

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RSA No.243/2017**

% **16th October, 2017**

RAJENDRA MOTWANI & ANR. Appellants

Through: Mr. A.K. Shrivastava, Senior
Advocate with Mr. Uchit
Bhandari, Advocate and Mr.
Divyakant Lahoti, Advocate.

versus

MCD & ORS. Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

C.M. No.37263/2017 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

RSA No.243/2017

2. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiffs in the suit impugning the concurrent judgments of the courts below; of the Trial Court dated 18.5.2016 and the First Appellate Court dated 6.7.2017; by which the suit filed by the appellants/plaintiffs for

restraining the defendant nos. 3, 4, 6 and 7(contesting defendants) from raising any illegal construction in their property no. A-I/32, Janakpuri, New Delhi has been dismissed. The relief clause of the plaint reads as under:-

- “1. Grant permanent injunction in favour of the plaintiff and against the defendants restraining them from raising any illegal construction in and/or divide, property number A-I/32, Janakpuri, New Delhi.
2. Grant Mandatory injunction in favour of the plaintiff, directing the defendants to remove the illegally raised wall shown in Annexure A and any other illegal construction in the drive way in the site plan which is required to be left vacant.
3. Cost of the suit be awarded to the plaintiff against the defendants.
4. Any other further relief, which this Hon'ble court deem fit and proper in the circumstances of the case, be awarded to the plaintiff and against the defendants.”

3. It is seen that the dispute between the parties is as regards illegal construction i.e as to whether the contesting defendants had to leave the side setback of three meters and by not leaving such side setback there is illegal construction by the contesting defendants in their property. In this regard, the appellants/plaintiffs placed reliance upon Clause 4.4.3 of the Master Plan of Delhi 2021 as per which if the side setback has to be reduced, it can only be reduced with respect to the side setback provided in the previous category of the plot size in the chart in Clause 4.4.3. It is argued that previous category of the plot size is having side setbacks again of some three meters and

therefore the contesting defendants had to maintain the side setback of three meters which they have not.

4. The courts below in their judgments have held that admittedly as per Clause 4.4.3 of MPD 2021 ground coverage i.e constructed area was permissible upto 75% of the plot area; the contesting defendants got regularization of their compoundable construction by paying regularization charges of Rs.7,03,320/- and MCD in this regard had issued the letter Ex.D3W1/2 dated 29.3.2007 for regularization of the construction existing in the property of the contesting defendants. In para 27 of the impugned judgment, the first appellate court has crystallized the issue as to whether the contesting defendants could not have covered the side setback area of three meters on side-1 of their own property. The first appellate court also notes that the appellants/plaintiffs have led no evidence as to how regularization granted by MPD 2021 was not in accordance with the rules and procedures or there was contravention of MPD 2021.

5. Learned senior counsel for the appellants/plaintiffs has relied upon the chart in Clause 4.4.3 of the MPD 2021 and this chart reads as under:-

“

S. No.	Plot Size (in sq.m)	Minimum setbacks (in meters)			
		Front	Rear	Side (1)	Side (2)
1.	Below 100	0	0	0	0
2.	Above 100 and upto 250	3	0	0	0
3.	Above 250 and upto 500	3	3	3	0
4.	Above 500 and upto 2000	6	3	3	3
5.	Above 2000 and upto 10,000	9	6	6	6
6.	Above 10,000	15	9	9	9

On the basis of this chart existing in Clause 4.4.3 of MPD 2021 it is argued that since the size of the plot of the contesting defendants is about 666 sq. meters therefore this plot will fall in the serial/category 4 and prior category thereof being at Serial no.3 in the chart which also requires side setback of three meters and therefore the contesting defendants have committed an illegality by not leaving any side setback.

6. In my opinion the arguments urged on behalf of the appellants/plaintiffs have to be rejected for two reasons.

7. The first reason is that when MPD 2021 as per its Clause 4.4.3 requires a previous category then obviously previous category will become the category at serial no.3. As per this previous category

at serial no.3 whereas the front and rear setbacks remain the same, however one side setback can be reduced up to zero as seen in the last/sixth vertical column. It is not the case of the appellants/plaintiffs that both the side setbacks have been covered completely and therefore the construction is illegal and could not be regularized. Obviously, therefore the contesting defendants would have only covered one side setback completely with, the wall of the property of the contesting defendants being attached to and adjoining to the construction of the appellants/plaintiffs and which is permissible as one side setback can be zero in terms of the chart in Clause 4.4.3. It is not the case of the appellants/plaintiffs in any of the courts below or even this Court that both the side setbacks of the property of the contesting defendants have been completely covered by their being no side setback at all for both the sides of the property. Therefore once regularization of the compoundable construction is permissible so that construction can be 75%, and once one side setback can be zero, hence there is no need of leaving a side setback at all at one side of the property of the contesting defendants and which adjoins the property of the appellants/plaintiffs. There is thus no illegality in the

MCD/defendant no.1/respondent no.1 regularizing the construction of the contesting defendants in terms of their letter dated 29.3.2007 proved as Ex.D3W1/2. After all there is no dispute that the contesting defendants have exceeded the 75% coverage which is permissible.

8. The second reason for rejecting the argument urged on behalf of the appellants/plaintiffs is that an illegal construction in itself does not give any legal right to a neighbor. An illegal construction always no doubt gives *locus standi* to the local municipal authorities to seek removal of the illegal construction, but, a right of a neighbor only arises if the legal rights of light and air or any other legal right is affected by virtue of the illegal construction of the neighbor. Legal right to light and air is only in terms of Section 15 of the Easements Act, 1882 which requires a cause of action to be laid out and proved that right to light and air has been enjoyed for 20 years and only on completion of 20 years there is a right to acquisition by prescription in the easementary rights. It is relevant to note that even after acquisition of easementary rights of prescription, yet, right to injunction for a neighbor is not absolute and is covered by Section 33 of the Easements Act which requires that disturbance to the easementary

rights must actually cause substantial damage to a neighbor and the infraction materially diminishes the value of the dominant heritage with the fact that there is material interference in the physical comfort of the neighbor of living in his own house or prevents the neighbor from carrying on his accustomed business in the dominant heritage/his own house. All these are factual aspects and admittedly there is no cause of action which is laid out in the plaint in terms of Sections 15 and 33 of the Easements Act that right to easement of the appellants/plaintiffs has become absolute as it has been enjoyed for 20 years and that in fact after rights to easement are acquired by prescription there is also a substantial damage to the appellants/plaintiffs or there is material interference in the physical comfort of the appellants/plaintiffs or the appellants/plaintiffs being prevented from carrying on his accustomed business in their own dominant heritage/own property.

9. Some of the relevant paras of the judgment of the first appellate court which rightly reject the arguments of the appellants/plaintiffs are paras 12 to 16, 20, 21, 26 to 28, 31,32, 37, 38 and 40, and these paras read as under:-

“12. It is further submitted that it was necessary for the Defendants to leave the setback of 3 meters on the side-1 of the property i.e. the side with the garage block, which adjoins plots of Plaintiff. It is submitted that the building plan permitting the said construction is void ab initio. In this regard, reliance was placed on the judgment of Hon'ble Apex Court titled as **K. Ramdas Shenoy Vs Chief Officer, Town Municipal Council (Supra)**.

13. The next contention of the Appellant is that MCD could not have regularized the construction raised by the Defendants on side-1 inasmuch as such violations cannot be compounded. In this regard, reliance was again placed on the judgment of **K. Ramdas Shenoy Vs Town Municipal Council, Udipi (Supra)** and **Royal Paradise Hotel P. Ltd. Vs State of Haryana; (2006) 7 SCC 597**.

14. It is further submitted that as per Ex. D1W1/X-3, the deviations which are not compoundable have been classified which includes setback and open space. Ld. Counsel for Appellant vehemently argued that there is sufficient evidence on record including report of Ld. Local Commissioner to establish that unauthorized construction was raised by Defendants on side -1 and that MCD could not regularize the same.

15. It is further submitted that as per the Master Plan 2021, which came into force w.e.f. 07.2.2017, the built up area can be to the extent of 75%. It was, however, mentioned that as per Clause 4.4.3 (x) minimum set back shall be as under:-

S. No.	Plot Size (in sq.m)	Minimum setbacks (in meters)			
		Front	Rear	Side (1)	Side (2)
1.	Below 100	0	0	0	0
2.	Above 100 and upto 250	3	0	0	0
3.	Above 250 and upto 500	3	3	3	0
4.	Above 500 and upto 2000	6	3	3	3
5.	Above 2000 and upto 10,000	9	6	6	6
6.	Above 10,000	15	9	9	9

16. It is submitted that it is the case of the Defendant that they can cover upto 75% of the plot area. However, they can do so provided they maintain the minimum setbacks. For category between 500 to 2000 sq. meters, the set back in the front is 6 meters and thus, the Defendants could have raised to the extent 75% area only after leaving setback. It is submitted that the MCD, in breach of the Master Plan, permitted regularization of construction on side-1 where 3 meter area was required to be left open. This can be calculated by taking into consideration the individual rooms. The permissible coverage area is 499.5 sq. meters but MCD while sanctioning the plan on 29.03.2007 has gone beyond the

permissible limit as indicated in the Master Plan i.e. requirement of leaving setback of 03 meters on side-1.

20. During the pendency of the suit, certain construction was demolished by the MCD and after which Master Plan of Delhi 2021 came into force. As per the new Building Bye-Laws, ground coverage was permissible upto 75% of the plot area, as per Clause 4.4.3 of the Master Plan 2021. It is further submitted that as per Clause 4.4.3, in case permissible coverage is not achieved with the given setback, as provided in the table, then setback may be allowed in the previous category as per the setback table till permissible ground coverage of 75% is made available to the Respondents.

21. Accordingly, the Respondents got regularized their constructions in the suit property, upon payment of requisite regularization charges of Rs. 7,03,320/- and upon submitting the necessary documents, as per the public notice issued by MCD on the directions of Hon'ble Supreme Court. The said public notice is Ex. D3W1/P1. The MCD issued letter Ex. D3W1/2 regarding regularization of the property on 29.03.2007.

26. It is further the contention of the Respondent that Ld. Trial Court also rightly observed that Plaintiff/Appellant failed to prove as to how the flow of air and light has been affected by aforesaid construction, and thus the Appeal, being devoid of merits is liable to be dismissed.

27. Having considered the aforesaid submissions, it is apparent that the parties are not at dispute with regard to extent of construction and the applicability of relevant Bye-Laws. The only question raised by the Appellant is that Respondents could not have covered the setback area of 3 meters on side-1 and the MCD could not have regularized the said unauthorized construction.

28. Before considering the construction with regard to challenge to Bye-Laws and the correctness of the regularization done by the MCD, it would be necessary in my view, to consider as to whether Appellant/Plaintiff was able to establish in the first place that he was in fact aggrieved by the act of the Respondents of raising the aforesaid construction.

31. Appellant/Plaintiff has also filed site plan Ex. PW2/B wherein his property i.e. property bearing No. A-1/32, Janak Puri, New Delhi is indicated in green colour and the adjoining property belonging to Respondent No. 3, 4, 6 and 7 is indicated in red colour. It is noteworthy that during the entire length of trial, the Plaintiff/Appellant failed to show as to whether there is any opening of any door or window of his property towards the side of the property of the Respondents or that due to the construction of the boundary wall by the Respondents, the air and light cannot now reach his property or that his property has become dark and un-useable.

32. On the contrary, the site plan Ex. PW2/B filed by the Plaintiff himself clearly shows that Plaintiff has left an open space on his plot towards the side property of the Respondents. Undoubtedly, the said open space has been left only for the purpose of free flow of air and light to his property.

37. However, as discussed above, the present Appellant failed to prove that his right to flow of air and light was invaded or affected by raising of the wall by the Respondent, in any manner. It must be borne in mind that the Plaintiff/Appellant filed the present suit contending inter alia that it is his right to flow of light and air to his property which is affected by the construction raised by the above named Respondents, which contention he failed to prove, as discussed herein above.

38. In so far as the question of regularization is concerned, Plaintiff's own witness namely PW7 Sh. V. K. Bagga deposed in his cross-examination that setback prescribed in MP-2021 are to be followed. He further deposed that for plots ranging from 250 to 750 sq. meters, the maximum ground coverage prescribed in the master plan is 75% and if the ground coverage is not achieved then the setbacks of the preceding category may be followed.

40. Ld. Trial Court after having considered the evidence on record rightly concluded that there is no evidence to establish that regularization granted by the MCD was not in accordance with rules and procedure or that it was in contravention of MP-2021. Ld. Trial Court also considered the testimony of PW9 Sh. Naveen Garg, who proved copy of licence granted to Sh. Q. L. Dua who issued structural suitability certificate in respect of suit property. It is submitted by the Respondents that Sh. Q. L. Dua neither signed nor submitted regularization plan and has only granted structural certificate to the licence. Ex. PW1/9 shows that there is no bar for issuance of structural certificate by the said structural engineer. The letter Ex. PW7/1 dated 26.05.2006 relied upon by the Appellant does not come to the aid of the Appellant, inasmuch as that information was given prior to come into force of the building bye-laws MP-2021 and PW7 Sh. V. K. Bagga himself deposed that Defendant can merge the garage block with the main building as per clause 4.4.3.” (underlining added)

10. In view of the above discussion I do not find any illegality or perversity in the judgment of the courts below. No substantial question of law arises. Dismissed.

OCTOBER 16, 2017/ Ne

VALMIKI J. MEHTA, J