

Santosh Arora and anr Vs. Mohan Lal Arora

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Court : Delhi

Decided On : Jul-28-2014

Judge : Najmi Waziri

Appellant : Santosh Arora and anr

Respondent : Mohan Lal Arora

Advocate for Pet/Ap. : Ms. Jyoti Singh, Mr. Satish Sahai, Mr. Ankur Aggarwal

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

28. 07.2014 + CM(M) 662/2012 & CM Nos.10036/2012 SANTOSH ARORA & ANR Through: versus MOHAN LAL ARORA Through: Petitioner Ms. Jyoti Singh, Sr. Adv. with Ms.Saahila Lamba, Adv. Respondent Mr. Satish Sahai, Adv. with Mr. Ankur Aggarwal, Adv. CORAM: HON'BLE MR. JUSTICE NAJMI WAZIRI % MR. JUSTICE NAJMI WAZIRI1 The petitioners have impugned an order dated 5 th May, 2012 which dismissed their application under section 151 Code of Civil Procedure seeking restoration of the pucca wall, as it existed on 11.3.2002, from points P to Q of the rear periphery of the suit premises, as shown in the site plan in the suit documents. Facts:

2. The facts are that suit bearing No.172/11/2002 was filed by the petitioner (plaintiff) seeking permanent and mandatory injunction against the respondent (defendant) apropos property bearing No.128, Sarojini Nagar Market, New Delhi.

In the plaintiffs application under Order XXXIX rules 1 and 2 of the CPC the Trial Court, on 11.03.2002, directed the parties to main status quo qua possession of the room in the rear courtyard and to use the courtyard and the toilet therein jointly, till the disposal of the application. The Local Commissioner who was appointed by the aforesaid order prepared a Rough Sheet on 11.3.2002 around 7.20 pm and submitted it alongwith her report on 13.3.2002. The report mentions a locked shutter which was opened by the plaintiff; an almirah placed on a heap of malba (building waste material) - which both parties claimed to be theirs; of obstructions being created by the defendant No.1 (present respondent); a room without any electric light -- in which some miscellaneous old items including plastic moulded chairs, two legs of a sewing machine, etc. were found; of obstruction being created by the malba in the opening of the shutter put up by the plaintiffs; of the door at the site marked Y not having any latch in the passage outside for ingress into the courtyard and the door being inoperable as there appeared to be some obstruction behind it from inside the courtyard; of ultimately accessing the courtyard from the front-side of the shop after removal of the obstructions which had jammed the plaintiffs shutter from the back side. Interestingly, neither of these reports mention about any broken courtyard wall. The Local Commissioner finally concluded inter alia:

And whereas adjoining the store I found a toilet which was the only toilet in this shop. There is a small staircase at a distance of about 2/3 feet from the toilet marked as B in the site plan.

And whereas the door marked Y opens only from the inside of the courtyard. The same could not be opened easy the due to obstructions by the malba .

And as well as on inspection it revealed that the plaintiff is in possession, use and control of the open courtyard on the ground floor of the suit premises marked C in the site plan and the store room appeared to be used by the defendant.

3. Admittedly, no objections were filed to the report. On 19.03.2002 the court ordered the parties to main status quo regarding the front portion of the property till the disposal of the application under Order XXXIX rules 1 and 2 CPC. Thereafter on 19.4.2002, it directed the parties to maintain status quo in terms of the order

dated 11.3.2002 i.e. that the parties were to use the courtyard and toilet jointly till the disposal of the application and if any obstructions had been caused by locking the rolling shutter by either of the parties, then such obstruction be removed forthwith.

4. The application which was dismissed by the impugned order was filed in September 2009. It merely sought the restoration of the rear peripheral wall, which according to the petitioner, had been illegally broken by the defendants. The petitioners contend that a complaint was registered with the police on the date of damage to the wall on 30 April 2002; and that with a view to maintain the security and safety of the suit premises a barrier was created with bamboo sticks affixed to bricks to prevent encroachment and unauthorised access by unscrupulous elements; more specifically the Courts intervention was sought in order to maintain the status quo as ordered by the Court earlier. The criminal complaint came to be disposed off on 4th September 2002 on the ground that the dispute between the parties was of civil nature and that there was no threat of breach of peace.

5. Later, on 13th of July 2009 the suit was referred to Mediation Cell for a possible resolution of disputes between the parties. It is alleged that on 26th July 2002, the respondent again sought to remove the temporary barrier/fence made with bamboo, attempting to convert this part of the perimeter into an unhindered passage into the courtyard, contrary to the specific order of the Court. Another complaint was registered with the police on 28 July 2009. Despite that on 22nd of August 2009 the respondent removed the said barrier/fence between points P and Q to gain an illegal access to the first floor from the staircase inside the courtyard, although he already had access to the first floor through another common staircase as was originally constructed, shown at point B of the site plan. The petitioners contended that the toilet in the courtyard was in a dilapidated condition and needed immediate repairs to make it usable. They apprehended that default in such repairs could well result in collapse of the sole toilet on the ground floor, leading to deprivation of use of the necessary facility. They submitted that although complaints were made to the local police on 27th of July, 22nd, 23rd and 25th of August 2009, no remedial measures were taken by them, compelling the petitioners to approach the Court for seeking protection from, what was termed as

a contumacious conduct of the respondent, i.e. for an order to (i) restore the position of the pucca wall from points P to Q as it existed on 11th March 2002 and (ii) permission to repair the walls of the dilapidated toilet.

6. The Trial Court dismissed the application on the ground that if it were to be allowed at the interim stage it would tantamount to decreeing the suit in apropos prayer C of the suit, and such relief at the interim stage would not be permissible in law. Analysis:

7. The said prayer C in the suit reads as under:

c) a decree for mandatory injunction may also be passed in favour of the plaintiff against the defendant number one directing him to remove the obstruction created by him in the steel rolling shutter at point be fixed on the back side as shown in the site plan so as to make the use of toilet constructed and water tap in the open courtyard available to these plaintiffs for the courtyard.

8. This Court notices that the application under consideration before the Trial Court sought reinforcement and restoration of the wall which had broken after the status quo order of 11th March 2002. It would not make a difference to any party if the wall was restored/repared, so as to protect the suit premises from encroachment and unauthorised access by strangers. Interestingly, the respondent (defendant) had denied any role in the damage to the wall. It could never be either partys case that the property to which they both staked a claim, should ever be susceptible to trespass and encroachment. The petitioner/plaintiff wanted the property to be safeguarded and irrespective as to how the wall came about to be damaged, the respondent (defendant) could not have an objection to it since repair of the wall would the serve the interests of both the parties. Furthermore, the Local Commissioners report, which remains unchallenged, mentions the courtyard and other relevant issues such as the room and the miscellaneous articles inside it, the toilet, the staircase outside, but it does not mention a broken wall. If indeed such a damaged wall existed, it would have been so mentioned in the report because the Local Commissioner was to determine possession, whereas if access was from an unprotected of makeshift protective barrier it would surely find a mention in the report. The report concluded that the

plaintiff (petitioner) was in possession, use and control of the open courtyard on the ground floor and the store room appeared to be used by the defendant. The Court had already ordered the parties to maintain status quo in terms of using the toilet jointly and this arrangement continued for the decade thereafter. The factum of a damaged wall is not averred in the suit. Logically therefore, no relief of restoration of a damaged wall between points P to Q could have been sought nor could such an order have been passed earlier. The balance of convenience also had been established on the basis of the Local Commissioners report as well as the order of 11 th of March 2002, in favour of a joint use of the toilet in the courtyard. Therefore, (i) the impugned order suffers from lack of exercise of jurisdiction vested in the Trial Court in as much as it erroneously equates the relief sought in the interim application with the relief sought in the suit and (ii) it also fell into material irregularity since it fails to take into account the Local Commissioners report which recorded that the possession of the courtyard was with the plaintiffs, a position which has been unchallenged over ten years. These records and significant orders of the Trial Court ordering joint use of the toilet, etc., would lead to the inexorable conclusion that the balance of convenience lay in favour of the plaintiffs and that the repair of the peripheral wall would be in the interest of both the litigating parties so as to protect the suit property. Conclusion:

9. For the reasons aforesaid, this Court is of the view that the impugned order suffers from material irregularity in not appreciating the complete records. In the circumstances, the impugned order is set aside. The petitioners would be free to repair and restore the peripheral wall which is stated to be damaged between points P and Q of the site plan (at page 123 of the petition) and to repair the toilet in the courtyard for the joint usage with the defendant/respondent. Nothing stated herein above shall affect the final adjudication of the suit. The petition is allowed in the above terms. NAJMI WAZIRI (JUDGE) JULY28 2014

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