

Amarjeet Singh Sachdeva Vs. Ashok Monga

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Court : Delhi

Decided On : Dec-03-2014

Judge : Najmi Waziri

Appellant : Amarjeet Singh Sachdeva

Respondent : Ashok Monga

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

25. 02.2014 Date of Decision:

03. 12.2014 + CM (M) No.1360 of 2012 & CM No.20876 of 2012 AMARJEET SINGH SACHDEVA Petitioner Through: Mr. Rajat Aneja & Mr. Ishaan Chhaya, Adv. versus ASHOK MONGA Respondent Through: Mr. S.K. Gupta, Adv. CORAM: HONBLE MR. JUSTICE NAJMI WAZIRI NAJMI WAZIRI, J.

1. By this petition filed under Article 227 of the Constitution of India, the petitioner impugns an order dated 5.11.2012 passed in an appeal, which resultantly set aside the order dated 1.8.2012 passed by the learned Civil Judge.

2. The case of the petitioner is that the respondent/plaintiff had filed a civil suit seeking reliefs of mandatory and permanent injunction as well as compensation/damages of Rs.1.85 lacs from the petitioner/defendant. The respondent/plaintiff is the exclusive and absolute owner of the third floor of

property bearing No.C-10/8B, Krishna Nagar, Delhi-110051 on the basis of a Sale Deed dated 29.6.2011, executed in his favour by the petitioner. The

respondent/plaintiff had contended that he was illegally deprived of the use and facility of the lift installed in the aforesaid property and had sought a direction against the present petitioner (defendant) to allow the plaintiff and his family members to use the lift without any hindrance or obstacle. In his written statement (WS), the petitioner/defendant had stated that the suit was not maintainable since the Sale Deed conveying the third floor flat to the plaintiff/respondent did not include the use and facility of the lift installed in the building. It was also contended that the plaintiff was yet to pay an amount of Rs.1,84,982/-, which had been attempted to be paid by the plaintiff through a post dated cheque of Rs.2.00 lacs as the balance sale consideration but upon presentation of the cheque, the same got dishonoured on account of insufficiency of funds in the account of the respondent. It was stated that the petitioner had initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881 much prior to the filing of the suit and the said proceedings are pending before the Metropolitan Magistrate, Karkardooma Courts, Delhi.

3. Regarding the plaintiffs application for interim relief under Order XXXIX, Rules 1 & 2 of the CPC in which relief nos. 2 and 3 were

not pressed, the Trial Court was of the view that in the Sale Deed, there was no mention of the lift or of it being classified as a common facility, therefore it would be a matter of trial as to whether the plaintiff had paid the cost of lift along with sale consideration to the petitioner (defendant). On appeal against the said order, the Appellate Court set aside the order of the Trial Court and directed the petitioner/defendant by way of a mandatory injunction to provide use and occupation of the lift in the suit premises. The Trial Court had held as under:

It is clear from above mentioned para that there is no mentioning of lift for common use for the plaintiff in the building. Further, it is a matter of trial whether plaintiff paid the cost of the life along with the sale consideration of the flat to the defendant or not. Further it is also admitted by the plaintiff in his plaint that the

other occupants of flats in the same building are also facing same problem as defendant is also not permitting them to use lift. In view of above discussion, it is clear that lift is installed by the defendant for his own benefit and not for the occupants/residents of the flats in the building as neither plaintiff nor the other residents of building are using the lift.

4. The Appellate Court was of the view that common area was provided to the plaintiff and it was so mentioned in the Sale Deed under Clause 8 thereof, which reads as under:

That the common area such as passage, entrance, stairs, one car parking and one scooter, right to install/repair water tank on roof of top floor and all common facilities/amenities attached to the said property shall be used and properly maintained in common

by all occupants of the aforesaid property and shall not be misused by any of the occupants of the building/property, together with undivided proportionate share in the land.

5. The Appellate Court reasoned that:

all common amenities/facilities were to be used jointly. Amenity means something that contributes to the physical and material comfort. It is a feature that increase attractiveness or value, especially of a piece of real estate or geographic location. Amenity denotes something that increases physical ease or facilitates work. Prima facie, it appears that the facility of lift is a common facility/amenity attached to the property and is required to be used and maintained commonly by all the occupants of the said property. Ld. Trial court has observed that it is a matter of trial whether plaintiff paid cost of the lift alongwith sale consideration of the flat to the defendant or not. Even if it is to be decided during the trial as to whether plaintiff paid cost of the lift to the defendant or not, the facility of the lift cannot be withheld during the trial. The plaintiff and his family would also suffer irreparable loss and injury if the facility of lift is denied to them during the trial. It is a matter of common knowledge that lift is used more and is more advantageous to the persons occupying the upper floors than the occupants of the ground or first floor. If the facility of lift was

not to be provided to the person on the upper floor, then there was no purpose of installing the lift in the property. Though there is no specific mention regarding lift in para. 8 of the sale deed but after reading para. 8 where there is mention of common area such as passage, entrance, stairs, one car parking and one scooter, right to install/repair water tank on the roof of top floor it appears that lift is not a separate amenity but is a common facility/amenity in the property. Also the lift is passing through all the floors and the door of lift is installed on all the floor. If the lift was not to be used by the person occupying the third floor then there is no purpose of having door of the lift at the third floor. To

that extent, I do not agree with the observations of the Id. trial court and therefore, the appeal of the plaintiff is liable to be accepted.

6. The learned counsel for the petitioner submits that the third floor of the suit property was sold by the petitioner/defendant to the respondent whereby he became the exclusive and absolute owner of the third floor without roof rights and the use of the lift, unlike the second floor and upper ground floor was excluded from the sale transaction. He submits that as per the Sale Deed, there was no agreement or consensus ad idem with respect to the lift being a common facility. He submits that the lift was a special facility provided for the users of the building but a value would be attached for the right to use the same and insofar as the value had neither been mentioned nor paid nor the right to use the said facility been conveyed to the plaintiff/purchaser, the latter would have no right to use it. Access to the third floor flat was provided through the staircase; that the petitioner/defendant had exclusive right on the terrace over the third floor and he had developed a terrace-garden thereon, to which he had exclusive access. He submits that the seller did not specifically mention the facility of lift which had already been constructed and installed at the time of purchase of the property.

He further submits that there was no need of incorporating various other expressions in the said clause of the agreement such as common entrance, passage, staircase, one car and scooter parking, etc. in case the lift was also part of the common facilities attached to the property. He submits that the conspicuous omission of the word lift makes it amply clear that the lift was not included as a

common facility; therefore, the omission of the word lift from the Sale Deed was deliberate and specific. He submits that two other sale deeds filed by the plaintiff himself would show that the word lift had been specifically mentioned in them; therefore, it would clearly signify that the petitioner/seller had never intended to nor agreed to transfer any such right to in favour of plaintiff. The learned counsel for the petitioner contends that the interim relief must not lead to grant of final relief and the parties must be given full opportunity to prove their case in trial on the disputed questions of fact and relies on *Richa Industries Ltd. & Ors. v. ICICI Bank Limited & Anr.* 190 (2012) DLT500. He also relies upon a Division Bench judgment of the Allahabad High Court in *Kan Constructions and Colonizers Pvt. Ltd. v. Allan Deo Noronha & Anr.* 2006 LawSuit (All) 1994, which held that while granting the ex parte mandatory injunction under

Rule 3 of Order 39 CPC any reason has been recorded by the court below to the effect that object of granting injunction would be defeated by delay. The Court was required to record and mentioned specific circumstances due to which it was necessary to grant mandatory interim injunction. The proviso to Order 39 Rule 3 is mandatory in nature and its non-compliance is fatal.

The Court referred to the decision of the Supreme Court in *Metro Marins & Anr. v. Bonus Watch Co. (P) Ltd.* 2004 7 SCC478 which followed the decision in *Dorab1* case that an interim mandatory injunction can be granted only in exceptional cases coming within the exception laid down in the decision. The High Court held that while deciding the issue of injunction the Courts have to consider the cumulative factor i.e., prima facie case, balance of convenience and irreparable loss but on an interlocutory application for grant of an interim mandatory injunction, the Court has to record a definite finding on a prima facie case of a higher standard or specific circumstance for grant of interim mandatory injunction. The Court referred to the decision of the Supreme Court in *Dorab Cawasji Warden v. Coomi Sorab Warden & Ors.*, 1990 1 SCR332 which held that:

1. *Dorab Cawasji Warden v. Coomi Sorab Warden & Ors.*, 1990 1 SCR332

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. But since the granting or non-granting of such an injunction may cause great injustice or irreparable harm to one of the parties, the Courts have evolved certain guidelines. Generally stated, the 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.

7. The learned counsel for the petitioner also relied upon the decision of this Court in *Denel (Proprietary Limited) South Africa v. Lord Gordon Siynn & Ors.*, 2010 IX AD (Delhi) 645, which held that where relief was sought in the nature of final relief, it could not have been granted at the interim stage particularly in cases where there were disputed questions of fact, which required leading of evidence by the parties. The Court went on to hold in the circumstances of that case that when an application for interim measures had been dismissed, there could be no justification for the petitioner to seek more or less the same relief by way of an interim award even without leading any evidence in the matter.

8. In response, the learned counsel for the respondent submits that the petitioner/defendants stand is self-contradictory since on one hand, he contends in his WS that there was no agreement between the parties regarding the facility of lift to the plaintiff or any other occupant of the suit premises because the said lift was installed by the petitioner/defendant for his benefit and for his aged father, who had been suffering from various ailments; however, in the same breath, the petitioner/defendant goes on to state that the purchasers of second and upper ground floors in the same building would be entitled to use the facility of lift. The learned counsel contends that exceptional circumstance for grant of mandatory injunction at the interim stage, was clearly made out in favour of the plaintiff since the plaintiffs mother had already died in August, 2012 and his father who is aged about 80 years had been suffering from senility as well as various other ailments for which he had been admitted to a hospital for treatment. Therefore, the

requirement of the lift already installed in the building was acute, for the plaintiff, his father as well as his other family members and relatives. He submits that the lift was installed after the building plan was sanctioned by the Municipal Authorities. He therefore submits, that the provision of lift is clearly

a facility for all the floors in the building and the plaintiff could not be deprived from using same. It is submitted that the other two sale deeds show that the lift was identified as a common lift for the use of the purchasers of those floors. He relies upon a judgment of this Court in *Veena Kohli v. Rawal Apartments Pvt. Ltd.* 71 (1998) DLT489 which held that toilet is an essential amenity for ladies, therefore, the plaintiff therein could not be deprived of the use of this facility. Accordingly, a temporary mandatory injunction had been granted to prevent irreparable loss. He also relies upon a Division Bench judgment of this Court in *DDA v. Nehru Place Hotels Ltd. & Ors.* 1993 (25) DRJ (DB) 286 and *Mrs. Vijay Srivastava v. M/s. Mirahul Enterprises & Ors.* AIR1988 Delhi 140, which held that where interim relief is the same as the final relief, it can be granted in appropriate cases to meet the ends of justice.

9. Considering the submission of the parties, this Court is of the view that the provision of a lift in any building is an added facility for ease of access to the upper floors in it. Access is normally provided by a staircase and depending upon the type of the construction, the lift may well become a primary mode of access to the upper floors and the staircase could be relegated to a fire escape. However, the

installation of a lift comes at a cost which would need to be billed into the price of the sale of any property which is serviced/reached by the lift. If the lift is mentioned as common area, it shall be so treated. If it is not, then it shall be treated as a separate facility for the use of which there may well be a cost. In the present case, the right to use the lift has not been conveyed to the purchaser/respondent. Clearly, the express omission of lift from the common facilities listed in the sale deed is conspicuous whereas with respect to other two sale deeds filed by the plaintiff/respondent, the said expression finds mention as a common facility i.e., common lift. The latter would confer a sharing right upon that purchaser and others to whom such right was conveyed to the extent that the facility of the lift

was common to them. Insofar as this common facility was not specifically extended to the present respondent/plaintiff, the use of the same or conveyance of any right in it cannot be inferred from the other sale documents/deeds. The personal circumstances of the plaintiff/respondent and his family, including the old age of his father would not make it a legally compelling case or create a special circumstance for the grant of mandatory interim injunction, which effectively was the final relief sought in the suit. No matter how

compelling the circumstance may be, it cannot confer a legal right upon a purchaser unless the said right was so agreed to be conveyed by the seller. In the absence of any material to show prima facie such transfer of rights to vendor, the right of the vendee deserves to be safeguarded. A seller's right in an immovable property cannot be deemed to be transferred by inference. Under the Transfer of Property Act, it requires a specific conveyance. The Trial Court had rightly held that it was a matter of trial as to whether the plaintiff/respondent had paid the cost of lift along with the sale consideration to the petitioner/defendant or not. If the lift was included in the carpet area of the property purchased by the respondent/plaintiff, he may well have had a case to pray for interim injunction but the impugned order is not based upon any such averment.

10. It is not the case of the plaintiff/respondent that he was using the lift and such facility was abruptly taken away by the petitioner/defendant. The permission to or actual use of the lift by the plaintiff had not been established, therefore, according to Dorabs (supra) principle, there was no status quo to be preserved or to be restored to the last non-contested status preceding the pending

controversy. Indeed the Trial Court referred to the plaintiff's legal notice to the defendant which stressed the urgent need for use of facility of the lift; thereby admitting that the plaintiff was not in use of the lift. The use of the lift was not a status to be preserved or restored. In the present case, it is yet to be established as to whether the plaintiff/purchaser had any right in the lift or whether the plaintiff had purchased the common right for the use of the lift. Therefore, to grant a mandatory injunction at this stage would be without any basis.

11. In view of the aforesaid, this Court is of the view that the impugned order directing the petitioner/defendant to provide use and occupation of the lift to the respondent/plaintiff, his family members and associates during the pendency of the suit, suffers from material irregularity. In the circumstances, the impugned order is liable to be set aside and the order of the Trial Court dated 1.8.2012 in the application under Order XXXIX, Rules 1 & 2 of the CPC be restored. The impugned order dated 5.11.2012 is accordingly set aside.

12. This petition is allowed. There shall be no order as to costs. DECEMBER03 2014 bnesh NAJMI WAZIRI, J.