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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 1218 OF 2014
IN
SUIT NO.768 OF 2014
WITH
NOTICE OF MOTION (L) NO.1252 OF 2015
IN
SUIT NO.768 OF 2014**

Mohammed Akhtar Usman Ansari & Ors. ...Applicants/Plaintiffs
VS
Mansoor Mehmood Sayed & Ors. ...Defendants

.....

Mr Sharan Jagtiani i/b Atul Dubey for the Plaintiffs.
Mr Shyam Mehta Sr. Advocate a/w Kirti Munshi i/b Kiran Jain & Co. for Defendant No.1.
Mr Venkatesh Dhond, Sr. Advocate a/w Mr Mayur Khandeparkar i/b Hemant Ghadigaonkar & S Paranjpe for Defendant No.2
Mr P.R.Kadam, Maintenance Surveyor, Superintendent City Survey & Land Record Office Present.

CORAM : S.C. GUPTE, J.

MAY 08, 2015

P.C. :

This suit is filed by the Plaintiffs for protection of their unobstructed right, title and interest to use certain common facilities such as toilet, washing place and electric meters cabin in Final Plot No.724 of TPS III- Mahim Division in Mumbai and also to a certain access for entering their premises and common facilities. Notice of Motion No.1218 of 2014 is the Plaintiffs' interlocutory application for protection of their use of these common facilities and access. On this Notice of Motion an ad-interim protection was granted to the Plaintiffs by this Court on 10 November 2014. Notice of Motion (L) No.1252 of 2014 is taken out by Defendant No.2 for vacating that order. Both Motions are taken up for hearing by consent of Counsel.

2 The case of the Plaintiffs may be stated in brief as follows:

The Plaintiffs and Defendant Nos.4 and 5 are occupants of a chawl consisting of a ground floor structure of 15 rooms on Final Plot No.724 ("F.P.No.724" or "suit property"). F.P.No.724 is purportedly owned by Defendant No.1 to whom the Plaintiffs pay rent for their respective tenements. There is a common toilet, washing place and electric meter room on F.P.No.724 for the common use of the residents of this chawl. There is also an access from Balaram Lane to enter F.P.No.724. Defendant No.2 is a developer claiming ownership / development rights in respect of an adjoining plot, Final Plot No.723 ("F.P.No.723" or "adjoining plot"). There was a soda factory on this adjoining plot and a common wall between the soda factory and the suit property. This common wall was recently demolished by Defendant No.2. Defendant No.2 has proposed a construction on the adjoining plot. Defendant No.2, for the purpose of such construction, has proposed to construct a wall within the suit property so as to block the Plaintiffs' access to the common facilities as well as to the chawl from Balaram Lane. Defendant No.2 has also proposed to demolish the common facilities. The Plaintiffs have alleged collusion in this behalf between the owner of the suit property (Defendant No.1) and Defendant No.2. The Plaintiffs have, in the premises, sought a declaration of their entitlement to these facilities and access and a permanent injunction restraining the Defendants from demolishing, or causing damage or obstruction or interference in the Plaintiffs' use of, the common facilities and access.

3 The gravamen of the case of Defendant No.2 is that the common facilities are all in F.P.No.723 and not in F.P.No. 724. Yet, Defendant No.2 does not propose to deprive the Plaintiffs of the facilities or the access during the pendency of these proceedings, but offers to relocate these facilities within F.P.No.723 itself. Defendant No.2 submits that it has purchased F.P.No.723 vide a registered conveyance; it has applied to the Mumbai Municipal Corporation for development of F.P.No.723 and procured an IOD; one of the conditions of the IOD requires Defendant No.2 to fence/ barricade F.P.No.723 from all sides;

accordingly, a barricade of G.I.Sheets is proposed by it around the plot, which involves putting up of G.I.Sheets even from the side of F.P.No.724; Defendant No.1 had initially proposed to Defendant No.2 a joint development of the two plots, i.e. F.P.Nos. 723 and 724, since F.P.No.724 is too small to be developed independently, but Defendant No.2 had refused the proposal; irked by this refusal, Defendant No.1 proceeded to file a suit in the City Civil Court in his capacity of the owner of F.P.No.724, but could not obtain any interim relief in that suit; and Defendant No.1 has now instigated the Plaintiffs to file the present suit as tenants of F.P.No.724. It is brought out by Defendant No.2, in its Notion of Motion, that the survey and demarcation of F.P.No.723 have been accomplished during the pendency of these Motions and the common facilities can be demonstrably shown to be standing on F.P.No.723, and obstructing the construction of Defendant No.2 on F.P.No.723. In the premises, Defendant No.2 proposes to relocate these facilities at its own cost within F.P.No.723 without either hampering the Plaintiffs' access to these facilities from F.P.No.724 or the Plaintiffs' access to F.P.No.724 from Balaram Lane. Defendant No.2 proposes this merely as an interim measure and without claiming any equity.

4 Defendant No.1, who is the owner of F.P.No.724, supports the Plaintiffs' case and reiterates that the common facilities form part of F.P.No.724 and cannot be either demolished or relocated by Defendant No.2.

5 The central question in these Notices of Motion is whether the common facilities form part of F.P.No.724, since that is the only basis on which the Plaintiffs claim an unobstructed right, title and interest to use these facilities. The Plaintiffs do not claim either a licence for use of the common facilities from the adjacent plot owner, i.e. owner of F.P.No.723, or adverse possession (adverse to the owner of F.P.No.723) of the common facilities, so as to claim entitlement to such use, on the footing that the common facilities form part of F.P.No.723. If that is so, what this Court has to consider at the interlocutory stage is, whether the Plaintiffs make out a *prima facie* case that the common facilities form part of F.P.No.724. Apart from a bald assertion in the plaint, there is no material produced by the Plaintiffs in support of such case. On the other

hand, Defendant No.2 has produced ample material to show that the common facilities actually form part of F.P.No.723 as noted below.

6 On 24 March 2014, Defendant No.2 applied to the City Survey Office for survey and demarcation of F.P.No.723. On 17 May 2014, a physical survey and measurement was carried out by the City Survey Officer, and a map was prepared. Thereafter a notice was issued by the Collector to Defendant No.2 as well as the occupants of the neighbouring plots, namely, F.P. Nos. 722 and 724, for the proposed visit of the Maintenance Surveyor of the City Survey & Land Records (city) Office for demarcation at site. Pursuant to this notice, the Surveyor actually visited the site on 19 July 2014. At that time, Defendant No.1, owner of F.P.No.724, objected in writing to the demarcation work being carried out. Defendant No.1 called upon the Surveyor to also carry out survey of F.P.No.724 and indicate boundaries of the two plots simultaneously, before F.P.No.723 was demarcated. Defendant No.1 offered to comply with the requisite paper work in this behalf within 15 days. No paper work was done or survey fee was paid by Defendant No.1 within 15 days. In the meantime, on 1 August 2015 this Court passed an ad-interim order noting *inter alia* that Defendant No.2 had applied for demarcation of F.P.No.723 and a notice for the same had been received. This Court also recorded the statements of learned Counsel for the Plaintiffs, Defendant No.1 and Defendant No.2 that whereas the Plaintiffs and Defendant No.1 had to objection to the demarcation exercise being carried out by the competent authority, pending that exercise Defendant No.2 shall not disturb the status quo in respect of the amenities as also the access of the Plaintiffs and occupants of F.P.No.724. Pursuant to this order, Defendant No.2 called upon the Superintendent, City Survey & Land Records to complete the demarcation exercise. On 27 August 2014, the Superintendent, City Survey & Land Records, issued a notice to the parties including Defendant Nos.1 and 2 as well as the Plaintiffs and occupants of F.P.No.724 for demarcation to be carried out on 6 September 2014. The Superintendent also pointed out that the time limit of 15 days asked for by Defendant No.1 had expired; that there was no compliance with any paper work or payment of survey fee for demarcation survey of F.P.No. 724; and that there was no valid objection now left on the part of

Defendant No.1 (owner of F.P. No.724) to the demarcation of F.P.No.723. Accordingly, on 6 September 2014, the Maintenance Surveyor visited the site and carried out the demarcation of boundaries of F.P.No.723 in the presence of Defendant Nos.1 and 2, i.e. the owners, respectively, of F.P.No.724 and 723. A panchnama to that effect was prepared by the Maintenance Surveyor. By his order dated 22 September 2014, the Superintendent, Mumbai City Survey & Land Records (city), forwarded the survey map of F.P.No.723 to Defendant No.2. Defendant No.2 has produced all these documents, namely:

- (i) The application of Defendant No.2 to the City Survey Office for survey and demarcation dated 22 March 2014;
- (ii) The Collector's notice dated 8 July 2014 in connection with the survey application dated 24 March 2014, and the survey carried out on 17 May 2014 along with the preparation of the survey map;
- (iii) the objection of Defendant No.1 dated 19 July 2014, requesting *inter alia* for 15 days period to comply with the paper work for demarcation of F.P.No.724;
- (iv) The notice of the Superintendent dated 27 August 2014, for demarcation to be carried out on 6 September 2014;
- (v) A panchnama dated 6 September 2014 of the demarcation exercise carried out, and
- (vi) The report of the City Survey Office dated 22 September 2014, enclosing therewith a survey map of F.P.No.723.

Defendant No.2 has also produced the actual survey map prepared and submitted by the Superintendent of City Survey & Land Records and the photographs taken at the time of physical demarcation at site by the Maintenance

Surveyor. These documents *prima facie* establish that:

(a) A physical survey of F.P.No.723 was actually carried out on 17 May 2014 pursuant to a formal application in that behalf by Defendant No.2 (the factum of physical survey having been admitted in writing by the owner of F.P.No.724, i.e. Defendant No.1);

(b) In pursuance of a notice duly issued to the Plaintiffs as well as Defendant No.1 and after affording adequate opportunity to both, demarcation of F.P.No.723 was carried out by the Survey Office in the presence of owners of both F.P.Nos. 723 and 724.

(c) A proper survey report has been duly prepared and also demarcation physically made at site by the City Survey Office. This survey report and the physical demarcation clearly show that the common facilities which are referred to by the Plaintiffs fall within F.P.No.723 and not F.P.No.724.

7 The Plaintiffs have, thus, failed to *prima facie* establish their case of entitlement to unobstructed right to use these facilities on the basis of the facilities forming part of F.P.No.724. On the other hand, there is an overwhelming evidence on record that these facilities actually stand on F.P.No.723.

8 Learned Counsel for the Plaintiffs and Defendant No.1 submit that the Plaintiffs, have at any, rate been using these facilities since long and cannot be dispossessed of, or prevented from using, the same otherwise than by due process of law. In the first place, the Plaintiffs' suit herein is not to protect their possession from the true owner of the property. The Plaintiffs' suit is to protect their right to use the common facilities on the ground that the said facilities form part of F.P.No.724 on which their chawl stands. The Plaintiffs have sought recourse to the process of law by seeking a declaration to that effect and a permanent injunction against Defendant No.2 on that basis. The interlocutory injunction claimed in this Notice of Motion is in aid of these main reliefs. If the Plaintiffs fail to establish their case *prima facie*, the interim injunction cannot be

issued. That is very much a part of the process of law. If such injunction is refused, it is not that the process of law is being denied to the Plaintiffs.

9 The Delhi High Court in the case of **Thomas Cook (India) Ltd. Vs. Hotel Imperial**¹ explained the concept of 'due process of law' thus:

“28. The expressions ‘due process of law’, ‘due course of law’ and ‘recourse to law’ have been interchangeably used in the decisions referred to above which say that the settled possession of even a person in unlawful possession cannot be disturbed ‘forcibly’ by the true owner taking law in his own hands. All these expressions, however, mean the same thing -- ejection from settled possession can only be had by recourse to a court of law. Clearly, ‘due process of law’ or ‘due course of law’, here, simply mean that a person in settled possession cannot be ejected without a court of law having adjudicated upon his rights qua the true owner.

Now, this ‘due process process’ or ‘due course’ condition is satisfied the moment the rights of the parties are adjudicated upon by a court of competent jurisdiction. It does not matter who brought the action to court. It could be the owner in an action for enforcement of his right to eject the person in unlawful possession. It could be the person who is sought to be ejected, in an action preventing the owner from ejecting him. Whether the action is for enforcement of a right (recovery of possession) or protection of a right (injunction against dispossession), is not of much consequence. What is important is that in either event it is an action before the court and the court adjudicates upon it. If that is done then, the ‘bare minimum’ requirement of ‘due process’ or ‘due course’ of law would stand satisfied as recourse to law would have been taken. In this context, when a party approaches a court seeking a protective remedy such as an injunction and it fails in setting up a good case, can it then say that the other party must now institute an action in a court of law for enforcing his rights i.e., for taking back something from the first party who holds it unlawfully, and, till such time, the court hearing the injunction action must grant an injunction anyway? I would think not. In any event, the ‘recourse to law’ stipulation stands satisfied when a judicial determination is made with regard to the first party's protective action.

1 (2006) 88 DRJ 545

Thus, in the present case, the plaintiff's failure to make out a case for an injunction does not mean that its consequent cessation of user of the said two rooms would have been brought about without recourse to law."

The Supreme Court in **Maria Margarida Sequeira Fernandes Vs. Erasmo Jack De Sequeira**² quoted with approval this analysis of Delhi High Court.

10 Due process of law is, thus, satisfied when inter se rights between the parties are adjudicated upon by Court. In a case where a plaintiff applies for such adjudication of rights claiming a protective relief on the basis of such rights, the Court determines the rights and grants or refuses protective relief to the plaintiff. In case the Court denies relief, it deprives the plaintiff from exercise of such rights. Such deprivation occurs by a process of law and not without it. In other words, the effect of the plaintiff losing his case for injunction effectively means that the plaintiff is prevented from exercising those rights by due process of law. In our case, the Plaintiffs have claimed the right to use the common facilities by asserting that the facilities are located in F.P.No.724. The Defendant disputes this claim and alleges that they fall within F.P.No.723. What is in issue in the present case is whether the common facilities form part of F.P.No.724 or F.P.No.723. A determination of this issue by holding that these facilities fall within F.P.No.723 implies that the Plaintiffs cannot use these facilities, since no other right is claimed. Once this determination is done, there is no point in again requiring the Defendant to prove in an independent suit that these facilities fall within F.P.No.723 and therefore can be dealt with by him in a manner he thinks fit. That cannot possibly be the meaning of due process of law.

11 That is as far as the final adjudication in this suit is concerned. But it equally holds good for a *prima facie* determination of rights for deciding the question of interlocutory injunction. If no *prima facie* case is made out, no interim injunction is granted. Refusal of such injunction implies denial of rights by a due process of law.

2 (2012) 5 SCC 370

12 As I have held above, the Plaintiffs have no *prima facie* case that the common facilities form part of F.P.No.724. Consequently no injunction can be claimed by them.

13 The balance of convenience in this case is also clearly in favour of Defendant No.2. As noted above, Defendant No.2, as and by way of a workable interim arrangement, has offered to relocate the common facilities at its own cost within F.P.No.723 and also keep an access to Balaram Lane open to the Plaintiffs and occupants of F.P.No.724 through F.P.No.723. Defendant No.2 offers to restore the common facilities to their original position in the event of the Plaintiffs succeeding in the suit, without claiming any equity for having relocated the facilities. The Plaintiffs, thus, will not be prevented from using the common facilities or access during the pendency of the suit. On the other hand, the existing location of the common facilities affects the construction line within F.P.No.723 as indicated by Defendant No.2 on the survey plan produced before this Court (referred to above). Besides it comes in the way of barricading F.P.No.723 so as to comply with IOD conditions for development of F.P.No.723. If Defendant No.2 is prevented from barricading F.P.No.723 and relocating the facilities, the Defendant will not be in the position to comply with the IOD conditions and develop its property according to the IOD till the Plaintiffs' suit is finally disposed of. Thus, as long as the common facilities are relocated within F.P.No.723 and the Plaintiffs are allowed to use them without affecting their use of F.P.No.724, the Plaintiffs will not suffer any prejudice, but Defendant No.2, without being able to relocate the facilities, will be prevented from developing F.P.No.723 according to the IOD so long as the Plaintiffs' suit is not finally disposed of. If the Plaintiffs succeed in their suit, the common facilities can be restored to the existing location as far as possible. No doubt insofar as third parties taking flats within the newly constructed building on F.P.No.723 are concerned, there may be some equities to be claimed if and to the extent such restoration affects their use of the new building. But then such third parties, in the first place, can claim only through Defendant No.2, and secondly, it may even be possible for this Court to balance the equities suitably at the end of the trial.

14 In the premises, the following may meet the ends of justice and it is ordered accordingly:

(i) Defendant No.2 shall not demolish the existing common facilities, viz. common toilet, washing place and electric meters cabin, which are referred to in prayer clause (a) of the Notice of Motion No.1218 of 2015, without first providing alternative common facilities of comparable size and dimensions within F.P. No.723 at locations as shown marked in red in the plan, which is taken on record, marked "X" for identification;

(ii) Defendant No.2 shall be entitled to barricade F.P.No.723 on all sides including from the side of F.P.No. 724 during the period of construction on F.P.No.723, but shall leave a suitable opening within the barricade so as to provide access to the Plaintiffs to (a) F.P.No.724 from barricade lane and (b) the relocated common facilities from F.P.No.724;

(iii) Defendant No.2 shall not construct any permanent wall on the boundary of F.P. No.723 adjacent to F.P.No.724 without seeking a prior permission from this Court;

(iv) In the event of the Plaintiffs succeeding at the trial of the suit in showing that the common facilities which are referred to in prayer clause (a) of Notice of Motion No.1218 of 2014 are situated within F.P.No.724 or the Plaintiffs are otherwise entitled to unobstructed right to the use of such common facilities, it will be open to this Court to order restoration of these common facilities to their existing location, if necessary, by ordering demolition of the part of the building, if any, constructed in F.P.No.723 or otherwise, compensate the Plaintiffs in any other manner and Defendant No.2 shall not claim any equity on account of construction of alternative amenities in terms of this order;

(v) It is clarified that these common facilities shall be relocated within the red boundaries marked in Plot No.F.P.No.723 presently marked at site;

(iv) In case of any difficulty in implementing this order, liberty to the parties to apply to this Court;

(v) Both the Notices of Motion are disposed of in above terms.

Learned Counsel for Defendant No.2 states that his client shall not implement the order for a period of three weeks from today. The statement is accepted.

(S.C.GUPTE J.)