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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: February 01, 2009
Date of Order: February 23, 2010

+ CM(M) 153/2006

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23.02.2010

Roshan Lal

...Petitioners

Through: Mr.J.P. Sengh, Sr. Advocate with Mr. Rajeev Saxena, Advocates

Versus

DDA & Ors.

...Respondents

Through: Mr. R.K.Kashyap, Advocate for R-4

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. By this petition under Article 227 of the Constitution of India, the petitioner has assailed the order dated 10th February 2005 passed by trial court whereby an application of the petitioner under Order 6 Rule 17 CPC for amendment of the suit was dismissed.

2. The facts reveal that the petitioner was allotted a DDA Flat no. 001A/1/(Eu), Ashok Vihar, Phase-III, Delhi. This flat was of category where a multi-purpose room was not there. The petitioner occupied multi-purpose room of another flat and filed a suit for permanent injunction on 12th November 1982 against respondents praying for a decree of permanent injunction to restrain respondents from forcibly dispossessing the petitioner from the multipurpose room which was part of respondent's flat but occupied by petitioner. The petitioner was granted an ex parte interim injunction thereby restraining defendants from dispossessing the plaintiff/petitioner from the multipurpose room. The respondent no.3 was added as a party later, on an application made on his behalf as he had entered into an agreement to sell in respect of flat no. IA/1 (E.U.), Ashok Vihar, with respondents no.1 and 2. Respondent no.4 was added as a party on 3rd January 1995 as a subsequent attorney holder under an agreement to sell dated 12th September, 1991.

3. It is submitted by counsel for the petitioner that on 4th March, 1993, the case was fixed for hearing before the trial court. The advocates were on strike on that day and the date of 18th May, 1993 was given by the court and was duly noted in daily cause list of the Court and in the register. On 13th May, 1993, respondent no.4 filed a suit for permanent injunction against the petitioner and one Mr. D.P. Chug in respect of the same multipurpose room setting out a case

that respondent no.4 was in possession of the multipurpose room. A decree of permanent injunction was sought against the petitioner from dispossessing respondent no.4 (plaintiff in that suit). Respondent no.4 obtained an ex parte order of status quo. When the petitioner learnt about this case, he found that the case of the petitioner though was adjourned for 18th May, 1993 but was taken on 6.4.1993 and was dismissed in default for non appearance of the petitioner. Taking benefit of this dismissal in default, the respondent no.4 broke open the petitioners lock over the multipurpose room and put his own lock. The petitioner then moved an application in the suit filed by respondent no.4 for appointment of a Local Commissioner. The Local Commissioner was appointed and the commission was executed on 17th May 1993. The Local Commissioner's report showed that the lock on the door of multipurpose room was that of respondent no.4 and the possession of the room was with respondent no.4 but the articles lying inside the room the room were being claimed by the petitioner as well. The petitioner then moved an application on 19th May, 1993 for restoration of the suit dismissed in default on 6th April, 1993. This suit was restored on 5th May, 1994. Thereafter, the petitioner made an application under Section 151 CPC with a prayer that since the petitioner was dispossessed from the multipurpose room despite injunction order, the possession should be restored to the petitioner. This application of the petitioner was dismissed by the trial court as the Court was of the opinion that the petitioner should amend the suit and seek a relief of possession and possession cannot be restored under Section 151 CPC. Against this order of trial court dated 9th March, 1995, petitioner preferred a revision petition before this Court being Revision Petition No.305 of 1995. This revision petition was admitted and listed for disposal.

4. It is submitted by counsel for the petitioner that since sufficient long time had expired and the revision petition was not heard, the petitioner was advised that in case the relief of possession was not claimed within the period of limitation, the petitioner would lose the right to seek possession. So, the petitioner moved an application before the trial court seeking amendment of the plaint so as to seek relief of possession. This application was dismissed by the trial court vide the impugned order and the trial court also observed that since the suit was filed by the petitioner for permanent injunction against dispossession and the petitioner had already been dispossessed, the suit itself became infructuous and he listed the matter for arguments on this issue. The petitioner then moved this Court by way of present petition.

5. A perusal of the order passed by the trial court would show that the trial court held that though the appropriate remedy for the petitioner was to amend the suit but the application for amendment of the suit ought to have been made by the petitioner within a reasonable time. The petitioner did not move application for amendment of suit and waited for disposal of his revision petition pending before this Court and ultimately moved an application under order 6 Rule 17 CPC

with considerable delay. The trial court dismissed the application observing that the period of limitation for moving an application for which no limitation period is provided was three years and the Residual Article 137 of the Schedule would apply in case of an application under Order 6 Rule 17 CPC as well from the date of accruing the cause of action. Since in this case, the cause of action accrued in May, 1995, the application should have been made within a period of three years.

6. It is submitted that the petitioner had a right to challenge the earlier order of the trial court passed on an application under Section 151 CPC and could hope that his revision petition may be decided by this Court shortly. Since the expectation of the petitioner did not turn to be true, that cannot be a ground for defeating the right of the petitioner in seeking appropriate amendment in the plaint. Regarding delay in filing application and limitation, the petitioner relied on *Harihar Nath & Ors v. State Bank of India & Ors. JT 2006(4) SC 241* wherein the Supreme Court observed as under:

17. An application seeking leave to proceed, in respect of a pending suit or proceeding (filed before the order of winding up) is not an application for enforcement of any claim or right. It does not seek any 'relief' or 'remedy' with reference to any claim or right or obligation or liability. It is an application which is interlocutory in nature. An interlocutory application is not subject to any period of limitation, unless otherwise specifically provided by law. We are conscious of the fact that an application under Section 446(1) seeking leave to proceed with the suit/proceeding, is not filed as an 'interlocutory application' in the suit/proceeding before the court where such suit/proceeding is pending. But an interlocutory application is nothing but an application in the course of an action. It is a request made to a court, for its interference, in a matter arising in the progress of a proceeding. Therefore, in a broad sense, the application under section 446(1) filed before the company court seeking leave to proceed with a pending suit or proceeding, is an 'interlocutory application' with reference to the pending suit/proceeding. Article 137 is intended to apply to applications for enforcement of a claim or adjudication of a right or liability in a court. An application for leave to proceed with a pending suit or proceeding not being such an application for any relief, will not attract Article 137.

7. On the other hand, respondent has relied upon *Salem Bar Association v UOI AIR 2005 SC 335* wherein Supreme Court observed that the onus is on the party seeking amendment to show

that despite due diligence amendment could not be preferred.

8. It is an undisputed fact that the petitioner was allotted Flat No.1A/1, Ashok Vihar, Phase-III by DDA. This flat did not have multipurpose room with it. The written statement filed by DDA shows that only two flats in row of ten flats had with them multipurpose room. The petitioner in this case occupied multipurpose room of respondent's flat and put lock over respondent's room and filed a suit for injunction. Despite the fact that the allotment and other facts were brought to the notice of the trial court, the trial court allowed the injunction observing that irrespective of the fact how the petitioner came into possession of the multipurpose room since the petitioner was in possession of the multipurpose room, his possession was to be protected and issued an interim injunction. When the suit of the petitioner was dismissed in default, the respondent exercised his right. The respondent was the rightful allottee of the premises. Since there was no injunction in operation, he put his own lock over the multipurpose room and took back the possession. The earlier suit which was filed by the petitioner for injunction had virtually become infructuous. The petitioner now again wanted possession of the room which was not allowed to him. I consider that the rightful owner of room who was deprived of possession by the petitioner by putting a lock over the rooms had a right to repossess the room when the injunction was not in operation.

9. If the petitioner had any right over this room, the only option available with the petitioner was to file a suit for possession of the room on the basis of his right as owner and not as a trespasser. It cannot be a policy of the Courts to encourage trespass and to prevent rightful owner from exercising his right. Where a trespasser deceitfully occupies one of the rooms of the property of another person by just putting his locks and placing some of his goods into the room when the flat is lying vacant and comes to the Court and obtains an injunction without disclosing the fact that the room in question was part of somebody else's flat, once the injunction is vacated, even because of dismissal of suit in default, the rightful owner has a right to repossess his room and put his own lock. If the trespasser wants to claim possession, he must file a suit for possession based on his right, title and not on account of his trespass. The trial court rightly disallowed the amendment of suit as it would have amounted to perpetuation of an illegality. Moreover, the amendment was filed after more than 10 years of incidence of dispossession and was highly belated.

10. I, therefore, find no force in this petition. The petition is hereby dismissed without there being any orders to costs.

February 23, 2010
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SHIV NARAYAN DHINGRA J.