

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 17th April, 2012

Pronounced on: 17th May, 2012

+ **CM (M) 39/2009**

SHRI GULSHAN SETHI AND ANOTHER Petitioner

Through: Mr. Sudhir Nandrajog Senior
Advocate with
Mr. P.S. Bindra, Advocate.
Ms. Shweta Priyadarshini, Advocate.

Versus

RAJAN DHALL AND OTHERS Respondents

Through: Mr. A.K. Singla Senior Advocate with
Mr. Sheetesh Khanna Advocate for
R-1.
Mr. Ajay Arora, Advocate with
Mr. Kapil Dutta, Advocate for
R-MCD.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. The Petitioners (Defendants No.1 and 3 before the Trial Court) challenge the order dated 28.11.2008 passed by the learned Additional District Judge whereby the Petitioners and Respondent No.2 were directed to *“remove the brick wall so constructed at the first floor of the property No.D-24 (WHS), Timber Market, Kirti Nagar, New Delhi and allow the appellant*

to use the back side staircase put at the back portion of the ground floor to have access to and from the first floor of property No.B-24 (WHS), Timber market, Kirti Nagar, New Delhi until and unless the stairs, as per the sanctioned plan are reconstructed/rebuilt/completed by the defendant no.1,2 and 3, till the final disposal of the suit.”

2. Status of the parties before this Court, the Appellate Court and the Trial Court is extracted from Para 3 of the Petition hereunder:-

Before this Court	Before Appellate Court	Before Trial Court
Petitioner No.1	Respondent No.1	Defendant No.1
Petitioner No.2	Respondent No.3	Defendant No.3
Respondent No.1	Appellant	Plaintiff
Respondent No.2	Respondent No.2	Defendant No.2
Respondent No.3	Respondent No.4	Defendant No.4

3. For the sake of convenience, the parties shall be referred to by their nomenclature before the Trial Court.
4. The facts of the case and the respective position taken by the parties is extracted from Para 2 to 6 of the Trial Court order hereunder:-

“2. The present suit for permanent injunction and mandatory injunction has been filed by the plaintiff

claiming that he is the absolute owner and in exclusive possession of first and second floors of the suit property (Property No.B-24, Timber Market, Kirti Nagar, New Delhi), which he had purchased from defendants No.1 and 2 after execution of some documents dt.24.7.1997 whereby the plaintiff also purchase all the roof rights, common passage and common stairs at ground floor. The ground floor is owned by defendant No.1 and 2 who later on inducted defendant No.3 in the property.

3. That the suit property had been constructed as per the sanctioned building plan and plaintiff has been enjoying right to access from the stairs constructed from ground floor to first floor, which are constructed in the front portion of the ground floor as per sanctioned plan.

Further it is alleged that on 8.1.2005, the defendants No.1 and 3 started constructing another staircase from ground floor to first floor. On 12.1.2005 they started demolishing the previous staircase. Despite the objection raised by the plaintiff, the defendants did not desist from their activity. Rather assured the plaintiff that they are doing so in order to re-erect a common staircase of a new design at the same spot by demolishing the old one and further they had constructed an alternative staircase of iron for the time being so as to avoid and inconvenience to the plaintiff, which he can use. The plaintiff acceded to this proposal. But despite repeated requests they avoided to re-erect the new staircase.

4. Further it is stated that on 8.2.2005 the defendants erected a boundary wall around the alternative staircase and at the first floor of the suit property which completely closed the access of plaintiff to his first floor. The plaintiff objected to this and complained to local authorities but it was of no use and due to this construction, the access of the plaintiff has been completely barred to his first floor. Against this illegal

activity the plaintiff has filed the present suit wherein by way of the ad-interim injunction that the wall surrounding the alternative staircase may kindly be demolished and the plaintiff be allowed to use the alternative staircase till the new one is erected.

5. The defendants have filed their WS and reply to the interim application and has objected to the present suit on merits on the ground that the alleged alternative staircase is an exclusive staircase for the use of defendant No.1 leading to the mezzanine floor in the exclusive possession of the defendant No.1 and was meant to be used by the defendant No.1 alone as there was no staircase leading to the first floor through the ground floor portion/shops of defendants No.1 and 3. Further it is stated that the plaintiff purchased the first and second floors along with right to use the iron staircase installed outside the suit property which existed since the time of purchase of the suit property by plaintiff.

6. MCD has also filed WS wherein they stated that the suit property was duly sanctioned and as per the plan there was a staircase at the front portion of the ground floor. On inspection carried on 5/9/2005, neither any building material nor any fresh construction activity was notice at the suit site and the staircase was not there at the sanctioned place and therefore, MCD has initiated action against the deviation/excess coverage at ground floor and first floor and against unauthorized construction raised at the entire basement floor, second floor and part third by booking the same.

On these grounds, all the defendants have opposed the grant of interim injunction.”

5. The Trial Court by the impugned order found that the Plaintiff had failed to prove that any stairs existed on the ground floor at

Point 'B' as shown in the site plan (at the time he purchased the first floor and the second floor of the property with roof rights) and thus held that the Plaintiff was not able to establish any prima facie case in his favour. The application for grant of ad interim injunction was accordingly dismissed.

6. The Appellate Court by the impugned order held that the Plaintiff was being deprived of the use of the first and the upper floor due to the blocking of the back passage by the defendant. It was held that the Plaintiff cannot be deprived of the use of the first floor and the ground floor as he is proportionate owner of the property. Thus, an interim injunction in mandatory form was issued in the initial stage directing Defendants No. 1 and 3 to remove the brick wall as aforesaid.
7. It is well settled that the Courts do have power to grant interim injunction in mandatory form at the initial stage. But, the Courts must be satisfied about the triple test of strong prima facie case, balance of convenience and irreparable loss and injury. In *Dorab Cawasji Warden v. Coomi Sorab Warden*, AIR 1990 SC 867 the Supreme Court referred to a catena of judgments including some English decisions and reiterated, the powers of the Court to grant interim injunction in mandatory form. Para 10,11,14 and 15 of the report are extracted hereunder:-

“10. The trial court gave an interim mandatory injunction directing the fourth respondent not to continue

in possession. There could be no doubt that the Courts can grant such interlocutory mandatory injunction in certain special circumstances. It would be very useful to refer to some of the English cases which have given some guidelines in granting such injunctions.”

“11. In Shepherd Homes Ltd. v. Sandham (1970) 3 All ER 402, Megarry J. observed:-

“(iii) On motion, as contrasted with the trial, the court was far more reluctant to grant a mandatory injunction; in a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this was a higher standard than was required for a prohibitory injunction.””

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“14. 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 or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these 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.”

“15. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.”

8. In the suit filed before the Trial Court, the Plaintiff alleged that when he purchased the first floor and the second floor with roof rights there were stairs in the front portion of the shop on the ground floor (bearing No.B-24 (WHS) Timber Market, Kirti Nagar, New Delhi) leading to the first floor. In support of his case, the Plaintiff places reliance on Special Power of Attorney, a Will, and an Agreement to Sell dated 24.07.1997 whereby Defendants No.1 and 2 had agreed to sell the first floor and the second floor with roof rights and common passage, stairs, etc. of property No.B-24 (WHZ), Timber Market, Kirti Nagar, New Delhi with proportionate right of land under the said property in

favour of the Plaintiff and delivered the vacant possession thereof. He also relies on the sanctioned site plan of the property vide file No.1637/B/HQ/89 dated 17.11.1989 by AE-III, Building Department, (MCD) which was got prepared by the Defendants at the time of initial construction of the same. In the Plaint, the Plaintiff averred that on 12.01.2005, Defendants No.1 and 3 started demolishing the common stairs. It is stated that the Plaintiff approached the local police and other authorities on 13.01.2005 and 02.02.2005 but no action was taken by the police due to which the Plaintiff had to accept the offer made by Defendants No.1 and 3 (that he could access the first floor, from a newly erected stairs in the rear portion of the ground floor).

9. It is very strange that in support of the averments, the Plaintiff did not prefer to file the actual site plan in existence before the demolition of the stairs. He (the Plaintiff) was content to place on record only the sanctioned site plan (in the year 1989). During the trial of the suit, the Plaintiff filed his Affidavit by his examination-in-chief. In cross-examination he admitted that the basement was not shown in the site plan Ex.PW-1/3. (This is another copy of the sanctioned site plan placed on record by the Plaintiff in the year 2010). Although, it is the case of the Plaintiff that he purchased the basement from Defendants No.1 and 2 prior to the purchase of the first and the second floor in the year 1997. In cross-examination, he could not give the year

of purchase of the basement. He could not even say if it (the basement) was purchased four-five or six years before the purchase of the first and the second floor.

10. The Plaintiff was not sure as to where the stairs existed before it was demolished. Initially, he stated that the stairs was between Point 'D' to 'D1'. He shifted his stand and deposed that it was in existence at Point 'A' and encircled red on the date of his cross-examination in the Court. About the existence of the construction, he testified as under:-

“I sold the basement to M/s. Prince Plywood, who are still there. In 1995, Gulshan Sethi and Mukesh Sethi partitioned the ground floor after demolishing the staircase on the ground floor. It is wrong to suggest that I was not possession of any part of the building in the year 1995. Again said I had purchased the basement in the year 1995. It is correct that whatever construction was there and is still there, was in the year 1995. The defendants had partitioned the ground floor in the year 2005 after demolishing the staircase. The staircase was of RCC. The same was leading from ground to third floor. Again said up to second floor. I have no photographs with me to show that the staircase existed between ground floor to second floor. The first floor and second floor which are in my possession are hundred percent covered.....”

11. Thus, the cross-examination of the Plaintiff reveals that he was vacillating as to when exactly the stairs on the ground floor was demolished. He (the Plaintiff) could not produce any photograph showing existence of the stairs. He purchased the first floor and the second floor in the year 1997. According to

him, the stairs was demolished in February, 2005. Thus, he enjoyed the use of the stairs for eight long years, but he could not file any photograph showing existence of the stairs inside the shop. In the plaint, the Plaintiff says that the demolition of the stairs started on 12.01.2005. He could have taken the photographs at the time of its demolition. But no such photograph was filed in support of the suit. When the Plaintiff was cross-examined on this aspect, he tried to take shelter of his absence from Delhi during the time the stairs were demolished, which is not the case of the Plaintiff either in the Plaint or in the alleged complaints made to the SHO and the MCD.

12. Now it is time to advert to the alleged complaints made to the SHO and the MCD. The first complaint dated 13.01.2005 was made to the SHO and the MCD. As per the complaint, the Defendants No.1 and 3 were threatening to demolish the stairs. It was stated that if the Defendants were allowed to demolish the stairs, he would not have any access to the first and the second floor portion of the property. Thus, there is contradiction on the very important aspect of threat and 'demolition' of the stairs in the Plaint and the complaint made to the SHO and MCD. If the stairs had already been demolished on 12.01.2005, (as stated in the plaint) the Plaintiff could not have made a complaint on the next date i.e. 13.01.2005 that Defendants No.1 and 3 were extending threats to demolish the stairs which might deprive him of bonafide use of the property purchased by him.

13. The complaint dated 13.01.2005 is shown to have been delivered in Police Station Kirti Nagar; it was not even sent to the MCD. In the second complaint dated 02.02.2005, the action of threat to demolish the stairs was repeated, although as per the complaint the stairs were already demolished on 12.01.2005. In addition to this, the Plaintiff was complacent to send the complaint to the authorities i.e. SHO and the MCD just by UPC (Under Postal Certificate) instead of delivering it by hand, sending it by registered post or by speed post. This shows that the Plaintiff was more interested in creating evidence rather than taking any action against the Defendants. There is contradiction in his cross-examination as PW-1 that he was out of station (to Gwalior) on the date when the stairs were demolished by Defendants No.1 and 3.
14. The sanctioned site plan Ex.PW-1/3 shows that the building has front of 20 ft.; it has a canopy in the front; office measuring 8'-1½" x 11'-0" is on the left side of the shop and the stairs are on the right side. As of today, there is no canopy and the shop is divided in two parts by intervening wall throughout and the wall extends even to the front which was an open area under canopy as per Ex.PW-1/3. The shop on the right side portion was sold by Defendant No.2 to Defendant No.3 in the year 1996 as stated by the Defendants. Obviously, if there are two shops divided throughout by intervening wall, there could not have been any stairs on the right side. Moreover, the stairs, as per the site plan

would be in the portion of the property belonging to Defendant No.3. Thus, it is apparent that the Plaintiff could not produce any material to show that the stairs existed inside the slop on the ground floor of the property leading to the first floor. On the other hand, there is overwhelming material to draw an inference that the stairs were demolished before the right side portion of the shop was sold by Defendant No.2 to Defendant No.3, before the first floor and the second floor were sold by Defendant No.2 to the Plaintiff. There is no manner of doubt that the Plaintiff did not have any prima facie case. The grant of interim injunction on interlocutory stage and that too in mandatory form was not made out.

15. Learned senior counsel for the Plaintiff argued that although a Petition under Article 226 is maintainable against the order of Appellate Court allowing an Appeal but this power must be exercised only in exceptional circumstances and with circumspection. Learned senior counsel places reliance on *Yeshwant Sakhalkar & Anr. v. Hirabat Kamat Mhamai & Anr.* (2004) 6 SCC 71. There is no dispute about this proposition of law; the same is well settled. However, in the instant case, the Appellate Court did not go into the question whether the stairs really existed on the ground floor as claimed by the Plaintiff and denied by Defendants No.1 and 3. The Appellate Court was swayed by the fact that every property or using of property is bound to have its way. The Appellate Court did not go into the

averments that the Plaintiff was using the first floor by a temporary stairs placed in the front of the shop. The photograph Ex.PW-1/D-1 and Ex.PW-1/D-2 placed on record by the Plaintiff show that more than three ft. opening up to the base of the first floor had been made to put the ladder to approach the first floor. It is nowhere stated by the Plaintiff as to when he demolished the wall in the front to make the passage to approach the first floor from a temporary ladder. In my view, the learned ADJ acted illegally and with material irregularity in reversing the finding of fact reached by the Trial court that the Plaintiff did not have any prima facie case.

16. The petition is bound to be allowed. The impugned order passed by the Learned Additional District Judge is set aside.
17. It is made clear that my conclusions are only tentative to decide the instant petition. The Trial Court shall decide the suit without being swayed by the observations made hereinabove.
18. This suit was filed in the year 2005. It is stated that the evidence of the Plaintiff has already been completed and the evidence of the Defendants has commenced. It is stated by the learned senior counsel for the Defendant No.1 and 3 (the Petitioners) that the Defendants shall render full cooperation in expeditious disposal of the suit.
19. In the circumstances, the Trial Court shall endeavor to dispose of the case within a period of six months from the next date of

hearing.

20. It is stated that the next date fixed before the Trial Court is 31.05.2012. The parties are directed to appear before the Trial Court on 31st May, 2012.
21. Trial Court record shall be transmitted to the Trial Court immediately through special messenger.
22. A copy of the order be sent to the Trial Court for information.
23. No costs.

(G.P. MITTAL)
JUDGE

MAY 17, 2012
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