

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

+ **RFA 10/2009**

% **Date of Decision: 30th January, 2009**

JYOTI KUMAR Appellant
! **Through: Mr. Sanjeev Anand and Ms. Kajal Chandra, Advocates**
versus

\$ **DR. P.K. TALWAR** Respondent
^ **Through: Mr. Varun Tyagi, Advocate**

* **CORAM:**
HON'BLE MR. JUSTICE P.K. BHASIN

1. Whether Reporters of local papers may be allowed to see the judgment?(No)
2. To be referred to the Reporter or not?(No)
3. Whether the judgment should be reported in the digest?(No)

JUDGMENT(ORAL)

P.K.BHASIN:

This is an appeal against the order and decree dated 15th October, 2008 passed by the learned Additional District Judge, Delhi in Suit No. 98/2004 filed by the appellant-plaintiff for permanent injunction whereby the suit was dismissed.

2. The relevant facts are that the plaintiff claiming herself to be the owner of an area measuring 100 sq. feet of open back courtyard of property no. E-34, Greater Kailash, Part- 1, New Delhi having purchased the same from the owner of the said property by a registered sale deed dated 6.4.1996 filed a suit for permanent injunction against the respondent-defendant on the allegations that he had purchased a part of the basement in the aforesaid property on the rear side and was threatening to break the wall of the toilet connected with his basement in order to use the back courtyard of which the appellant-plaintiff was the exclusive owner. In the plaint, a prayer was made for passing of a decree of permanent injunction restraining the respondent-defendant from entering the back courtyard. The respondent-defendant contested the suit by filing a written statement. While not disputing the fact that the appellant-plaintiff had purchased the back side courtyard of property no. E-34 claimed that since the original owner of plot no. E-34 had got constructed several flats through a builder the provisions of the Delhi Apartment Ownership Act, 1986 became applicable in respect of different apartments. It was further pleaded that as per law the so called rear side

backyard which the plaintiff claimed to have purchased was in fact open “setback” area which is required to be left open in front as well as in the rear side of a building and every apartment owner has an undivided interest in that area as per Section 4(3) of the aforesaid Act of 1986 and consequently the sale deed in respect of that area relied upon by the plaintiff was void being contrary to the provisions of the Delhi Apartment Ownership Act. Thus, according to the respondent defendant the suit filed by the appellant-plaintiff was not maintainable.

3. On the afore said pleadings of the parties the learned Trial Judge framed the following two issues only vide order dated 17.11.2006:

1. Whether provisions of Delhi Apartment Ownership Act, 1986 prohibited the plaintiff from purchasing common area of the suit premises? OPP
2. Whether the plaintiff is entitled to the injunction as sought? OPP
3. Relief.

4. Thereafter the case was adjourned five times for the plaintiff’s evidence but no evidence was adduced. Finally vide

impugned order dated 15.10.2008 the learned trial Court after declining to grant any further adjournment to the plaintiff closed plaintiff's evidence and then after observing that since there was no evidence adduced by the plaintiff in support of her case and there was no admission made by the defendant dismissed the suit. Feeling aggrieved the present appeal was filed by the appellant-plaintiff.

5. The only grievance urged by the learned counsel for the appellant is that only two issues were framed by the learned trial Court and the same were purely legal in nature and, therefore, despite the fact that the appellant-plaintiff had failed to adduce any evidence, for which he had been, no doubt, granted adjournments, the suit could not have been straightaway dismissed in the manner it has been done by the learned trial Judge. Learned counsel submitted that the issues framed being purely legal in nature, the learned trial Judge was obliged to give his findings on those legal issues after giving an opportunity to the parties to advance arguments but that was not done and there could be no summary rejection of the suit without giving an

opportunity of hearing to the parties. It has been further contended that although in the present appeal the appellant has sought one more opportunity for adducing evidence but that opportunity is now not being pressed since in the counter suit filed by the respondent herein in respect of the same property which was the subject matter of the present suit and in which a declaration has been sought that the sale deed in favour of the present appellant in respect of the back side courtyard was void, the same very legal issue, namely, whether the area which is being claimed to be a “setback” area could not be sold to the present appellant is still pending decision. Learned counsel also submitted that in fact both the suits were to be consolidated and disposed of together and that is evident from different proceedings recorded in the suit but no formal order to that effect was passed. Learned counsel further submitted that now all that the appellant is praying to this Court is to afford an opportunity to at least advance arguments on the legal issues framed in the matter since appellant is quite sure that even without adducing any evidence he has a very good case to succeed and, therefore, he would restrict his prayer in this appeal to the matter being

remanded back to the trial Court with a direction to hear argument from both the sides and then to dispose of the suit in accordance with law.

6. Learned counsel for the respondent-defendant submits that if the opportunity of adducing evidence is not being claimed now by the appellant and is only seeking an opportunity to address arguments on the issues framed in the suit he has no objection to this appeal being disposed of by giving him the afore-said relief and sending the matter back to the trial Court for passing of the judgment after hearing arguments from both the sides.

7. In view of the afore-said, this appeal is allowed in part. The impugned order dated 15th October, 2008 as well as the decree drawn pursuant thereto are set aside and the matter is remanded back with a direction to the trial Court to give its findings issue-wise and then to pass a final judgment after hearing the arguments from both the sides.

8. The parties shall appear before the trial Court on 12th

February, 2009, on which date the suit filed by the respondent herein is stated to be coming up.

JANUARY 30, 2009
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P.K. BHASIN,J