

* **HIGH COURT OF DELHI: NEW DELHI**

CM (M) No. 941/2010 & CM No. 13032/2010
& CM No. 16435/2010

% Judgment reserved on: 23rd September, 2010

Judgment delivered on: 20th October, 2010

Sh. Keshav Aggarwal
Son of Sh. M. R. Aggarwal,
R/o B-365, Third Floor,
Chitranjan Park,
New Delh-110019. Petitioner.

Through: Mr. Sandeep Sharma, Adv.

Versus

1. Sh. Sudarshan Kumar Banga,
S/o Sh. Jiwan Mal Banga,
R/o B-365, Ground Floor,
Chitranjan Park,
New Delhi-110019.
2. Smt. Aradhana Banga,
Wife of Sh. Sudarshan Kumar Banga,
R/o B-365, Ground Floor,
Chitranjan Park,
New Delhi-110019.
3. Sh. P.P. Sharma,
R/o T-23, Khirki Extn.,
Malviya Nagar,
Delhi-110017. Respondents

Through: Mr. Saurabh Trivedi, Adv. for
Respondents no. 1 and 2.
Respondent no. 2 in person.

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.

Present petition under Article 227 of the Constitution of India has been filed by the appellant against order dated 22nd May, 2010 passed by Additional District Judge, New Delhi, whereby appeal filed by the respondents against order dated 11th February, 2010 passed by Judge Small Cause Court was allowed.

2. Brief facts of this case are that petitioner and his wife are the joint owner of the entire third floor of property bearing no. B-365, Chitranjan Park, New Delhi. Respondent nos. 1 and 2 are the owners of the ground floor. On the ground floor, there is a front setback, east side common passage and rear setback for common usage of the occupants so as to facilitate the common facilities. There are water pumps installed for each floor adjacent to the underground water tank. Respondent nos. 1 and 2 in violation of the terms and conditions

contained in the sale deed, have debarred the petitioner and other occupants from operating, maintaining and cleaning the water pump as well as groundwater tank. Aggrieved by their illegal action, petitioner filed a suit seeking permanent injunction against the respondents. Trial court after considering the pleadings, allowed the application of the petitioner under Order 39 rule 1 and 2 of the Code of Civil Procedure (for short as 'Code'), vide order dated 11th February, 2010.

3. Aggrieved by the trial court's order, respondents preferred an appeal. First Appellate Court, vide order dated 18th March, 2010, stayed the operation of order dated 11th February, 2010 of the trial court.

4. Being aggrieved, petitioner filed CM (M) No. 497/2010 in this Court, but the same was dismissed on 16th April, 2010 with following observations;

“Since petitioner has already approached the Appellate Court for vacation of the ex parte order of stay, there is no need for this Court to interfere with the matter.”

5. There after, petitioner filed an application under Order 39 rule 4 of the Code for vacation of the ex parte stay granted by the First

Appellate Court. First Appellate Court, set aside order dated 11th February, 2010 passed by the trial court and allowed the appeal of the respondents, vide impugned order.

6. It is contended by learned counsel for petitioner that First Appellate Court erred in holding that the respondents have full proprietary rights including the rear side of the ground floor where the water pumps and tanks are installed, despite the fact that trial court has given a finding that the sale deed of the respondents does not mention anything of the common passage on the rear side of the ground floor as under absolute ownership of the respondents. The common passage includes rear side back, entry, exit, stairs and lift and no one exclusively owns the said common facilities.

7. On the other hand, it is contended by learned counsel for the respondents that petitioner has limited right to have access to the rear court yard only for purposes of repairing and maintenance of the water tank and booster pumps at reasonable times and after notice to the respondents. The rear portion is in continuous and exclusive possession of the respondents.

8. It is also contended that respondents are not creating any hindrance for the petitioner or any other occupants of the flat. Petitioner or any other occupants do not have unrestricted access or right to reach their water tank and pump. They have got only limited right and that can be used only after giving proper notice to the respondents.

9. Respondents in the written statement does not dispute this fact that petitioner has right to access to the rear court yard for the purpose of repair or maintenance of water tank and booster pump etc. However, the same is a limited right. Relevant portions of the written statement read as under;

“The plaintiff alongwith owners of the upper floors of the building in question are only entitled to have right to entry from the front gate, the passage to the stairs/lift leading to their respective portions. They further have a limited right to have access to the rear court yard only for the purposes of repair/maintenance of the water tanks and booster pumps of the owners of the upper floors at all reasonable times and after notice to the answering defendants. Similarly, the answering defendants have right to access to the top terrace for repair/inspection/maintenance of their overhead tanks, cable TV connection and dist antenna etc.”

10. Trial court in this regard observed;

“It is admitted stand of parties that they have a limited right to access for repairing/maintenance of water tanks and booster pumps. From the documents, defendant no. 1 and 2 have failed to show the alleged common passage at rear side of ground floor, having under their exclusive ownership. Having failed to show as such, defendant no. 1 and 2 have no right to forcibly install or construct any iron gate/obstacle in any manner in the said common passage, which the defendant no. 1 and 2 have installed.

It is an admitted case of the parties that all the water pipe lines connections and motor pumps are being separately connected at all the floors including the basement and it is provided by the builder/defendant no. 3 from the rear setback common passage of ground floor.

In view of the titled documents relied upon by the parties and in view of the recital in Sale Deeds and also admitted by parties, the said rear setback is common, to be used by all the occupants and which cannot be blocked in any manner and the access to the water tank has to be through the common rear setback passage. Prima facie therefore plaintiff has been able to establish a case in her favour. The balance of convenience also lies in favour of plaintiff. It is the plaintiff who shall suffer irreparable loss in view of the circumstances stated above, if the relief is not granted, as due to the gate being locked by defendant no. 1 and 2, plaintiff apart from other occupants would be facing difficulty in access to the rear setback common passage.”

11. On the other hand, the First Appellate Court in the impugned order observed that though the staircase and other amenities are for

the common use of all the occupants and the fact that the water tanks of the other occupants are installed within the court yard of respondent nos. 1 and 2, no doubt leaves the occupants at their mercy, but if petitioner is aggrieved by the same, he should make alternate arrangements, he cannot insist that he be permitted to barge in the respondent nos. 1 and 2 property on the pretext of getting the water tanks cleaned.

12. Since First Appellate Court has also held that staircase and other amenities are for common of all occupants and the water tank of petitioner is installed in the courtyard of the ground floor and no doubt it leave the occupants at the mercy of respondent nos. 1 and 2, then by no stretch of imagination it can be said that respondent nos. 1 and 2 have full proprietary rights of the entire ground floor of the premises. Under these circumstances, petitioner cannot be denied access to his water tank and water pumps situated on the ground floor.

13. Thus, the findings of the First Appellate Court are totally perverse and against the pleadings of the parties.

14. Petitioner has a prima facie case in its favour and balance of convenience also lies in his favour and it is the petitioner who will suffer irreparable loss if injunction prayed for, is not granted.

15. Accordingly, impugned order passed by First Appellate Court is set aside and order dated 11th February, 2010 of the trial court is restored.

16. Present petition stands disposed of accordingly.

17. Parties shall bear their own costs.

18. All pending applications also stand disposed of.

October 20, 2010
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V.B.GUPTA, J.