Anil Sen Gupta Alias Anil Kr. Sen

Vs

Dhirendra Nath Basak (Deceased) By Lrs. and Others

Civil Appeal No. 2692 of 1979

(M. M. Punchhi, K. S. Paripoornan JJ)

28.02.1996

ORDER

1. This appeal by special leave is against the judgment and decree dated 8-9-1978 of the Calcutta High Court in appeal from Appellate Decree No. 227 of 1968.

2. The parties herein respectively purchased two sites from a cooperative society and in their respective deeds of transfer there was an identical restrictive covenant to the following effect :

> "To construct his building at least 10 feet off from the road constructed by the landlord and which is at least 15 feet in width and to keep at least 8 feet of land open on each side of the premises and to 10 feet land open on the back and altogether to keep at least on behalf (sic one half) of the demised premises open at all times from any structures thereon and not to plant any tree from which timber may be made in the space reserved as open on the four sides of demised land."

3. The above restrictive covenant was claimed by the respondents to have been superimposed and invalidated by Rule 40 relating to the "use of building sites and the execution of building work" contained in Schedule VI of the Bengal Municipal Act, 1932 which provides, inter alia, that if either side of a domestic building is not attached to the adjacent building, and if such side does not abut on a public square or street which is not less than 4 feet (later by amendment of the West Bengal Act 51 of 1980, substituted by 1.83 metres), there shall be between the buildings an open space extending along the entire length of such side and forming part of the said domestic building. The respondents claimed that as adjacent owners to the site of the appellants, they had a right to construct their building leaving the rule-provided width from the boundary line, being no longer bound by the restrictive covenant. Since the plaintiff-appellant disputed that claim of the respondents, he went therefore to the trial court for adjudication. The trial court granted a decree in favour of the plaintiff-appellant as prayed for, predominating the restrictive covenant. But the High Court, on appeal, took the view that since Rule 40 aforementioned was statutory and the restrictive covenant merely personal, the law should prevail and, therefore, the defendant-respondents were held to have been absolved from observing the restrictive covenant. This has given rise to this appeal.

4. In our view, the High Court was patently wrong in putting forth Rule 40 against the plaintiff-appellant. That provision only prescribes the minimum distance which need be kept on each side of the site calculable from the boundary line - the limit now fixed for the purpose being 1.83 metres as substituted. The building cannot extend to cover up the minimum distance to be kept from the boundary line. Nowhere does the provision take away the right of the parties to strike a personal covenant restricting a space limit more than 1.83 metres width. In that event there could be no

violation of law. If the parties had clearly purchased the adjacent sites from the cooperative society with identical restrictive covenants, both were bound to leave the stipulated distance from the respective boundaries under their personal covenants - the observance of which in no way is violative of the provision of Rule 40.

5. For the view taken above, we upset the impugned orders of the High Court and restore that of the trial court, restoring the decree of declaration as obtained by the plaintiff-appellant. The appeal is allowed accordingly. There shall be no order as to costs.