

HIGH COURT OF DELHI : NEW DELHI

FAO No.24/2009 & CM No. 1671/2009

% Judgment reserved on: 3rd August, 2009

Judgment delivered on: 2nd September, 2009

Sanjay Kapoor,
S/o Late V. N. Kapoor,
R/o 1/98, Ashok Vihar,
Phase-II, Delhi.

....Appellant

Through: Mr. Nalin Tripathi, Adv.

Versus

(1) M/s Kiryana Committee Delhi(Regd.)
Through: Authorized Representative,
Sh. Rakesh Kumar Bhatia,
372 , Khari Baoli,
Delhi

(2) Mr. R. C. Kapoor,
E-6 , Lajpat Nagar,
New Delhi

....Respondents.

Through: Mr. Swastik Singh, Adv.
for respondent no.1.
None for respondent
no.2.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

V.B.Gupta, J.

Appellant has filed this appeal against order dated 15th January, 2009, passed by Additional District Judge, Delhi, vide which his application under Order 39 Rule 4 of Code of Civil Procedure (for short as 'Code') was dismissed, whereas, application under Order 39 Rules 1 & 2 of the Code, filed by respondent no.1 was allowed.

2. Brief facts of this case are that appellant is having a decree dated 31st August, 2004 on the basis of suit for specific performance filed by him against Sh. Gagan Raj Kapoor on the basis of an agreement to sell dated 10th November, 1999 executed by said Gagan Raj Kapoor. In the suit, respondent no.1 has challenged the judgment and decree dated 31st August, 2004 passed by the court of Sh. D. S. Pawaria, the then Additional District Judge, Delhi, in

suit no. 207/04 on the ground that the same has been obtained by fraud and collusion and as a consequence thereof, sale deed dated 15th February, 2008 was also challenged.

3. In first week of November, 1999, Sh. Gagan Raj Kapoor approached various officials of the respondent no.1 and stated that he has gone into huge business losses and is in great financial crunch. He requested them to help in clearing the debts by mutual settlements with other members/his creditors and also deposited original title deeds of the suit shop with respondent no.1, so as to create charge/mortgage against aforesaid debts to various members of respondent no.1.

4. On 19th November, 1999, father of Sh. Gagan Raj Kapoor, namely, Sh. R. C. Kapoor-respondent no.2, also handed over physical possession to respondent no.1 and as such, respondent no.1 came into possession of aforesaid shop along with title deeds and said possession of respondent no. 1, continues till date along with all the right, title and interest in suit shop.

5. It is contended by learned counsel for appellant, that perusal of plaint shows that no legal rights subsist in favour of respondent no.1. The main purpose of respondent no. 1, is to extort money from appellant. Since, appellant is a lawful owner in possession of the suit premise and there is not even an iota of evidence to show that respondent no.1 has any right, title and interest and in the absence of any right, question of having possession does not arise.

6. It is also contended that if property belonging to respondent no.1, would have been sealed then he would have contested the case after vacation of interim order and asked for de-sealing of the property, but it did not do so. Moreover, appellant was lawful owner in possession, that is, why receiver handed over the keys to him and as such no case for grant of injunction is made out in favour of respondent no.1.

7. On the other hand, it has been argued by learned counsel for respondent no. 1, that, as per finding of the trial court, it is respondent no.1 who is in possession and being in possession is entitled to relief.

8. It is also contended that as per bailiff's report dated 29th March, 2008, shop is in possession of Sh. Gagan Raj Kapoor.

9. Principles for grant of injunction are well settled, namely:

(i) There has to be a prima facie case;

(ii) Balance of Convenience should be in favour of the party seeking injunction and;

(iii) Irreparable loss would be caused if injunction is not granted.

10. Trial court in impugned order held that prima facie, respondent no. 1 is in possession of the suit property, as there is mortgage in his favour. Since, respondent no.1 is in possession of the suit property, balance of convenience also lies in its favour and if its possession is not protected during trial, it will cause irreparable loss.

11. As per report of bailiff dated 29th March, 2008, copy of which is same placed on record by appellant, prima facie, it is clear that appellant was not in possession on that date.

12. Relevant portion of this report states;

“I Bailiff along with Sh. Sanjay Kapoor-DH reached on the disputed site as per the address given in the warrant i.e. property no. 617, Katra Ishwar Bhawan Khari Baoli, Delhi, in the possession of Sh. Gagan Raj Kapoor J. D. The D.H. identified the disputed property at the time property was found closed and locked. There was no written order to break lock and door in the warrant, where by the Bailiff could informed and get the possession delivered at this situation D. H. also made his statement that the disputed property was found locked and closed there was no order to break open the lock. I shall move an application through my counsel to the Court to get the order for braking open the lock and door and thereafter, I shall take possession. Written report about the warrant is presented.

Sd/-

Bailiff”

13. Since, respondent no.1 is in possession, the trial court, rightly protected its legal right and as such there is

no ambiguity or illegality in the impugned order. There is no merit in the appeal and same is hereby dismissed.

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14. Since, appeal has been dismissed, present application is also not maintainable and same also stand dismissed.

15. Trial court record be sent back forthwith.

16. Parties are directed to appear before trial court on 14th September, 2009.

2nd September, 2009
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V.B.GUPTA, J.