

Aman Nath Vs. Atul Nath and ors

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Court : Delhi

Decided On : Mar-28-2014

Judge : G. S. Sistani

Appellant : Aman Nath

Respondent : Atul Nath and ors

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment Reserved on :

11. h March, 2014 Judgment Pronounced on :

28. h March, 2014 % + CS(OS) 2250/2013 AMAN NATH Through : Plaintiff Ms.Shobhana Takiar, Adv. versus ATUL NATH AND ORS Through : Defendants Mr.Sandeep Sethi, Sr. Adv. with Mr.Salman Hashmi and Mr.Zeeshan Hashmi, Advs. along with Mr.Ashish Nath, son of defendant no.1. CORAM: HON'BLE MR. JUSTICE G.S.SISTANI G.S. SISTANI, J.

IA.No.18453/2013 (u/O.39 Rs=1 & 2 CPC filed by plaintiff) IA.No.18860/2013 (u/O.39 R=4 CPC filed by defendant no.1) 1. A mother forgets the pain she suffers at childs birth, the moment she hears the cries and sees the face of her child. A mothers sleepless nights and countless sacrifices are not uncommon for her children. Smt.Sheela Ashok Nath gave birth to four children (three sons and one daughter). This mother even on her death has given a share of her property to each of her four children, in a residential house worth crores of rupees. In a wildest

of her dreams she would not have expected that her dead body would lie in the Veranda of her own house and would not be placed in her living room which was locked on account of inter se disputes between her children.

2. This order shall dispose of IA No.18453/2013 & IA No.18860/2013.

3. Plaintiff has filed the present suit for injunction. Plaintiff is the brother of defendants no.1 to 3. Defendant no.4 is the maternal uncle of the plaintiff i.e. plaintiff's mother's brother. Plaintiff and defendants no.1 to 3 are the children of late Sh.Ashok Nath and Smt.Sheela Ashok Nath (hereinafter referred to as the mother). Smt.Sheela Ashok Nath died on 17.11.2013. The mother executed a Will dated 24.4.2009, which was presented before the Sub-Registrar-V, Delhi for registration on 27.4.2009. The Will was registered vide registration No.2630 in additional book no.3, volume no.1716 on pages 5 to 10 on 28.4.2009. The defendant no.4 has been named as the executor of the Will. Further as per the plaint, the immovable property bearing No.A-51, Nizamuddin East, New Delhi (hereinafter referred to as the suit property), which consists of ground floor, first floor and the second floor has been bequeathed in the following manner: Ground Floor First Floor Second Floor Terrace of Second floor Mr.Aman Nath (Plaintiff) Mr.Atul Nath (Defendant no.1) Mr.Achal Nath (Defendant No.2) Mr.Achal Nath and Smt.Anshu Chopra (Defendant No.2 and Defendant no.3) If and when Constructed third floor Smt.Anshu Chopra (Defendant No.3) Third floor terrace (after Mr.Achal Nath and Smt.Anshu construction of third floor) Chopra (Defendant No.2 and Defendant no.3) Front & Back garden Common area between Aman Nath and Mr.Atul Nath (Plaintiff and Defendant No.1) Access to their respective portion From the front and rear stair case.

4. The Will is yet to be accepted by all the parties.

5. It is further stated in the plaint that at present the property comprises of ground floor (including a store-room in the basement), first floor and the second floor. The suit property was initially owned by the father of the plaintiff and defendants no.1 to 3, who expired on 6.1.1994, leaving behind a Will dated 15.9.1988 by which he bequeathed the suit property to his wife. A probate was granted with respect to the aforesaid Will on 8.7.1995. The matter remained uncontested. Consequent to the

grant of probate, the name of Smt. Sheela Ashok Nath was substituted in the records of the Land and Development Officer on 5.12.1996; the property was also got mutated in her name in the records of Municipal Corporation of Delhi on 29.1.1997 and pursuant to the mutation house tax was being paid by her. Further as per the plaint during the life-time of the mother, the plaintiff along with his daughter (Aadya Nath) was and is in occupation and possession of the entire ground floor of the suit property. The plaintiff along with defendant no.2 was taking care of their ailing mother and serving her. The defendant no.1 was and is in possession of the first floor, and he was allowed to use one kitchen on the ground floor by the deceased mother. The defendant no.2 was and is in possession of the second floor.

6. It is the case of the plaintiff that since the contents of the Will were known to all the parties, they were occupying their respective portions in the suit property and plaintiff, defendants no.1 and 2 had given effect to the Will, even during the life-time of their mother. An averment has also been made in the plaint that when the health of the mother started deteriorating and since the plaintiff was running between the hospital and the house, the defendant no.1 with ulterior motives and mala fide intentions unauthorizedly started using the living room on the ground floor. In order to maintain peace and to avoid mental agony or tension to the mother, the plaintiff tolerated the mala fide activities of the defendant no.1. However, an apprehension had started to build up in the mind of the plaintiff that after the demise of the mother, the defendant no.1 would deprive the plaintiff by unauthorizedly usurping the living room on the ground floor, in addition to the first floor which he is exclusively enjoying.

7. It is also averred in the plaint that on 17.11.2013 morning, the plaintiff along with the defendant no.2, as usual took some clothes in the morning for their mother who was in the I.C.U. in the Moolchand Hospital. After reaching the hospital, the plaintiff and the Defendant no.2 called up defendant no.1 and others and informed them about the sad demise of their mother and that they would be shortly bringing the body to her house, after completing the hospital formalities. It is also averred in the plaint that when the plaintiff along with defendant no.2 brought the body of their mother back home, to their utter shock, they found the living room on the

ground floor locked. No answer was given by defendant no.1, who admittedly had locked the same. The dead body was put in the Verandah outside the living room, as the defendant no.1 along with his two major sons and wife did not open the living room, however, after one hour and with the intervention of the Police the defendant no.1 was made to open the living room on the ground floor where the body was placed.

8. Apprehending that the defendant no.1 would again try to create disturbance and unauthorizedly make an attempt to occupy the living room, the present suit has been filed.

9. Ms.Shobhna Takiar, counsel for the plaintiff submits that the plaintiff being the beneficiary under the Will and as per the arrangement made during the life time of the mother, has every right to claim the continued free use and occupation of the entire ground floor to the exclusion of the others. It is also contended by Ms.Takiar that the mother was admitted in Mool Chand Khairati Ram Hospital on 14.11.2003 in a critical condition and only the plaintiff, defendant nos.2 and 3 attended to her in hospital. It is also submitted that the defendant no.1 took advantage of the situation. He did not visit the ailing mother in the hospital, and instead made a plan to usurp the ground floor while the plaintiff, defendants No.2 and 3 were busy in attending to the mother round the clock. It is submitted that in furtherance of his evil design, defendant no.1 stole the keys of the living room on the ground floor and when the dead body was brought from the hospital, he locked the same. It is further contended that the mother expired on 17.11.2013. The plaintiff along with defendant Nos.2 and 3 made all necessary arrangements for her last rites. On the same day after the funeral, copy of the registered Will of the mother was duly supplied to the defendant no.1 along with all the other legal heirs of late Smt.Sheela Ashok Nath by defendant no.4, who is the executor of the Will.

10. It is also the case of the plaintiff that he has always been and has remained a permanent resident of the ground floor of the suit property. During the period when his mother was extremely unwell, out of two bed-rooms on the ground floor one bed-room was being used by the mother and another bed-room was being occupied by the nurses.

11. It is also the submission of counsel for the plaintiff that plaintiff along with the entire family has been living in the suit property since the year 1959. The plaintiff being a bachelor continued to live with his mother on the ground floor of the suit property, while the second floor was constructed by the defendant no.2 out of his own funds in the year 1995/96 and defendant no.1 was living on the first floor. In the year 2002 the plaintiff adopted an infant and continued to live on the ground floor with his mother.

12. It has also been submitted by Ms.Takiar that the plaintiff along with defendant nos.2 and 3 continuously looked after their ailing mother including catering to all her medical requirements and bearing all her medical expenses and hospital bills. On the contrary defendant no.1 never cared about his mother, nor did he meet any of her expenses. It is clarified that the suit property is one of the many properties owned by the plaintiff and he has been staying in his own properties from time to time as per his necessity, convenience and suitability. The defendant no.1 also owns various residential properties including two properties in New Friends Colony and one property in Gurgaon. In support of her submission that the plaintiff is a permanent resident of the suit property and in settled possession thereof, reliance is placed on the passport issued since 1972, election card, driving licence since 1988, joint account along with the mother in Central Bank of India and the plaintiff's bank account, all of which reflect the address of the suit property.

13. Attention of the Court is also drawn to some of the documents of other properties purchased by the plaintiff to show the address of the plaintiff as A-51, Nizamuddin East, New Delhi. Besides other documents, Ms.Takiar has drawn attention of the Court to official documents issued in the name of the adopted daughter of the plaintiff, who was raised by the plaintiff and his mother which include the Bus Card issued by the Vasant Valley School, ID card issued by the School, birth certificate issued by the school, passport and Aadhar card and various receipts issued by the professional institutes, all of which bear the address of the suit property.

14. In support of her plea that the dead body of the mother was lying in the Verandah, photographs dated 17.11.2013 have been placed on record.

15. It is also submitted by counsel for the plaintiff that even otherwise each floor of the house has a separate dwelling unit and the plaintiff along with his mother and daughter were residing on the ground floor, defendant no.1 was residing on the first floor and the defendant no.2 was residing on the second floor. It has also been submitted that the first floor of the suit property is a complete dwelling unit and thus the defendant no.1 cannot be permitted to interfere in the possession of the plaintiff on the ground floor including the living room.

16. In the light of the above facts, Ms.Takiar submits that it is clearly established that the plaintiff is in settled possession of the ground floor of the suit property. Besides actual physical possession, he is also in constructive possession, as per the Will dated 24.04.2009. Moreover, the defendant no.1 cannot be permitted to deprive the plaintiff of his possession of the entire ground floor, including the living room and thus during the pendency of the suit the possession of the plaintiff should be protected. It is also submitted that all belongings of the plaintiff are lying on the ground floor of the suit property.

17. Another argument raised by counsel for the plaintiff is that after the demise of the mother, the status of the parties is that of co-sharers, hence, a single party cannot be granted exclusive possession.

18. Reliance is placed on Hindustan Petroleum Corpn. Ltd. Vs. Sriman Narayan & Anr. (2002) 5 SCC760 by counsel for the plaintiff that while dealing with an application for interim relief, the Court must take into consideration the existence of a prima facie case and must not deal with the matter, as if the suit is to be decided finally.

19. Written statement has been filed by the defendant No.1 who is the contesting defendant. As per the written statement, the plaintiff has made a false averment with regard to his residing at the suit property. As per the defendant No.1, the plaintiff resides at property bearing No.12, First Floor, Jaipur Esate, New Delhi which fact, according to defendant No.1, is established from a bare scrutiny of the directory of the Nizamuddin East Residents Welfare Society of the years 2009 and 2011. As per the defendant No.1, the plaintiff has been living at the said property for more than 10 years which is also evident from their address mentioned in the

directory of the Delhi Golf Club, electricity, telephone and water bills and other documents pertaining to the property No.12, First Floor, Jaipur Estate, New Delhi. It is further stated that the defendant No.2 is residing on the second floor of the suit property. It is also the case of the defendant No.1 that the fact that the plaintiff has not been residing at the suit property is further established by the fact that hours before the death of their mother the plaintiff tried to break the locks of the door leading to the ground floor after locking the living room in the mother's portion. It has also been stated that even before the dead body of the mother could reach the property, the plaintiff was able to break open one door and in case he had been in possession of the living room the plaintiff would not have attempted to break the lock of the aforesaid door. It is also the stand of defendant No.1 that on 17.11.2013, the plaintiff along with other defendants i.e. defendants No.2 and 3 forcibly tried to enter the ground floor of the property by breaking the locks and tried to dispossess the defendant No.1 and his family. It has also been stated that the plaintiff along with defendants No.2 and 3 locked the living room in the mother's portion and refused to open the door for receiving the body of the mother and plaintiff and defendants No.2 and 3 threatened the defendant No.1 and his family with dire consequences in case he refused to part with possession of the suit property. Reliance is placed on photographs taken by the defendant No.1. It is also the stand of the defendant No.1 that he was constrained to approach the police authorities who arrived at the spot and on their assurance the defendant No.1 opened the ground floor of the suit property and further the DD Entry dated 17th November 2013 shows that the plaintiff did not have the key to open the door of the drawing room from any entrance and the same was produced by the defendant No.1. It is also submitted that after the demise of their mother the plaintiff tried to take possession of the ground floor. The defendant No.1 found that the plaintiff No.1 was trying to forcibly gain entry into the living room with the help of a carpenter. The police was called. The plaintiff did not open the living room No.5 where the body could have been placed. It is submitted that the plaintiff in collusion with the defendants No.2 and 3 is trying to create false evidence. He is trying to get his addresses changed in order to gain entry into the ground floor of the suit property. It is submitted that the plaintiff wants to forcibly gain entry into the ground floor of the suit property with a view to harass the defendant No.1. It is

also the case of the defendant No.1 that he along with his deceased mother, wife, children and granddaughter are residing and have been in exclusive possession of the ground floor along with gardens and first floor of the property for more than 30 years. It is also the case of the defendant No.1 that after the demise of his father the defendant No.1 has been taking care of his mother i.e. she has been living under his care and protection on the ground floor. Earlier the defendant No.1 had allowed the plaintiff and other defendants to visit their mother without any restriction. However, on account of forgeries committed by the plaintiff in connivance with defendant No.2 and the consequential discord and dispute, the defendant No.1 allowed the plaintiff and other defendants to visit their mother through the side entrance without entering the other areas of the ground floor such as drawing room, dining room which are in his exclusive possession. It is also the case of the defendant No.1 that the ground floor and the first floor of the property are of a duplex form and as the first floor does not have a kitchen and the only kitchen is situated on the ground floor, it would stand proved beyond doubt that the defendant No.1 herein is in possession of both the floors as a single unit and his mother was living under the care and protection of the defendant No.1. Besides, defendant No.1 has been paying the electricity bills, telephone bills and water bills with respect to the suit property. Defendant No.1 has also disputed the execution of the will by their mother.

20. Mr.Sethi, learned senior counsel appearing for defendant No.1 has contended that there are sufficient documents on record filed by defendant No.1 to show that the plaintiff was not residing in the suit property. Even as per the plaint it is an uncontested position that the defendant was using the living room on the ground floor and the defendant No.1 cannot be removed either from the kitchen of the ground floor or the living room. It is also submitted that it is not the case of the plaintiff that he has other properties or that he is not residing anywhere else. It is also contended that it is the case of the plaintiff that defendant No.1 is using the living room and the kitchen on the ground floor and based on these admissions itself no injunction can be granted in favour of the plaintiff. It is also submitted that the cause of action for filing the present suit as per the plaint is only the locking of the living room and not using the living room which is admitted even by the plaintiff in the plaint. The order of injunction cannot change the last contested position with

regard to possession of the parties.

21. I have heard the learned counsel for the parties and perused the plaint, applications, documents filed along with plaint. Before the rival submission of the parties can be considered it may be noticed that on 18th November 2013 while issuing summons in the suit the defendant No.1 was restrained from interfering with the plaintiffs access and possession to the living room on the ground floor of the suit property. On 22nd November 2013 an application under Order XXXIX Rule 4 CPC filed by defendant No.1 was listed where the following order was passed:

After hearing learned counsel for the parties, it is directed that after the conclusion of the ceremonies associated with the demise of the mother on 29th November 2013, neither the plaintiff nor any other party will use the ground floor of the premises at A-51, Nizamuddin East, New Delhi -110 013, except to the limited extent that the defendant No.1 will be permitted to use the kitchen on the ground floor, which is currently being used by him. Both the plaintiff and defendant No.1 are permitted to remove their respective belongings from the ground floor before 29th November 2013. This order be scrupulously followed till the next date.

22. On 29th November 2013, on an application filed by the plaintiff being IA No.19309/2013 a local commissioner was appointed. The operative portion of the order reads as under:

6. There is a dispute as to which of the two kitchens in the ground floor is currently being used by defendant No.1. Be that as it may, the Court considers it appropriate to appoint Mr.K.G.Malik, Court Officer (Mob.9971988890) as CC to visit the premises at A-51, Nizamuddin East, New Delhi at 11 am on 30th November 2013. One representative each of the plaintiff and each of the defendants are permitted to remain present along with their respective counsel during the visit of the CC. Defendant No.1 will indicate to the CC one of the kitchens that he has been using. The other kitchen and the entire ground floor will be secured by the CC placing locks on the doors leading into them. The requisite number of locks will be procured for that purpose by the CC. The keys will be deposited forthwith by the CC with Registrar (O) of this Court and will be kept in a

sealed cover. A report will be submitted by the CC to the Court within a week thereafter enclosing photographs. The fee of the CC is fixed at Rs.20,000 which will be paid by the plaintiff to the CC tomorrow itself. This is apart from incidental expenses and transport charges, including costs of the locks which will be borne by the plaintiff.

7. This order is passed without prejudice to the rights and contentions of either party. It is made clear that defendant No.1 will have access to the kitchen which is opted to be used by him from the rear side and there will be no hindrance to his ingress and egress from thereon.

23. By the order of 29th November 2013, except for one kitchen on the ground floor the entire ground floor stands locked.

24. During the course of hearing arguments on 26.02.2014 it was submitted by counsel for the defendant no.1 that the ground floor and the 1 st floor is a single unit and there is no living room on the 1st floor. The order dated 26.02.2014 reads as under:

Counsel for defendant No.1 submits that defendant No.1 was using the living room on the ground floor as there is no living room or dining room on the first floor of the suit property. Counsel for the plaintiff and defendants No.2 to 4 dispute this submission. Counsel for the plaintiff submits that a Local Commissioner may be appointed at the expense of the plaintiff to visit the first floor of the property No.A-51, Nizamuddin East, New Delhi today itself and give a report as to whether there is a dining room and a drawing room on the first floor of the property or not. Ms.Priyam Mehta, Advocate, (Mobile No.9953032272), who is present in Court, is appointed as a Local Commissioner to visit the first floor of the property bearing No.A-51, Nizamuddin (East), Delhi, today itself, without waiting for formal orders of this Court, and ascertain as to whether there is any drawing/living room and dining room on the first floor of the suit property. The Local Commissioner will be entitled to take photographs. This order is being passed in the presence of the parties. The parties will cooperate with the Local Commissioner. In case any of the parties do not cooperate or obstruct the proceedings of the Local Commissioner, this Court would be forced to take a serious view of the matter, taking into

consideration the previous allegations made by the plaintiff against the defendant No.1 when the proceedings of the earlier Local Commissioner were obstructed. The fee of the Local Commissioner is fixed at Rs.40,000/-, which shall be borne by the plaintiff, besides all out of pocket expenses. Post lunch the matter has been taken up. Further arguments have been addressed. Local Commissioner should file her report along with photographs within 2 weeks from today. List on 11.03.2014. Copy of the order be given dasti to the Local Commissioner under signatures of the Court Master.

25. Written statement has also been filed by defendant No.4 who is the brother of the deceased mother and uncle of the plaintiff and defendants No.1 to 3. In his written statement the defendant No.4 has supported the case of the plaintiff. The defendant No.4 has stated in his written statement that plaintiff and defendants No.1 to 3 have been given a share in the suit property as per the desire and will of their mother dated 24.04.2009 registered on 29.04.2009. The will was executed in the presence of two witnesses and videographed. The defendant No.4 had accompanied his sister along with two witnesses to the office of the Sub-Registrar, Mehrauli for registration. He has been named as executor and administrator in the will. Defendant No.4 has further stated in the preliminary submissions in the written statement as under:

(I) Before giving parawise reply to the plaint, the defendant No.4 who is the brother of the deceased Smt.Sheela Ashok Nath and maternal uncle of the plaintiff and the defendant No.1 to 3, submits that he supports the case of the plaintiff who is seeking decree of injunction against the defendant No.1 his representatives, assigns and agents from interfering in the peaceful possession, occupation and enjoyment of the entire ground floor with storeroom in the basement, including the living room on the ground floor of the suit property i.e. A-51 Nizamuddin East, New Delhi-11013. (II) The plaintiff, defendant No.1 and 2 are sons of the deceased Smt.Sheela Ashok Nath. The defendant No.3 is the daughter of the deceased and sister of the plaintiff and the defendant No.1 and 2. (III) It is significant to state that each of the plaintiff and defendant No.1 to 3 are having share in the suit property as per the desire of their mother who had executed a will dated 24 th April 2009. It was registered on 29th April 2009. The Will dated 24th April 2009 is a solemn

document. Entire execution of the will dated 24.04.2009 in the presence of two of the witnesses was videographed at the behest of the defendant No.4. The defendant No.4 accompanied his sister along with two witnesses to the office of the Sub-Registrar, Mehrauli for its registration. (IV) That the defendant No.4 has been named as an Executor and Administrator in the Will of his deceased sister. The defendant No.4 is the legal representative of the deceased sister. As an Executor of Will dated 24th April 2009 at present the defendant No.4 is a legal representative of the deceased Sheela Ashok Nath for all purposes and representing the person of testator after her death. (V) It is significant to state that the deceased during her lifetime had made necessary arrangements in respect of enjoyment of her assets to avoid any misunderstandings against her children. She unconditionally bequeathed the ground floor including the store cum utility room below ground floor to the plaintiff. First floor to the defendant No.1, second floor to the defendant No.2 and terrace third floor to her daughter the defendant No.3 with the right to use or build a floor on the same and on construction by the defendant No.3 the said third floor shall be owned and possessed by her. However, the terrace above will be shared and used jointly by the defendant No.2 and 3. Therefore, all the four children of the deceased Sheela Ashok Nath are co-owners without any hindrance whatsoever. (VI) It is pertinent to mention that the defendant No.4 came to know about the severe sickness of his sister on 12.11.2013, as such he was planning to come to Delhi. On 17.11.2013, the sister of the defendant No.4 breathed her last. In the evening of 17.11.2013, the defendant No.4 reached Delhi and attended the funeral of his sister at Nizamuddin Cremation ground. The defendant No.4 was extremely pained to see the behaviour of the defendant No.1 and his family at the cremation ground when the purohit announced 13th day as the last day of ceremony of the mother but the defendant No.1 contrary to that and contrary to the decision of the family announced 4th day as the last day of the ceremony. This incident was noticed by the other visitors and relatives who had attended the cremation. (VII) That after coming from the cremation ground the defendant No.4 who was in possession of the will dated 24.04.2009 of his sister handed over a copy of the same to all the four children of the deceased. Even at that time the defendant No.1 without any reason had thrown the Will back by saying that he knows about it. The defendant No.4 was astonished at the

behaviour of the defendant No.1.

26. It would also be not out of place to reproduce para 9 of the reply on merits in the written statement of defendant No.4. It reads as under:

9. That the contents of para 9 of the plaint are admitted and need no reply. It is admitted that the plaintiff and the defendant No.2 was taking care of their ailing mother. Both the brothers were serving her in all manner from her day to day needs, medication, hospitalization etc. It may be noted that the defendant No.1 had a kitchen on the first floor. It was later on converted into a bedroom and toilet. Thereafter the defendant No.1 unauthorizedly started using a room below the staircase of the first floor from rear side of the house as kitchen for himself. The sister of the defendant No.4 objected to this several times. Subsequently when she was totally bed ridden, the defendant No.1 took advantage of her sickness and continued to use the said room as kitchen. It is pertinent to mention that all the three sons of the deceased Smt.Sheela Ashok Nath were using the premises in question as mentioned in the Will during her lifetime. The desire of the deceased was given effect to during her lifetime. Plaintiff along with his daughter Aadya were using the ground floor along with the deceased Smt. Sheela Ashok Nath. Cook as employed by the defendant No.2 was taking care of the meals of the plaintiff and his daughter, the defendant No.2 and their mother by cooking the food in the kitchen attached to the living room. Till her last breath, the food was cooked in the same kitchen.

27. Counsel for defendants No.2 to 4 have supported the case of the plaintiff.

28. The arguments of learned counsel for the plaintiff can be summarized as under:- (1) The entire ground floor except one kitchen has been in continuous possession of the plaintiff, his deceased mother and daughter. The defendant No.1 i.e. the contesting defendant has been in possession of the entire first floor. Reliance is placed on various independent documents to show that the plaintiff has been a resident of the ground floor of the suit property. (2) The first floor has been in occupation of the defendant No.1 along with his family with the use of kitchen on the ground floor. The second floor has been in continuous use of defendant No.2. The plaintiff and defendants No.2 and 3 have been looking after

the ailing mother including all expenses for her maintenance, hospital expenses and medical expenses have been borne by the plaintiff and defendants No.2 and 3. On learning about the demise of the mother with a view to grab possession of the living room on the ground floor the defendant No.1 locked the same illegally. (3) Even as per the Will of the deceased the ground floor portion is to fall to the share of the plaintiff and the first floor to the share of the defendant No.1. The defendant No.1 was never in possession of any part of the ground floor except one kitchen. The balance of convenience is in favour of the plaintiff, in case the order is not modified it is the plaintiff who will suffer irreparable loss and injury as the defendant No.1 has a full floor for his use.

29. The submissions of learned counsel for defendant No.1 can be summarized as under:(1) The plaintiff has not been residing at the suit premises but his permanent place of residence is property No.12, First Floor, Jaipur Estate, New Delhi. The plaintiff is attempting to forcibly take possession of the ground floor. Even as per the plaint the defendant No.1 has been using a kitchen on the ground floor and the living room. Various independent documents show the address of the plaintiff as property No.12, First Floor, Jaipur Estate, New Delhi. It is only the defendant No.1 who looked after the mother including her medical expenses and the electricity bills of the ground floor were paid by the defendant No.1. The fact that the key of the living room was with the defendant No.1 would establish his possession over the living room. In the absence of any living room on the first floor it was natural for the defendant No.1 to be using the living room on the ground floor along with kitchen.

30. It is well settled that while deciding an application under Order XXXIX Rule 1 and 2 CPC the Court must apply the following three established tests of prima facie case, balance of convenience and whether the plaintiff would suffer an irreparable loss and injury if an injunction is declined. It is also a well established principle that while deciding an application for injunction the Court must not deal with the matter as if it were finally deciding the suit. It is also a well established principle that the Court must also consider as to whether grant of injunction is likely to cause inconvenience to the defendant. It is also not necessary for the Court while deciding an application for grant of injunction to go into the question of

title to establish that the plaintiff has been in continuous possession of the entire ground floor except the kitchen.

31. The first argument of counsel for the plaintiff is that the plaintiff has been in continuous possession of the ground floor of the suit property along with his minor daughter and mother (since deceased) for which learned counsel for the plaintiff has drawn attention of the Court to various documents [Bus Card issued by the Vasant Valley School, ID card issued by the School, birth certificate issued by the school, passport and Aadhar card and various receipts issued by the professional institutes].. It is also the case of the plaintiff that the plaintiff along with the defendants no.2 and 3 have been continuously looking after their old ailing mother in the house and thereafter when she was hospitalized.

32. Ms.Takiar, counsel for the plaintiff has laboured hard to show that when the mother was in the house, nurses were employed who were occupying one room on the ground floor; and all the medical expenses have been borne by the plaintiff and defendant no.2.

33. Per contra, counsel for the defendant No.1 has argued that the plaintiff has been residing at 12, Jaipur Estate, Nizamuddin (East), New Delhi. In support of his submission counsel for the defendant no.1 has placed reliance on documents including directory of Delhi Golf Club, Residents Directory and certain other documents, where 12, Jaipur Estate, Nizamuddin (East), New Delhi, has been shown as the residence of plaintiff. It is also the case of the defendant no.1 that defendant no.1 is in possession of the entire first floor along with possession of ground floor, including one living room and a kitchen. Counsel for the defendant no.1 has also refuted the submission of Ms.Takiar, counsel for the plaintiff that the plaintiff and defendants no.2 and 3 were looking after the old ailing mother.

34. It is contended that the defendant no.1 was looking after the old ailing mother and was paying the electricity bills of the ground floor portion.

35. The plaintiff has placed on record a copy of his pass-port, which shows the suit property as the address of the plaintiff. Copy of the documents, such as, driving licence, copy of the pass-book of Central Bank Account No.1027445965, Identity

Card of Vasant Valley School of the daughter of the plaintiff, Voter Identity Card of the plaintiff, the directory of Nizamuddin (East) Association Members and various other documents, have been filed, in support of the address of the plaintiff.

36. On the contrary Mr.Sethi, counsel for the defendant no.1 has also drawn attention of the Court to numerous documents of the plaintiff, wherein plaintiff has given his address as 12, Jaipur, Estate Nizamuddin (East), New Delhi.

37. It is not in dispute that the plaintiff is also the owner of 12, Jaipur Estate, Nizamuddin (East), New Delhi as well. The documents relied upon by the plaintiff are independent documents and cannot be termed as selfserving documents or documents procured after filing of the present suit or procured soon before the filing of the present suit. In my view the possession of the plaintiff in the present suit cannot be ascertained simply on the basis of documents filed by either of the parties, but the surrounding circumstances are also to be considered, which according to me supports the case of the plaintiff. Defendant no.1 claims that he was exclusively looking after his ailing mother, which prima facie appears to be incorrect. Voluminous documents have been filed on record by the plaintiff, which includes a large number of bills for payments made to nurses and the bills of the hospitals, would show that it is the plaintiff who was looking after his ailing mother and not the defendant no.1.

38. A large number of bills showing payments made to Suraj Nurses Bureau from 31.7.2011 (81 bills) and details provided, evidencing payments together with bills; so many bills of chemist, bills of laboratories, bills of Moolchant Hospital, would show that it is the plaintiff, who was looking after his mother and the stand of the defendant no.1 is prima facie to be disbelieved at this stage and in case the defendant no.1 was exclusively looking after his ailing mother, the bills would have been with him.

39. It is also the stand of defendant no.1 that there is no living room on the first floor and thus the defendant no.1 was in occupation and possession of the entire first floor along with the living room and kitchen on the ground floor. Mr.Sethi, counsel for the defendant no.1 strongly contended that the kitchen on the ground floor is not disputed even by the plaintiff and if the kitchen can be on the ground

floor then it is to be presumed that defendant no.1 alone was using the first floor and the ground floor.

40. This court was forced to test this argument that there is no living room on the first floor, by appointing a Local Commissioner during the course of hearing. Ms.Priya Mehta, who was present in court was directed to visit the suit premises including first floor without waiting for a formal order from the court and give a report as to whether there is any living room on the first floor of the suit property or not. The Local Commissioner has, along with the report, filed photographs and a site plan. The site plan shows that the area marked A and B of 168 x 28 comprising of 470 sq.ft. is the sitting room available on the first floor in addition to 4 bedrooms. The scanned site plan filed by the Local Commissioner is as under:-

41. Photographs 5, 6, 7 and 8 annexed along with the report of the Local Commissioner also show the living room, although strangely a cloth-stand and a bucket has been shown in photographs No.1, 2 and 3 by the defendant No.1. The report of the Local Commissioner along with the site plan and photographs leave no room for doubt that there is a huge living room on the first floor and the argument of defendant No.1 that the first floor has no living room and thus the defendant No.1 was using the living room of the ground floor is patently false.

42. To say that the plaintiff has admitted in para 10 of the plaint that the living room was being used by the defendant No.1, in my view, is a misreading of para 10 of the plaint. Para 10 reads as under:

10. That recently when the health of the mother of the plaintiff started deteriorating and the plaintiff was running around between the hospital and the house, the defendant No.1 with ulterior motives and malafide intentions had unauthorisedly started using the living room in the absence of the plaintiff. However, in order to maintain peace and not to do anything which would cause mental agony, tension and pain to his mother, and in order to maintain harmony and peace within the family, the plaintiff was tolerating the malafide activities of the defendant No.1.

43. A reading of this paragraph would show that the plaintiff has averred that on account of the deteriorating health of his mother, he was running between the house and the hospital and defendant No.1 with ulterior motives and malafide

intentions has unauthorizedly started using the living room and in order to avoid mental agony and tension to his mother the plaintiff No.1 was tolerating this act of defendant No.1. The defendant No.1 cannot take advantage of his illegality and thus no benefit can accrue to defendant No.1 on the basis of averment made by the plaintiff in the plaint.

44. Principles laid down for grant of interlocutory injunction have been discussed by the Supreme Court in the case of *Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan & Anr* reported at (2002) 5 SCC760 Relevant paragraphs of the judgment read as under:

7. It is elementary that grant of an interlocutory injunction during the pendency of the legal proceeding is a matter requiring the exercise of discretion of the court. While exercising the discretion the court normally applies the following tests: (i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.

8. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the exercise of the legal right asserted by the plaintiff and its alleged violation are both contested and remain uncertain till they are established on evidence at the trial. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before which that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the balance of convenience lies.

9. In *Dorab Cawasji Warden v. Coomi Sorab Warden* (1990) 2 SCC117 this Court, discussing the principles to be kept in mind in considering the prayer for

interlocutory mandatory injunction, observed:

16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are: (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction. (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money. (3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as a prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.

45. It would also be useful to refer to the decision reported at (1983) 4 SCC31Gangubai Bablya Chaudhary & Ors. v.Sitaram Bhalchandra Sukhtankar & Ors. Relevant paragraph of the judgment reads as under:

6. When an interim injunction is sought, the Court may have to examine whether the party seeking the assistance of the court was at any time in lawful possession of the property and if it is so established one would prima facie ask the other side contesting the suit to show how the plaintiffs were dispossessed?. We pinpointed this question and heard the submission. We refrain from discussing the evidence

and recording our conclusions because evidence is still to be led and the contentions and disputes have to be examined in depth and any expression of opinion by this Court may prejudice one or the other party in having a fair trial and uninhibited decision. Having given the matter our anxious consideration, we are satisfied that this is not a case in which interim injunction could be refused. Similarly we are of the opinion that if respondents are allowed to put up construction by the use of FSI for the whole of the land including the land involved in dispute, the situation may become irreversible by the time the dispute is decided and would preclude fair and just decision of the matter. If on the contrary injunction is granted as prayed for the respondents are not likely to be inconvenienced because they are in possession of about 9000 sq. metres of land on which they can put up construction.

46. It would also be useful to refer to the decision reported at AIR1998 Bombay 87 Mulji Umershi Shah & etc. v. Paradisia Builders Pvt. Ltd., Mumbai & Ors. The contention that in a suit for injunction based primarily on possession, question of title cannot be gone into and therefore while considering the application for temporary injunction the only consideration before the Court was possession and not the title of plaintiff is neither impressive nor sound. In the suit for perpetual injunction the Court may be called upon to hold inquiry in title, right, interest or status, as the case may be, of the plaintiff to find out whether plaintiff is entitled to protection of his possession by decree of injunction. The same consideration, prima facie, is required to be seen while considering an application for temporary injunction. The question of possession presupposes lawful possession and for adjudication of that question whether finally or at interlocutory stage, the inquiry into title, right, interest or status of plaintiff is not foreign to the subject-matter.

47. Applying the settled law to the facts of the present case, in my view the plaintiff has been able to make out a strong prima facie case in the light of the documents placed on record. The stand taken by the defendant no.4 in his written statement duly supported by defendants no.2 and 3, the voluminous bills from Suraj Nurses Bureau from 31.7.2011 onwards (81 bills placed on record), would show that the plaintiff was looking after his mother in the house and not the defendant no.1. Supporting hospital bills, the bills of Chemist, the existence of four bed rooms and

a large living room on the first floor, all lean in favour of the plaintiff to establish a strong prima facie case and balance of convenience, and in case the plaintiff is deprived of exclusive use of the ground floor, including the living room except Kitchen, the plaintiff would suffer irreparable loss. Accordingly, the defendant No.1, his servants, agents, relatives, or anyone acting through him are restrained from using any portion of the ground floor except access to the kitchen. The defendant No.1 is further restrained from causing any hindrance, inconvenience or obstruction to the peaceful enjoyment of the plaintiff of the entire ground floor except kitchen. The key deposited with the Registrar (Original) shall be handed over to the counsel for the plaintiff forthwith.

48. The application filed by the plaintiff [IA.No.18453/2013 (under Order 39 Rules 1 & 2 CPC)]. is allowed and the application filed by the defendant no.1 [IA.No.18860/2013 (under Order 39 Rule 4 CPC), is dismissed. CS(OS) 2250/2013 49. List the matter before Joint Registrar for admission/denial of documents on 22.7.2014.

50. List the matter before Court for framing of issues on 28.8.2014, when parties shall bring suggested issues to Court. Mr.Ashish Nath will remain present in Court on the next date of hearing in terms of the order dated 6.12.2013. (G.S.SISTANI) JUDGE MARCH28h, 2014 dk/ssn

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