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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 28.08.2009
Pronounced on : 07.09.2009

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I.A. No. 510/2009 (U/O 39 Rule 1 & 2 CPC)
In CS (OS) 77/2009

SHRI KULWANT SINGH

..... PLAINTIFF

Through : Ms. Amita Sehgal, Advocate

Vs.

DR. LALJEE KENT & ORS.

..... DEFENDANTS

Through : Mr. Rajesh Yadav, Advocate

CORAM:

HON'BLE MR. JUSTICE S.RAVINDRA BHAT

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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? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

HON'BLE MR. JUSTICE S.RAVINDRA BHAT

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1. The court proposes, by this order, to dispose of I.A. No. 510/2009, whereby the plaintiff seeks interim mandatory injunction restraining the defendants from creating third party rights in respect of the suit property, as well as a mandatory injunction to them to hand over physical possession of the entire ground floor portion of the suit property to him (i.e. the plaintiff).

2. The facts, which emerge as undisputed, from the pleadings are that the plaintiff, a senior citizen, retired as an Accountant General; he had served with the Indian Audit and Accounts service. At the time of institution of the suit, he was 88 years; his wife is aged 76 years. The plaintiff purchased a 500 square yards plot, being C-31, Green Park, in 1958. He retired from service in 1978. There exists a three storeyed building (ground, first and second floor) on the plot; the plaintiff's daughter lives on the second floor; his second son, Willy

Singh, lives on the first floor. The plaintiff and his wife live in a portion of the ground floor, comprising dining, drawing room and a bedroom area; the First defendant, his son, and the second defendant, his wife (and the plaintiff's daughter in law) as well as their son, the third defendant (and the plaintiff's grandson) are in possession of two bedrooms, with attached bathroom. Apparently only the third defendant (grandson) was living in the said portion.

3. The plaintiff claims that his son (the first defendant, a doctor), who used to live in the Middle East, and practice there, found difficulty in raising his son, the third defendant; the plaintiff alleges having offered to care for the child, when he was young, and ensure that his schooling went smoothly, and to that end, keeping him in the house. It is submitted that the first two defendants returned to India in 2002, and requested him to give a part of the ground floor to accommodate them. The plaintiff says that he was reluctant to agree to this request, as he and his wife needed the space since both were suffering from ailments, but despite that, he agreed to give two bedrooms, with attached bathrooms to the defendants, at his wife's request. The suit averments are that the defendants were asked not to create problems in relation to common areas. On these conditions, says the plaintiff, the defendants were permitted to occupy two bedrooms on the ground floor. It is alleged that the defendants started intentionally creating disturbances, which they persist in doing. It is contended that this disturbs the plaintiff immensely, as he suffers from angina, and pectoris of the heart, and enlarge prostrate. His wife is said to be suffering from Parkinson's disease. The plaintiff says that it is now difficult to carry out their normal daily routine, peacefully, due to the disruptive activities of the defendants, the irregular hours they keep, the entry of strangers, brought by the third defendant, at odd hours, and the manner in which the common kitchen is used by the defendants, with a view to deny timely food to the plaintiff. It is submitted that the defendant Nos. 1 and 2 have acquired other properties, and despite this are not moving out from the premises, despite repeated requests; it is also averred that the third defendant is of late not even living in the premises. Yet, the defendants continue to keep possession of a portion of the ground floor premises, with a view to claim it, on a later date. The plaintiff and his wife are at the fag end of their life; he (the plaintiff) alleges that they are entitled to peace and also take care of their health, at this late stage. The plaintiff is forced to see deterioration in his wife's health, on the one hand, and also facing humiliation in the hands of the defendants. It is submitted that the plot was purchased by the plaintiff, from his funds, and every floor was constructed by him, with his funds. The defendants were not even born when the property was purchased, and they cannot claim any right, title or interest over the property. The

plaintiff relies on a registered Sale deed, dated 10-5-1958, in relation to the suit property. He submits having borrowed money to purchase the plot. The sale deed has been filed on the record; reliance is also placed on several other documents, including Ex. P-4/D1 and Ex. P-5/D1, which are apparently accounts maintained by the plaintiff, regarding construction of a portion of the first floor.

4. Ms. Amita Sehgal Mathur, for the plaintiff, contends that the material on record unequivocally points to the plaintiff being the sole and exclusive owner, in uninterrupted possession of the ground floor, since 1978. It is urged that the defendants cannot claim any kind of property rights, in respect of the suit property, since the entire funds for acquiring it, were paid by the plaintiff. It is contended that the two documents, produced as evidence of accounts kept by the plaintiff, also establish that the construction too was done by him. Therefore, the defendants, who are avoiding to hand over possession, despite receiving a legal notice, should be appropriately directed to hand over at least one room on the ground floor. It is contended that though such relief is rarely granted, the facts of this case would justify a sound exercise of jurisdiction to issue an interim *mandatory* injunction against the defendants. The plaintiff relies on the decision reported as *Dorab Cawasji Warden –vs- Coomi Sohrab Warden & others* 1990 (2) SCC 117 in support of his case that such directions can be issued in the circumstances of this case; similarly, reliance is placed on the decision reported as *Krishan Dev Sharma –vs- Som Dutt Sharma* 58 (1995) DLT 424, to submit that in the absence of any defence about the Hindu Undivided Family owning the assets, and a plaintiff establishing his right, interest, there is no need for a trial on that question.

5. The defendants raise serious disputes about the plaintiff's claims. Mr. Rajesh Yadav, appearing for them, does not deny that the plaintiff bought the plot; he also does not deny that the plaintiff had constructed on it. He however asserts that the first floor portion was constructed with his (the first defendant's) money, which he used to remit to the plaintiff. The defendant relies on a document, which is in similar terms to what is produced by the plaintiff; it appears to be a half document. According to the plaintiff, the two loose sheets Ex. PW-4/D1 and Ex. PW-5/D-1 show that an amount of Rs. 1.58 lakhs was given by the defendant, in 1991, for construction on the suit property; the plaintiff asserts having returned the money to the latter. The defendants, however, in the document produced on record, state that the plaintiff only borrowed the amount, but did not repay it. It is urged that in this case, the parties understanding always was that the first defendant would, as a consideration for giving

money, be allowed to peacefully stay in the ground floor. It is urged that another suit for partition has been filed.

6. The first defendant also submits that since he was away in Saudi Arabia, at the relevant time, the plaintiff had been given blank cheques in respect of an NRE account, which was used, and the latter had withdrawn Rs. 3,00,000/-. Counsel submits that even in the Municipal property tax returns filed by the plaintiff, he actually revealed that he (the first defendant) was shown as a co-owner with the plaintiff. It is submitted that though the third defendant is presently not staying on the property, he would in all probability be returning soon, in which case the ground floor portion would be needed by him. It is submitted that there are in any case, not exceptional circumstances, as in *Warden's case*. The defendants also rely on *Saraswati Devi Sharma –vs- Sunil Kumar Sharma* 2001 (V) AD (Del) 417 to submit that such interim directions should be given even more rarely, and under no circumstance, in the facts of this case.

7. The disputants before the court are father and son. It is an undisputed fact that the plot was purchased by the plaintiff; he has also filed a letter, written to seek clearance of the department, for construction of a portion of the first floor. The plaintiff relies on two documents, said to be accounts maintained by him, at the relevant time. The defendants rely on a portion of an identical document; except it does not contain any mention of the plaintiff had repaid the sums of money. The defendants, as a matter of fact, dispute the portion of the plaintiff's documents, showing that money was repaid.

8. The first defendant had submitted about an oral partition, in respect of the suit property. The court, therefore, recorded his statement, on oath, on 24th July, 2009. The defendant No. 1 acknowledged that there was no material or document in support of the claim of oral partition. He also answered another question about existence of any letter or document, evidencing the oral partition. The defendant No. 1 denied the signatures of the plaintiff, on certain portions of documents otherwise admitted by him. The portions denied pertain to the plaintiff's maintaining accounts, and showing that the first defendant's money had been returned to him. The first defendant apparently returned to India, in 2002; he says that he did not live in the house, but his son used to live there, since he was studying in St. Columbas School. The first defendant says that no son gives a loan to his father, and that all money was given on the understanding that he (the first defendant) would be permitted to live in the ground floor of the building.

9. The above discussion would show that there is no dispute that the plaintiff purchased the plot in 1958; the first defendant was about 5 years old then. The said defendant also does not dispute that the ground floor was built in 1961. What he submits is about an informal arrangement, not recorded in writing or in any document or letter, which enables him to continue in the ground floor. He relies on a property tax declaration given by the plaintiff, who states that he (the first defendant) was joint owner.

10. *Krishan Dev Sharma* (supra) is an authority for the proposition that in the absence of any proof about partition, would mean that a claim for joint ownership property would have to fail. Here, the plaintiff is concededly the owner of the plot, and the ground floor. Even if, for a moment, it were to be assumed that the first defendant had given some amounts for construction of a portion of the property, the onus of establishing ownership rights lies squarely with him. He has conceded in his statement, not possessing any material to substantiate his plea of “oral partition”; the defendants also, in this court’s opinion, have not been able to say how they acquired any title or interest in the property, in the absence of any written document, or even correspondence. In the circumstances, the defendants’ plea about right to residence, is *prima facie* untenable. In this context, it is not also the case of the defendants that the property, owned by the plaintiff, is held by him in a “fiduciary” capacity, to enable them to claim it. Section 4(3) of the Benami Transactions (Prohibition) Act, 1988 recognises only such a situation as an exception where an ostensible property owner can be asked to account for what is held by him. Here, the defendants concede that the property was purchased by the plaintiff. The claim for an “oral” partition is *prima facie* unconvincing, and legally untenable, also because without showing how they acquired ownership rights (since the plot was purchased by the plaintiff in 1958, apparently with his funds).

11. In *Dorab Cawasji Warden*, the Supreme Court endorsed the view held by English courts that a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. It was held that if the case is clear and one which the court thinks ought to be decided at once, a mandatory injunction will be granted on an interlocutory application. As to what can be the circumstances, of course were not spelt out by the court. However, it is apparent that the court should conclude that there are “special” circumstances, and the requirement of demonstrating a *prima facie* requirement for the interim order, should be of a higher order. The irreparable nature of the injury to the party seeking the remedy, should, similarly be of a graver nature than in other cases.

12. In this case, the plaintiff has been able to establish that he is the owner of the plot; he also built the ground floor, and also a part of the first floor- witnessed by the letter written to the government, seeking permission in that regard. The defendants also acknowledge these facts, particularly about ownership. Their plea is based on an “oral partition” which is explained by the first defendant, in his statement to the court as having been achieved through a series of telephonic conversations, spread over a period of time. The details of this arrangement have not been revealed; besides, the question of an oral partition of the property, owned by one person, exclusively, conferring rights to others, who do not own it, is *ex-facie* unsound in law; it is apparently untenable. Such an arrangement to be recognized and enforced, *prima facie* are to be recorded in registered documents. It is also a matter of the record that the first two defendants do not reside in the ground floor portion which they have possession of; their son, the third defendant, is apparently likely to stay there – at the moment, he does not live there. The first defendant states that his son “lived” in a portion, and he “used to” study in St. Columbus School. His affidavit shows that when the common written statement was filed, he was not even in India; during a later visit in March, 2009, he affirmed the written statement, by an affidavit, admitting that he was studying a management course in the United Kingdom. Apparently, the first two defendants own other properties. The plaintiff and his wife are of advanced age; both are ailing from debilitating, even ailments. The plaintiff’s wife suffers from Parkinson’s disease. They have to depend on domestic help for their daily chores, and are residing in one portion of the ground floor; besides the common space, they have only one bed room. The defendants control the other two bedrooms.

13. Though not directly relevant, the court is mindful that Parliament enacted the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, with a view to providing for senior citizens who are neglected by their children or near relatives; the enactment provides positive rights of claiming maintenance, (by the senior citizens) from those relatives who are likely to inherit their property. Here, the first defendant is the plaintiff’s son; it would be a gross understatement to say that he does not “get along” with his father – a sentiment apparently shared by the other defendants. They do not say that the plaintiff is not suffering from the ailments stated by him, or that his wife too is suffering, as alleged. They do not say that the plaintiff has other properties, or has filed this suit out of some motive; their case is some right vested because of an oral partition, as the first defendant had given some money to the plaintiff to carry on construction. *Prima facie*, it appears that the attempt to keep possession of a part of the ground floor property is to acquire “leverage” so that in the

eventuality of the plaintiff's death, the defendants can consolidate their hold on the property. It is not explained how the living arrangement has crystallised into a property right, based on a vague "oral" partition of property that was never shared. Partition is only where the ownership is joint, or undivided.

14. In this court's opinion, all the circumstances discussed above reveal that the plaintiff has been able to demonstrate a strong prima facie case, of the kind required of in *Warden*, warranting an interim mandatory order. In the event of refusal of such order, the plaintiffs' prejudice would be irreparable, because having regard to his age, and that of his wife, and their medical complications, they are unlikely to live for long. The process of trial and their eventual success at a later stage, in the circumstances, might be no consolation, if either – or both- of them are not able to survive for that long.

15. In view of the above discussion, the defendants are directed, by an interim mandatory injunction, to handover one of the bedrooms in their possession, closest and proximate to the bedroom and attached bath, in possession of the plaintiff, to him, within two weeks from today. An undertaking to comply with the order, in the form of an affidavit, shall be filed within five days; the affidavit of compliance with these directions shall be filed within 20 days. I.A. No. 510/2009 is allowed in these terms. The defendants shall bear the costs of these proceedings, quantified at Rs. 30,000/- to be paid to the plaintiff, within two weeks.

September 7, 2009

(S.RAVINDRA BHAT)

JUDGE