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**Kanjimull and Sons Vs. Ansal Properties and Industries Ltd.**

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**SooperKanoon Citation : [sooperkanoon.com/679962](http://sooperkanoon.com/679962)**

**Court : Delhi**

**Decided On : Jan-24-2003**

**Reported in : 2003IIAD(Delhi)8; 102(2003)DLT852**

**Judge : Vikramajit Sen, J.**

**Acts : Partnership Act**

**Appeal No. : IAs 12815/99 and 6440 and 13150/00 and Suit No. 2779/99**

**Appellant : Kanjimull and Sons**

**Respondent : Ansal Properties and Industries Ltd.**

**Advocate for Def. : S.K. Puri, Sr. Adv., ; Sachin Puri and ; Kadambari Datta**

**Advocate for Pet/Ap. : V.K. Makhija, Sr. Adv.,; Akshay Makhija and; Vandan Khurana**

**Judgement :**

**Vikramajit Sen, J.**

is No.6440/00

1. On the first hearing of the Suit in terms of the Orders dated 22nd December, 1999, Ansal Properties and Industries Limited, its employees, agents, servants is stated to have been engineered and conceived of in order to defeat the Plaintiff's

claims in the Suit, which already stood protected by the Interim Orders passed by this Court on the first hearing of the Suit. Thirdly, it is contended that the Defendants had given over possession of the disputed area as shown in the site plan delineated 'CDEF' (hereinafter referred to as the Kiosk) to the Hongkong and Shanghai Banking Corporation for setting-up their ATM machine, after the passing of these Interim Orders. The representatives of the Bank had appeared before the Court and given an undertaking that they would vacate the Kiosk on or before 31st December, 2000 and hence the Application for Contempt was not pressed against these Respondents. This undertaking has been complied with. Prima facie, I am satisfied that Respondents No. 1 to 6, as arrayed in is No. 6440/2000, had disobeyed the injunction granted by this Court on 22nd December, 1999 and, therefore, Section 2A of Order XXXIX has been attracted.

2. The following Issues are framed:

(i) Whether the Defendant No. 1, together with Respondents No. 2 to 6, has individually or severally disobeyed the injunction Orders passed on 22nd December, 1999 in this Suit?

(ii) If the Issue is decided against the Respondents, what punishment is to be passed against the said Respondent individually or severally?

3. Since the matter partakes the nature of Contempt of Court, it is essential that, before the Suit progresses any further, the contemnors should be given an opportunity to purge the contempt if the Court comes to this conclusion after the evidence is completed by the parties. Hence, the evidence in this Application should be recorded first.

4. List in the week commencing on 17th February, 2003 for recording of evidence, day to day.

is No. 12815/99

5. Arguments on this Application have been heard at length. The contention of the Plaintiff is that the Kiosk was not contemplated at the time when it had entered into an agreement for the purchase of show room No. BG 03A. The allotment letter

dated 5th April, 1999 contains the following clauses, which are relevant and salient for the disposal of the Application:

'15(a) Rates charged above for the area of the Flat or for what is correctly known as 'Super Area' i.e., for the covered area plus walls, plus proportionate share of areas under staircases, common areas, corridors/passages, walls, escalators & lifts, shafts, machine rooms and mummies, Air Handling Unit Room on floors, Fire Control/Security Rooms etc. exclusive open terrace/spaces will be charged extra at the rate fixed by the Developer, notwithstanding what is provided else where in the allotment letter regarding right of exclusive use of such areas by the developer in any manner deemed fit by it.

(b) Except for the specific areas herein allotted and the necessary easementary rights pertaining thereto, all the common areas and the facilities and the residuary rights in the proposed building shall continue to vest in the Developer till such time as the same or a part thereof is allotted, sold or otherwise transferred to any particular Flat Buyer and/or to the association of the Flat Buyer(s). The Buyer hereby agrees that in case after the completion of the Building, further construction on the plot or the Building becomes permissible the developer shall have the sole right to raise such further construction as belonging to the Developer notwithstanding the designation and allotment of any common areas as limited common areas or otherwise. It is agreed that in such a situation the proportionate share of the Flat Buyer in the common areas and facilities shall stand varied accordingly.

17. Except the specific space agreed to be acquired by the allottee, he shall not have any claim, right, title or interest in any other common areas or any other portion of the building complex. As such, the developer shall be entitled to put facade and other common areas to such use as it may deem fit without, of course, causing any inconvenience to the allottee for his ingress to and egress from the space allotted to him.

23. That the actual physical possession of the property hereby agreed to be allotted to the Allottee shall be handed over pursuant to this Agreement after the allottee has made the payment of the entire consideration of the amount to the

Ansals in the manner stated herein before.'

6. Along with this Agreement, a Site Plan of the ground floor had been appended, a bare perusal of which shows that the Kiosk was not in contemplation at the time of the execution of the Agreement. It is palpably an after-thought. At the time of hearing, the Plaintiff had also filed a Plan, which I have marked 'PX', bearing the date 12/2/1999. This Plan also shows that the Kiosk was not thought of even at that stage. The Defendant has filed a Plan, which is dated 16/11/1999 and is marked 'DX'. On a perusal of this Plan also, the same position emerges. A condensed version of these Plans has also been filed by the Defendant and is marked 'DXY', in which the Kiosk has been delineated boldly. Learned counsel for the Defendant has also relied on a Completion Certificate issued on 16/11/1999 in which four Kiosks are enumerated in the list. It is contended that the Kiosk in question is covered by the Completion Certificate. Beyond this ipsi dixit, there is no extraneous or corroborative evidence in respect of this contention.

7. Architectural drawings always have a symmetry about them which is of mathematical precision. On scrutinising the Plan 'DXY', I find that the Kiosk blocks all ingress and egress from the outer periphery of the building unlike in any other part of the Plaza. The area immediately in front of the Kiosk is not built upon. There is no similar construction in any other portion of the entire ground floor. Prima facie, I am of the view that the Kiosk was conceived of and constructed on a date subsequent to when the Plaintiff had entered into a contract with Defendant No. 1 to purchase the Show Room. We are dealing with a commercial transaction and a Show Room where a large area for display/viewing is of greater value than other properties, not having such features. The Plaintiff is entitled to enjoyment of the Show Room with all easementary privileges.

8. There is no dispute that the Plaintiff has paid valuable sale consideration for its Show Room. There is, however, some controversy as to how much of the sale consideration the Defendants No. 2 and 3 have paid for the Kiosk. According to the Plaintiff, only Rs.6,00,000/- had been paid by them out of a total consideration of Rs.21,00,000/-. The Defendants, however, claim that a larger portion was paid and certain sums, owing to the Defendants No. 2 and 3, were adjusted against the

sale consideration. The fact remains that the Defendants No. 2 and 3 are related to a senior officer of Defendant No. 1 and, therefore, complicity cannot be ruled out at the present stage. After the evidence is available on the court file, the Court will come to a concrete conclusion. The clause in the Agreement which mandates that the possession of the premises would only be handed over after the allottee has made the payment of the entire sale consideration, appears not to have been adhered to by Defendant No. 1 in respect of Defendants No. 2 and 3. This factor also persuades me to confirm the ex-parte ad interim injunction granted earlier.

9. Clauses 15 and 17 have been relied upon in common by learned counsel for the parties. So far as the Plaintiff is concerned, it is contended that he has acquired a right in all common spaces which have been calculated and introduced into the area purchased by him. The Plaintiff also contends that his easementary rights cannot be arbitral and unilaterally tampered with. The Defendants, however, contend that if any construction is permitted in the future, the developers shall have the sole right to raise such further construction, notwithstanding the designation and allotment in common areas as limited common areas or otherwise. The Defendant is also entitled to put the passage in common areas to such use as it may deem fit, but this right is a qualified one since it is available without causing inconvenience to the allottee for his ingress and egress from the space allotted to him. These clauses, in an oblique manner, do not come to the assistance of the Defendants. The access of the Show Room has been seriously restricted, and its display area and viewing has been drastically reduced. The Defendant No. 1 claims that the Completion Certificate has been issued in respect of the Kiosk. Direct evidence is wholly lacking and, therefore, a prima facie case exists in favor of the Plaintiff, since the initial Building Drawing do not contain the Kiosk.

10. As has been seen, the Plaintiff has filed an Application under Order XXXIX Rule 2A, alleging that the Defendants have disobeyed the Orders of this Court. A perusal of the photographs filed by the Plaintiff show that when the initial construction was going on, the space presently occupied by the Kiosk, was totally vacant and free ingress and egress was possible to and from the outer circular promenade of the Plaza. Learned counsel for the Defendant had not admitted the

correctness of these photographs, but that could only be in respect of the date on which the photographs were taken. Even if they were well before September, 1999, the fact remains that the Kiosk was not constructed contemporaneously with the main building. There is a specific allegation in the Plaint that the construction of the Kiosk behind the Plaintiff's shop has been done unauthorisedly and without getting the Plan sanctioned from the M.C.D. In the Written Statement, it has been averred that the possession of the Show Room was given to the Plaintiff on 30/11/1999 and to Defendants No. 2 and 3 on 22/12/1999, which is the date on which the ex-parte ad interim injunction was granted. This is indeed an extraordinary co-incidence. One has to be extremely gullible to believe, at this stage, that the Defendant had delivered the possession to the other Defendants on the same date as the passing of the Order, without knowledge of the Interim Orders. Paragraph 18 of the Written Statement contains these averments. Earlier paragraph 16 mentioned that a sum of Rs.2,50,000/- was paid by the Defendants No. 2 and 3 on 27/12/1999 and Rs.1,08,017/- on 29/12/1999. Unless there was complicity between the Defendants, there was little or no reason for the Defendant No. 1 to put the Defendants No. 2 and 3 in possession before payment of the entire sale consideration had been received by the Defendant No. 1.

11. A public notice was put in the newspapers after the passing of the injunction Order on 22/12/1999. An Affidavit of Compliance has been filed on behalf of the Plaintiff, disclosing that copy of the Plaint, said Application and other documents, have been sent to the Defendant by Registered AD Post on 24/12/1999. The Defendant No. 1 was served in the ordinary manner through the Process Server on 17/1/2000. Despite this fact, it took no steps, whatsoever, to ensure the obedience of the injunction Order of which it had gained knowledge. Instead, Defendant No. 1 permitted possession of the Kiosk to the Hongkong and Shanghai Banking Corporation. Law expects that the Defendant No. 1 should have immediately approached the Court firstly for vacating of the ex-parte injunction, secondly for disclosing that it had handed over possession to the Defendants No. 2 and 3 before learning of the Interim Orders, and possibly, thirdly, that Defendants No. 2 and 3 should be immediately imp leaded as parties. None of these actions were taken and the Plaintiff has had to file the Application under Section 2A of Order XXXIX. These Defendants have, prima facie, attempted to

over-reach the Court by presenting a fate accompli, viz. handing over possession of the Suit property to a third party.

12. For all these manifold reasons, I am satisfied that a prima facie case has been disclosed by the Plaintiffs. Since immovable property is at stake, the Plaintiffs are likely to suffer irreparable loss and injury if the temporary injunction, prayed for, is not confirmed pendente lite. The balance of convenience is in favor of the Plaintiffs and against the Defendants for the reason that the construction of the Kiosk is clearly an after-thought. Even though it may be covered by a Completion Certificate, this would not legalise or authorise the violation of the Plaintiff's contractual rights.

13. Mr. Puri, learned senior counsel for Defendants No. 2 and 3, has contended that during the pendency of the Suit, the Kiosk in question should be permitted to be let-out so that the parties may not incur any loss. Reliance is placed on a judgment of Division Bench of this Court in CWP No. 3068/1998 titled The Motor & General Finance Co. Ltd. vs. Punjab & Sind Bank Ltd. in which it had been observed that ' it will not benefit anybody if the complex so brought up is left to stand without being subjected to any use. The directors of the company are fighting inter se and resolution of disputes amongst themselves may take a long time'. Reliance is also placed by Mr. Puri on the opinion in Ouseph Mathai and Others vs . M. Abdul Khadir, : AIR 2002 SC110 to support his contention that the Kiosk may be permitted to be let-out and that the Defendants No. 2 and 3 would file an undertaking that they shall abide by any orders passed by the Court in the future. These arguments appears to me to be wholly untenable inasmuch as a party which is guilty of a breach of the contract, or violation of the law, cannot plead equities in its favor. If the structure is illegal, there would be no justification for any party to derive any benefit there from. This prayer is, therefore, rejected.

Suit No. 2779/99

14. I have heard learned counsel for the parties. Following issues are framed :

1. Whether the Plaintiff firm is duly registered under the Partnership Act and whether Shri Vijay Khanna is one of the registered partners of the firm? (OPP)

2. Whether the suit as framed is maintainable in law? (OPP)
3. Whether the construction of the room behind the Plaintiff's showroom, being termed as shop No. AG-01, is unauthorised and not covered by the sanctioned plan/completion/occupancy certificate issued by the MCD? (OPP)
4. Whether the construction of the room behind the Plaintiff's showroom, being termed as shop No. AG-01, is contrary to the layout plans originally given by the Defendant No. 1 to the Plaintiff? (OPP)
5. Whether the layout plans originally given by the Defendant No. 1 are revisable by the Defendant No. 1? (OPD)
6. Whether under the terms of the sale of the showroom to the Plaintiff, Defendant No. 1 reserved its rights to raise construction on the unconstructed areas? If so to what effect? (OPD)
7. Whether the space where shop No. AG-01 now stands was meant to be a common passage? (OPP)
8. Whether a show window existed at the rear of the Plaintiff's show room BG-3A at the time of allotment and at the time of occupation? (OPP)
9. Whether the construction of shop no AG-01 by Defendant No. 1 has blocked the source of natural light to the Plaintiff's showroom by blocking the show-window of the Plaintiff's shop? (OPP)
10. Whether the Plaintiff is estopped from claiming right to have a show window in the rear of its showroom by reasons of the defense taken up in the written statement and documents placed on record? (OPD)
11. Whether the Plaintiff is entitled to the relief of permanent and mandatory injunction as prayed? (OPP)
12. Relief.

No other issue arises or is pressed.

15. I appoint Shri Atul Batra, S/o Shri B.D. Batra, 419, Lawyers Chamber, Delhi High Court, New Delhi. Phone No. :3387156, 981172797 as the Local Commissioner. He is entitled to fees as per the Schedule, which fees will be equally shared by the parties, subject to the final outcome of the suit.

16. List of witnesses be filed within four weeks from today.

17. Examination-in-Chief be recorded by way of affidavit, to be filed within six weeks.

18. List before the Joint Registrar for scrutiny on 1.5.2003.

19. Parties to appear before the Local Commissioner on 9.5.2003. Parties are further authorised to take appropriate steps for summoning official witnesses before the Local Commissioner for the date fixed, or any subsequent date.

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