

IN THE COURT OF SH.MUNISH MARKAN, ADJ-01 (SOUTH),
SAKET DISTRICT COURTS, NEW DELHI

CS No. 6077/16

CNR No.: DLST01-000055-2011

1. Sh. Anil Seth

S/o Late Sh. K.P.Seth,
R/o M-88, Ground floor,
Greater Kailash Part-I,
New Delhi

2. Smt. Mona Seth

W/o Late Sh. K.P.Seth,
R/o M-88, Ground floor,
Greater Kailash Part-I,
New Delhi

.....plaintiffs

VERSUS

Mrs. Surjit Ahuja

R/o M-88, First Floor,
Greater Kailash Part-I,
New Delhi

.....Defendant

Date of Institution	: 04.05.2011
Date reserved for judgment	: 06.02.2019
Date of announcement of judgment	: 28.02.2019
Decision	: Partly decreed

Suit for permanent & mandatory injunction

J U D G M E N T:

1. **This is a suit for permanent and mandatory injunction** filed by the two plaintiffs, the occupants/owners of the Ground floor of the suit premises against the defendant/occupant/owner of the First floor and above of the same property, the defendant having sold the ground floor to the plaintiffs way back in the year 1990 and certain clauses in those Sale Deeds executed in the year 1990 are the bone of contention. The plaintiffs, relying on those clauses in the two Sale Deeds have asserted their rights to access the ground floor of the suit property by the user of common side entrance through the drive way as well which passage also leads to the upper floor in the suit property.

CASE OF THE PLAINTIFF

2. **The case of the plaintiffs** is that they are owners/ residents of ground floor of suit property bearing no. M-88, Greater Kailash Part -I, New Delhi (hereinafter called the 'suit property'). Defendant is the resident/owner of first and second floor of the suit property. Plaintiffs purchased the ground floor vide two regd. Sale Deeds dated 08.06.1990 and 23.11.1990 each pertaining to ½ portion of the ground floor. At the time of construction of the ground floor, only two entrances to the same were provided for, one at point AB at the front and other through the

common side entrance of the driveway as shown as SXYT as shown in red in the site plan. The clause 3 of both the Sale Deeds reads as under:

“ That the VENDEES shall be entitled to have a right of access to the main PREMISES by the user of common side entrance through the passage to the drive way only in case the VENDOR sells her portion of the PROPERTY or constructs or sells the roof rights to first floor or lets out the first floor or second floor after construction thereon.”

3. Further, Clause 12 and 13 of the Sale Deeds reads as under:

“That the vendor/occupants (along with servants/workmen) of other portions of the said property will have full right of access thereto for cleaning, repairs, etc. Booster pump, water storage tank, water meter and sewer tank at all reasonable times (except in the case of emergency).”

“Likewise the VENDEES along with servants/workman of the various dwelling units of the said PROPERTY will have full rights for access through staircases etc. to overhead tank on the terrace of the property at all reasonable times to get the overhead tanks repaired /cleaned etc. or to start the booster pump or to switch it off as the need may be or do all such things in this connection that are necessary.”

Clause 7 and 8 of both the Sale Deeds reads as under:

“ That the Vendees or any of their representatives will have no objection to the construction of second floor by the VENDOR on the terrace of

first floor including the terrace of the garage block of the property but no construction or sale shall be made over and above the second floor.”

4. It is further stated that as per the agreement, no construction or sale shall be made over and above the second floor. In December 1999, defendant raised the construction of second floor and additional construction over the second floor of the servant quarters of the suit property. Defendant also shifted over head water tanks on the roof of the newly added floor i.e. third floor on the servant quarters and the second floor of the main premises. A temporary make shift ladder arrangement was provided by the defendant instead of cemented staircase as per the norms to access the water tanks and it is inherently dangerous for any person to climb. The plaintiffs have been denied total access to the overhead water tanks above the second floor terrace of the main building causing great inconvenience to the plaintiffs.

5. They further stated that in October 2000, the plaintiffs approached the defendant invoking clause 3 of the Sale Deeds asking to open the side entrance door to allow the plaintiffs free passage from the main existing entrance at point SXYT i.e. from main entrance through the passage through the driveway to the premises of the plaintiffs and also asked for the access through the common staircase to oversee the water tank on the roof of the second floor of the main premises. Plaintiffs also requested the defendant to construct the proper cemented

staircase to the roof of the servant quarters to have free and proper access to the water tanks. The defendant sought time to provide the same. Plaintiffs made several oral requests and also wrote letters dated 12.03.2001 and 26.03.2001 to the defendant in this regard but neither the defendant replied nor acceded to their request despite assurance given in this regard during the time of construction of second floor. Therefore, the plaintiffs served a legal notice dated 14.04.2001 upon the defendant but to no avail and therefore, filed civil suit for permanent and mandatory injunction which was dismissed in default on 03.03.2004 and restoration application was also dismissed on 10.07.2006. The denial on the part of the defendant is a continuing cause of action.

6. Plaintiffs further stated that on 19.04.2011, plaintiffs observed and enquired and found that defendant was moving to America and selling the second floor with terrace rights and property brokers were coming along with potential buyers for the said purposes. The efforts of plaintiffs asking the defendant to comply with the terms of the Sale Deed failed.

7. Therefore, the plaintiffs filed the present suit praying for decree of permanent injunction to restrain the defendant or anybody on her behalf from creating any third party interest over and above the second floor of the suit property and to restrain from erecting any structure thereon.

8. Plaintiffs also prayed for decree of permanent injunction restraining the defendant or anybody on her behalf from creating any obstruction in accessing the main premises through the existing common side entrance through the drive way at point SXYT and to allow the access therefrom. Plaintiff further prayed for decree of mandatory injunction to direct the defendant to raise the additional construction of the staircase over the third floor of the servant quarter in order to have smooth and free access of the plaintiffs to their water tank situated thereon. Plaintiffs also prayed for decree of mandatory injunction to direct the defendant to provide smooth and free access to the plaintiffs through the existing common staircase to the water tank situated on the terrace of the second floor in the main building of the suit property.

9. **Defendant filed the written statement** wherein she stated that the suit has not been properly valued. No injunction can be granted against the owner. The plaintiffs are encroacher and misuser of the property and the garage which was meant for parking but they have converted into commercial centre. The suit is barred U/s 41 (h) of The Specific Relief Act as well as by res judicata. The suit is time barred and the cause of action arose in the year 1990. The clause 3 of the Sale Deed can only be invoked in case in case defendant sells her portion of the property. Defendant admitted that she is the owner of the first and second floor above the suit property. The Sale Deed in favour of the

plaintiffs are not disputed. However, the site plans filed by the plaintiffs are denied. As per earlier Agreement to Sell between the parties, it was agreed that purchaser shall not have any right to the main premises by the user of side common entrance through the passage to the drive way as long as the owner is having first floor premises under her and under her family's occupation and purchaser would have such access only in case the owner sells her portion of the property or construct or sells the roof right of the first floor or lets out the first floor or second floor after completion thereon. Clause 3, 12 and 13 are not relevant and are negative covenants.

10. Defendant admitted that she raised construction of second floor in the year 1999. She stated that the height of the water tank is not such that it requires cemented staircase. In fact, the plaintiffs have denied access to the ground water storage tank. Plaintiffs already have three entrances, two in the front and one at the back and their demand for the fourth entrance is uncalled for. Defendant denied writing of letters by the plaintiffs to her. Defendant denied that the denial of the opening of side entrance in terms of registered sale deeds by the defendant is a continuing cause of action. The usage of the garage for commercial purpose by the plaintiffs and parking of the vehicles on the driveway create nuisance to the defendant and plaintiffs have created nuisance by installing a generator in the shaft without any device to control the air

pollution. The plaintiffs have cooked up the story of selling efforts by the defendant. The defendant prayed for dismissal of the suit.

11. Plaintiffs filed the replication wherein they reiterated their case as made out in the plaint and controverted the stand taken by the defendant in the written statement.

12. During admission denial, defendant admitted the certified copies of the Sale Deeds dated 08.06.1990 and 23.11.1990 as Ex.P-1 and Ex.P-2.

13. From the pleadings of the parties, following issues were framed:

ISSUES

- 1. Whether there is any cause of action against the defendant?
OPP.**
- 2. Whether the suit is barred u/s 41 of The Specific Relief Act?
OPD**
- 3. Whether plaintiff is entitled to a decree of permanent injunction restraining the defendant from selling portion over the second floor of property no. M-88, G.K.-I, N.D.? OPP**
- 4. Whether plaintiff is entitled to a decree of permanent injunction restraining the defendant from obstruction in accessing the ground floor of suit property through the common side entrance? OPP**

5. Whether the plaintiff is entitled to a decree of mandatory injunction directing the defendant to raise additional construction of the staircase over the third floor of property floor No. M -88, G.K.-I, N.D.? OPP

6. Relief

14. During plaintiffs' evidence, plaintiff no.1 examined himself as PW-1 and tendered his affidavit as Ex.PW1/A and relied upon the documents Ex.PW1/1 and Mark-A and Mark-B. **During defendant evidence**, defendant examined herself as DW1 and tendered her affidavit Ex.DW1/A.

15. I have heard the Ld. Counsels for the parties and have gone through the record carefully. The issue wise findings of the court are as under:

ISSUE No.1

**Whether there is any cause of action against the defendant?
OPP**

16. The cause of action has to be ascertained from the averments made in the plaint. Plaintiffs are the residents/owners of ground floor of the suit property and defendant is the owner and occupant of the first floor and above in the same property. As per plaint, the Sale Deeds executed by the defendant in favour of plaintiffs Ex.P-1 and Ex.P-2 provide clauses 7 and 8 as per which the defendant shall not sell or make

any construction over and above the second floor. Plaintiff has sought the injunction against the defendant to restrain the defendant from creating any third party interest over and above the second floor of the suit property and to also restrain the defendant from erecting any structure over and above the suit property. Plaintiff has also sought access to their property at the ground floor by the user of common side entrance through the passage through the drive way by relying on clause 3 of the Sale Deeds. They also sought the mandatory injunction to direct the defendant to provide smooth and free access to the plaintiffs through the existing common staircase to the water tank situated on the terrace of the second floor in the main premises by relying on clause 12 and 13 of the two Sale Deeds. Not only that, plaintiff has sought the additional construction of the staircase over the third floor of the servant quarter in order to provide smooth and free access to the plaintiffs to their water tank situated at the roof. From the averment in the plaint, it is clear that if the claim of the plaintiff remains un rebutted and uncontested, the plaintiffs are likely to succeed in the suit in a substantial manner. Therefore, it cannot be said that there is no cause of action. The plaint discloses a valid cause of action and therefore, this issue is decided against the defendant and in favour of the plaintiffs.

ISSUE No.2

Whether the suit is barred u/s 41 of The Specific Relief Act?

OPD

17. Ld. Counsel for the defendant had argued that plaintiff ought to have filed the suit for specific performance of the contract as the plaintiffs want to enforce the clause 3 of the two Sale Deeds. He argued that since the plaintiffs have claimed the creation of a right to access the ground floor by the user of common side entrance through the passage to the drive way on account of construction of the second floor by the defendant, the plaintiffs ought to have filed the suit for specific performance of contract and had equally efficacious alternative remedy and therefore, he argued that by virtue of Section 41 (h) of The Specific Relief Act when equally efficacious remedy can be obtained by any other usual mode, the injunction ought not to be granted.

18. On the other hand, Ld. Counsel for plaintiff had argued that suit for specific performance of contract is required to be filed only when there is an agreement to sell between the parties and not where there is already validly registered Sale Deeds executed between the parties. He argued that plaintiffs simply want the defendant to remove obstruction created by the defendant to enable the plaintiffs to access the ground floor of the suit property through common side entrance through the passage to the drive way by invoking the clause 3 of the Sale Deeds.

19. In my considered opinion, specific performance of a contract warrants reciprocal obligations whereas in the present case, plaintiffs merely seek direction to defendant to remove the obstruction/ locks put by the defendant on the door in the common side entrance leading through the drive way to the ground floor of the suit property. In my considered opinion, the case of the plaintiffs does not fall within any of the categories as specified in Section 15 of which provides for the cases as to who may obtain specific performance and no requirement are to be fulfilled as warranted u/s 16 of The Specific Relief Act. In my considered opinion, the appropriate remedy for the plaintiff is the suit for injunction which they have rightly invoked. Therefore, this issue is decided in favour of the plaintiffs and against the defendant.

ISSUE No.3

Whether plaintiff is entitled to a decree of permanent injunction restraining the defendant from selling portion over the second floor of property no. M-88, G.K.-I, N.D.? OPP

20. The plaintiffs have relied upon clause 7 and 8 of both the Sale Deeds. Clause 7 and 8 of the Sale Deeds clearly reflect that both the parties had agreed that no construction or sale shall be made over and above the second floor. Ld. Counsel for defendant had argued that defendant has no intention to create any construction over and above the second floor of the suit property. Therefore, to balance the equities and to

honor the commitments given by the parties to each other and to enable the plaintiffs to enjoy their own property, the plaintiffs are entitled to the injunction to the effect to restrain the defendant from erecting any structure over and above the second floor of the suit property. Further, the defendant is restrained from selling the portion over and above the second floor of the suit property. However, it is clarified that these two restrictions have to be strictly construed and are against the defendant in person and cannot be construed so as to bound the property in perpetuity. Any condition which creates a bar on the transfer of an immovable property in perpetuity can't stand the test of legal scrutiny and is against public policy. Therefore, to that extent, defendant in person is restrained from raising construction or selling the portion over and above the second floor of the suit property during her lifetime. Therefore, this issue is accordingly disposed off.

ISSUE No.4

Whether plaintiff is entitled to a decree of permanent injunction restraining the defendant from obstruction in accessing the ground floor of suit property through the common side entrance? OPP

21. This is the main issue argued by both the counsels. The two Sale Deeds Ex.P-1 and Ex.P-2 are not in dispute by virtue of which the ground floor (in two portions) was sold by the defendant in favour of the plaintiffs. Ex. PW-1/DC, Ex.PW-1/DB and Ex.PW-1/DD are the three

site plans pertaining to the two portions of the ground floor which are admittedly part of the two Sale Deeds Ex.P-1 and Ex.P-2. Perusal of the site plan Ex.PW-1/DC reflects that there is a portion marked with blue which is backside portion of the ground floor. This portion specifically do not cover the passage leading to the staircase leading towards the first floor and above. Similarly, the site plan Ex.PW-1/DB which refers to the front portion of the ground floor of the suit property specifically excludes the same passage. These 3 site plans bear certain colour markings which are not disputed by either of the parties. Ld. counsel for the defendant had argued that these site plans were deliberately not filed by the plaintiffs as it made the picture clear and reflects the intention of the parties that the parties never intended to include the said portion SXYT which is the passage leading to the staircase towards the first floor and the same portion was not even sold to the plaintiffs. He further argued that PW-1 Sh. Anil Seth during his cross examination had admitted that the portion SXYT is the only way to the first and second floor owned and possessed by the defendant. He further argued that during his cross examination, PW-1 had admitted that there are three entrances to the ground floor i.e. two from the front side portion and one from the backside. It is argued that it was not the intention of the parties to allow the plaintiffs to have access to the ground floor of the suit property through passage from the drive way leading to the common entrance during the

period the defendant remained in exclusive possession of the portions above the ground floor and to give effect to this intention of the parties, clause 3 was added in both the Sale Deeds. Ld. Counsel for the defendant further argued that PW-1 during his cross examination had admitted that first and second floor are being used for the purposes of residence of defendant and her two sons and their families. He argued that the plaintiff had admitted during cross examination that there has been no construction on the terrace of the second floor ever since January 2000 till date. He argued that the clause 3 of the Sale Deeds has to be interpreted by keeping in mind the intention of the parties which was that so long as the defendants are occupying first floor and above and do not allow any third person to have access thereto, the plaintiffs shall not have any right to have access to the ground floor through the common passage through the drive way.

22. Ld. Counsel for defendant further argued that defendant DW-1 during her cross examination had stated that second floor of the property was built somewhere in the year 1998 and the PW-1 during his cross examination had admitted that there was no written communication from their side with regard to his claim of SXYT. He submits that the earlier suit filed by the plaintiffs was dismissed in default on 03.03.2004 and even the restoration application was dismissed. He argued that the present suit was filed on 04.05.2011 is barred by limitation as the case of

the plaintiff falls under Article 104 and Article 113 of The Limitation Act. He further argued that defendant was ready to give undertaking that he shall not construct or sell the property over and above the second floor of the suit property and the defendant has no intention to sell the same.

23. On the other hand, Ld. Counsel for the plaintiff has argued that clause 3 of both the Sale Deeds specifically uses the word “construct” in the 4th line and the defendant having constructed the second floor in the year 1998, the plaintiffs got a right to have access to the main premises by the user of common side entrance through the passage to the drive way. He argued that it is a continuing cause of action as the right of the plaintiffs is being affected continuously every time the defendant commits breach thereof and the plaintiffs are denied access to the said passage and it is a continuous wrong by virtue of section 22 of The Limitation Act and being so there is no limitation and the suit filed by the plaintiffs is within limitation and on account of violation of the clause 3 of the sale deeds by the defendant, the plaintiffs are entitled to the injunction prayed for.

24. **Clause 3** is reproduced which is as under:

That the VENDEES shall be entitled to have a right of access to the main PREMISES by the user of common side entrance through the passage to the drive way only in case the VENDOR sells her

portion of the PROPERTY or constructs or sells the roof rights to first floor or lets out the first floor or second floor after construction thereon.” (emphasis supplied.)

25. In my considered opinion, clause 3 of both the Sale Deeds is to be read in a meaningful way so as to give effect to the intention of both the parties. The contention of Ld. Counsel for plaintiffs is that the use of word “constructs” in the 4th line refers to the construction of the roof of the first floor and the word “constructs” has to be read in conjunction with the roof of the first floor. In my considered opinion, this is erroneous interpretation of clause 3. If every word in a clause has to be given its natural meaning, it has to be read as such, no addition or alteration need to be brought in. The word “constructs” in 4th line do not specify as to what is the type of construction and as to which area or portion it pertains to. The “constructs” can be read in conjunction with next word i.e. “constructs” or “sells the roof rights to the first floor”. There is never any construction of the rights. Construction is always of the floor and not of rights. Therefore, taking the plain and natural meaning, the word “constructs” cannot be interpreted so as to read the construction of the first floor.

26. Had that been the case, the word “lets out” the first floor or second floor after construction there would have become otiose. If the mere construction of the second floor would have enabled the plaintiffs

to invoke clause 3, there was no necessity to write the word “*lets out the first floor or second floor after construction thereof*”. Otherwise, because the very moment the construction was raised on the second floor, the right would have come into operation but that was not the intention of the parties. Hence there was elaboration of the same by specifically providing the “lets out the first floor or second floor after construction thereof.” As observed above, the two site plans which are part of the sale deeds Ex P-1 and Ex P-2 specifically exclude this portion i.e. passage leading to the staircase for the first floor out of the purview of the Sale Deeds.

27. Further, the testimony of PW-1 clearly reflects that the portion Mark SXYT is the only way to the first and second floor owned and possessed by the defendant. PW-1 also admitted that first and second floor are being used for the purposes of residence of defendant and her two sons and their families. Further, clause 7 and 8 of the Sale Deeds specifically stipulates that no construction shall be made over and above second floor. From the evidence, it is clear that the intention of both the parties to bring this clause 3 into existence was to give exclusivity to the defendant during the time the defendants are occupying the first floor or above in the suit property as the said passage is the only passage leading to the first floor and above of the suit property. It is for this reason that the clause 3 was worded in such a manner that plaintiffs would be enti-

tled to have access to the user of common side entrance through the passage to the drive way only when the defendant sells her portion or sells the roof right of the first floor or lets out the first floor or second floor being reconstruction. The word “constructs” in the 4th line of the clause 3 has to be read ‘ejusdem generis’ and it must reflect the intention of the parties. In my considered opinion, the clause 3 as on date does not give any right to the plaintiffs to seek the injunction so as to allow them to use the common side entrance through the passage to the drive way.

28. In view of the above, once the right has not accrued to the plaintiffs, no question arises of any breach thereof and no question arises of any limitation. Therefore, this issue is decided against the plaintiff and in favour of the defendant.

ISSUE No.5

Whether the plaintiff is entitled to a decree of mandatory injunction directing the defendant to raise additional construction of the staircase over the third floor of property floor No. M -88, G.K.-I, N.D.? OPP

29. At the time of final arguments, Ld. Counsel for plaintiff on 27.09.2013 stated before the Ld. Predecessor of this court that plaintiffs do not wish to press for prayer clause “c”. The prayer clause “c” in the suit reflects that plaintiff has sought the relief as in present issue. Even otherwise, no arguments were led by any of the counsels in this regard as the main bone of contention between the parties was the door leading

through the common passage through drive way. In view of the same, this issue is decided against the plaintiffs and in favour of the defendant.

RELIEF:

30. In view of the above, the suit of the plaintiff is partly decreed and the defendant in person is restrained from raising construction or selling the portion over and above the second floor of the suit property during her lifetime. Costs of the suit are also awarded to the plaintiffs. Decree sheet be prepared.

File be consigned to Record Room.

**(Announced in open
Court on 28.02.2019)**

**(Munish Markan)
Additional District Judge-01
(South) Saket District Courts,
New Delhi**