

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

+ FAO 500/2011

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Judgment delivered on: 11.05.2012

ANIL NIGAM

..... Appellant

Through : Mr. T.K. Ganju, Sr. Adv. with
Mr. Abhishek Singh, Mr. Arvind
Kumar Ray and Mr. Aditya Ganju,
Advocates

versus

ASHOK SINHA

..... Respondent

Through : Mr. Sunil Kumar, Sr. Advocate with
Mr. Himanshu Shekhar & Mr Manish
Mohan, Advocates

**CORAM:
HON'BLE MS. JUSTICE VEENA BIRBAL**

VEENA BIRBAL, J.

1. This is an appeal under Order XLIII Rule 1 of Civil Procedure Code, 1908 challenging the impugned order dated 14.09.2011 passed by the learned ADJ, South District, New Delhi whereby the injunction application under Order 39 Rule 1 and 2 of CPC moved by the appellant/plaintiff has been dismissed.

2. The appellant herein i.e. plaintiff before the learned trial court has filed a suit for permanent and mandatory injunction alleging therein that he is the owner of entire ground floor portion of property bearing no. 111,

Sunder Nagar, New Delhi by virtue of `Will' dated 9th July, 2002 of his mother. The property in question comprises of ground floor and first floor and the same was originally owned by his mother. His mother had left a will dated 09.07.2002 wherein the entire ground floor portion was bequeathed in favour of the appellant/plaintiff while the first floor of the property in question was given to his sister i.e., Dr. Madhuri Nigam. Appellant/plaintiff is settled in USA and most of the time the ground floor that is owned by him mostly remains in possession of tenant. When his sister was alive, she used to reside on the first floor along with her family members i.e., her husband and son i.e., the defendants before the trial court. It is alleged that so long as his sister was alive, there was no problem from having free access to the ground floor from the main entrance provided from the porch which is adjacent to the drive way. The said entry on the ground floor from the porch was being utilized by the appellant/plaintiff and his tenants for having access to the ground floor. It is stated that in addition to said entry, there is a sliding door made available on the front portion of the ground floor which provides access to the front lawn. The sliding door cannot be locked from outside and the same is purely made available on the ground floor portion with the purpose to have access to the front lawn only.

3. It is alleged that after the death of sister of the appellant/plaintiff, the respondent and his father i.e., the defendants before the trial court had been resisting their entry to ground floor from the porch entrance. The appellant has alleged that his relationship with his brother-in-law i.e. defendant no.1 was never cordial and the same had deteriorated further after the death of his sister. It is alleged that whichever tenant comes to reside on the ground

floor, they are not able to enjoy the property freely due to free access not being provided by the defendants from the porch entrance. The appellant/plaintiff has given the names of tenants who had occupied the ground floor on different dates and the difficulty being faced by them due to no access being given to them from the porch entry and the appellant/plaintiff has prayed for a decree of permanent injunction in his favour as well as the occupants of the ground floor. Along with the said suit, an application under Order 39 Rules 1 and 2 CPC was filed seek ad interim injunction restraining the defendants their associates from creating any obstacle to the appellant, his servant, lawful tenants from entering access to the ground floor portion from main entry from the porch in the property in question.

4. It is alleged in the written statement that by the 'Will' of mother of appellant, it is not only the first floor but the barsati floor and the three servant quarters on the second floor of garage block and garage devolve upon the wife of defendant no.1. The stand taken in the written statement as well as reply to the application under Order 39 Rules 1 and 2 CPC is that the main door has been placed in front of the house and is located on the ground floor varanda facing the front gate of the house. By long practice, the said entrance has been used as main entrance. It is also claimed that the appellant or its tenants had never used the porch entrance since the death of mother of defendant no.2 i.e., the respondent herein, as such he is not entitled for injunction as is claimed by him.

5. After hearing both the parties, the learned trial court dismissed the ad interim injunction application by holding that granting of relief under Order 39 Rules 1 and 2 CPC shall result in virtually decreeing the suit of the appellant without adjudicating on the rights of the appellant to use the entry from the porch side.

6. The learned senior counsel for appellant/plaintiff has contended that the grant of relief under Order 39 Rule 1 and 2 CPC is in the discretion of the court. It is contended that the trial court has not exercised its discretion in a reasonable manner. It is stated that the `Will' dated 09.07.2002 of the mother of the appellant on the basis of which the appellant/plaintiff has been given the ground floor does not restrict in any manner to the entry of appellant to the ground floor from the porch side. It is further contended that it has been admitted in the written statement by the opposite party that prior to death of sister of the appellant/plaintiff, the said entry was being used by appellant/plaintiff. It is contended that simply by holding that grant of interim injunction will amount to decreeing the suit, is not a ground to reject the application of the appellant/plaintiff.

7. On the other hand, learned senior counsel for the respondent has argued that the right of the appellant to have access from the porch side on the ground floor is yet to be proved. The trial court has exercised its discretion in a reasonable manner while disposing of the application under Order 39 Rule 1 and 2 CPC, as such no case for interference is made out.

8. Learned senior counsel for the parties have been heard at length.

9. It is an admitted position that earlier the property in question was owned by the mother of the appellant. The mother of appellant has left behind 'Will' dated 09.07.2002 which is also not disputed. As per the aforesaid 'Will', the ground floor and other portions stated therein have been bequeathed in favour of the appellant/plaintiff. The first floor and other portions stated therein have been bequeathed in favour of the sister of the appellant, who died on 16.8.2007. The suit has been filed by appellant against the husband and son of his sister. The sister of appellant had died prior to filing of suit. Her husband i.e., defendant no.1 has also died in 2010. The appeal is filed against respondent i.e., son of sister of appellant who is defendant no.2 before the trial court. The respondent is stated to be living abroad.

10. The 'Will' dated 09.07.2002 on the basis of which both the parties derive their right to the respective portions mentioned therein, nowhere restricts the right of the appellant/plaintiff for his entry to the ground floor from the porch side. In the written statement, the stand of the respondent is that the porch entrance has been used exclusively by the respondents/defendants after the death of Dr. Madhuri Nigam. However, there is nothing on record to substantiate the same. The stand of the appellant is that till his sister Dr. Madhuri Nigam was alive i.e., till 16.8.2007, there was no problem in using the porch entry for the ground floor. The contention that it has not been used since the death of Dr. Madhuri Nigam does not create a right in the favour of respondent so as to contend that the said entry cannot be used by the appellant at all. Reference

is made to judgment *Shatrughan Sinha V. Gurudev Singh Mann & Ors* 2006 (5) Bom CR 546.

11. The photographs/site plan on record show that there is a main gate in front of the house for entry to the building. Then there are sliding doors on the ground floor which open on the drawing room. The entry through porch leads to a common passage from where the stair case for going to first floor starts. The said common passage also leads to a door which opens to the ground floor. The stand of the appellant is that said porch entry had been used by the appellant/his tenants to have access to the ground floor portion through the main entrance door to the ground floor portion when his sister was alive. The sliding door on the front portion of the ground floor provides access to the front lawn and cannot be said to be main entry gate as is alleged.

12. In view of above discussion, the appellant has been able to make out a prima facie case in his favour. The balance of convenience also lies in favour of the appellant inasmuch as by not allowing appellant/his associate to use the entry to the ground floor from the porch side, they will be prevented from beneficial use of his property whereas no inconvenience is being caused to the first floor occupants. If interim relief is not granted to the appellant/plaintiff, it will cause irreparable loss and injury to him because if he ultimately succeeds in the matter, he cannot be adequately compensated.

13. Considering the totality of facts and circumstances, the trial court has not exercised the discretion in a reasonable manner. Accordingly, the impugned order is set aside and by way of ad interim injunction the respondent, his associates and assignees are restrained from creating any obstacle for the appellant, his servant, associates, tenants or any other person acting on behalf of the appellant from preventing access to the ground floor portion from the porch entry till the disposal of the main suit.

14. It is clarified that any observation made in this order will not have any bearing on the final outcome of the suit which is pending disposal before the learned trial court.

15. The appeal stands allowed. No order as to costs.

LCR be sent back forthwith.

VEENA BIRBAL, J

MAY 11, 2012

kks/srb