloses that apart from the entire first floor of this property, the entire terrace was also gifted to the Plaintiff by her mother-in-law. The relevant portion of the Gift Deed is reproduced hereunder:-

"And whereas the present donor has great love and affection with the DONEE, (who is the daughter in law of the DONOR), and out of natural love and affection the DONOR is willing to gift the "entire first floor of the abovesaid property, having covered area measuring 2384.0 sq. ft., with entire terrace rights of second floor

thereof and above, which is at present having/comprising two servant quarter with W.C. of the abovesaid property bearing No. 106, Block No.M, situated in the residential colony known as Greater Kailash, New Delhi, constructed on the land measuring 500.0 sq. yds., alongwith proportionate undivided, indivisible and impartible ownership rights in the said freehold plot of land, with all right, title and interest, easements, privileges and appurtenances thereto, with all fittings, fixtures, connections, structures standing thereon, with all rights in common entrance, passage, staircase, driveway and other common facilities and amenities provided therein". (hereinafter called the Said Portion OF Said Property) to the Donee aforesaid."

15. Thus, it is evident that only rear second floor flat with right to use one servant quarter and common servant toilet on terrace was given to the Defendant and her husband and entire terrace rights vested with the Plaintiff. The Defendant was, therefore, not entitled to occupy rear portion of terrace either by raising temporary construction or by placing a large number of pots thereon. The Defendant was only entitled to use the servant quarter and the common servant toilet on terrace and to have excess to the same from the terrace. The evidence produced clearly reveals that the Defendant has unlawfully occupied the rear portion of the terrace. A complaint dated 02.09.2010 in this regard was immediately lodged by the Plaintiff with the concerned Police Station but without any effect.

16. Thus, the Plaintiff is entitled to a decree for possession with respect to the terrace floor rear portion in the premises bearing no.M-106, M Block, Greater Kailash Part-1, New Delhi-110048 as shown in the site plan (Ex.PW-1/1).

17. The Plaintiff has not been able to place any documentary evidence with regard to rent which the terrace occupied by the Defendant could fetch. Although, the Plaintiff claims that rate of rent of such terrace was Rs.30,000/- per month but could not produce any documentary evidence for the same. The Defendant also failed to produce any evidence as to the going rate of rent or the amount which a terrace could fetch. In any case, I do not feel that during the year 2007-2011 such an amount could be earned as use and occupation charges for the terrace. At the same time, on a conservative estimate, I would make an assessment that such a terrace could have fetch at least an amount of Rs.15,000/- per month if it had been let out to any person. The Defendant occupied the terrace in May-June, 2007. The suit was initially filed (before the District Court) on 14.03.2011. The claim of the Plaintiff for the period prior to November, 2008 for use and occupation charges prior to 15.03.2008 is barred by limitation. Thus, the suit of the Plaintiff is decreed for recovery of mesne profits and damages at the rate of Rs.15,000/- per month from 15.03.2008 till the decision of this suit.

18. The Plaintiff shall also be entitled to interest on the mesne profits awarded @ 9% per annum from 15.03.2008 till the filing of the suit and at the rate of 6% per annum from the date of filing of the suit till the date of decree and then at the same rate

from the date of decree till realisation of the amount.

19. An inquiry under Order XX Rule 12 CPC shall be held with regard to future mesne profits till the recovery of possession.

20. The suit of the Plaintiff is decreed in above terms.

21. A decree sheet be prepared accordingly.

22. Pending applications also stand disposed of.