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

Reserved on: 11.09.2015
Pronounced on: 08.10.2015

+ **FAO(OS) 206/2014, C.M. APPL.7375/2014, 8715/2014 & 12738/2014**

ATUL NATH Appellant
Through : Sh. Amanpreet Wahi and Sh. Salman Hashmi,
Advocates with Sh. Atul Nath, appellant in person.

versus

AMAN NATH AND ORS Respondents
Through : Ms. Shobhana Takiar and Sh. Udayan
Khandelwal, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This is the first defendant's (hereafter "Atul Nath") appeal against an order dated 28.03.2014 restraining him through an *ad interim* temporary injunction from interfering with the plaintiff's (hereafter "Aman") possession of the ground floor of the suit property, i.e. A-51, Nizamuddin East. Both are children of the late Ashok Nath and late Sheela Ashok Nath. The other parties to the suit are the second defendant (hereafter "Achal"), another brother of Aman, and Anshu Chopra (hereafter "Anshu"), the plaintiff's sister. The fourth defendant (hereafter "Myer") is the maternal

uncle of the other parties and brother of deceased Sheela Ashok Nath. Aman had filed the suit for injunction to restrain the present appellant Atul from interfering with the possession of the ground floor of the suit property. By the impugned judgment and order, the learned Single Judge allowed an application of the plaintiff Aman Nath for *ad interim* temporary injunction and dismissed the present appellant's application for vacation of the *ex-parte* injunction which was preferred by him under Order XXXIX Rule 4 of the Civil Procedure Code (CPC).

2. The brief facts are that all parties except Myer are sons and daughters of the late Sheela Ashok Nath. Their father had executed a Will on 15.09.1998 bequeathing the suit property to his wife, the mother of the parties – Sheela Ashok Nath. The probate of that Will was granted by this Court on 08.07.1995 and the property was mutated in the name of Sheela Ashok Nath. The appellant refers to a Will executed by Sheela Ashok Nath dated 23.10.1996 as well as a subsequent Will dated 29.05.2009, , bequeathing the property in favour of Ashok Nath Family Welfare Trust. The plaintiff Aman, on the other hand, claimed that another Will prior to 29.05.2009 was executed, i.e. on 24.04.2009 by the deceased mother. Aman filed the suit claiming that Atul was interfering with his possession of ground floor of the suit property. The appellant, on the other hand, contended that he was residing in the suit property for the last 30 years along with his parents, wife and children, and ever since the death of his father, with his mother and other members of his own family. He also contended that though he lived on the first floor of the property, he was also in possession of the ground floor of the suit property as he was actively taking care of the mother.

3. Aman claimed that the immediate provocation for the filing the suit was that he was in possession of the ground floor of the suit property. It was contended in the suit that ever since the contents of the late mother's Will were known to the parties, they were occupying the portions respectively assigned to them in the suit property. It was alleged that when the health of late Sheela Ashok Nath started deteriorating, since Aman, the plaintiff, was running between the hospital and the house, the present appellant, with ulterior motive and *malafide* intentions unauthorisedly started using the living room on the ground floor. Aman, the plaintiff urged that he occupied the ground floor as it was known that in the event of death of the mother, that portion of the suit property was to devolve upon him. It was averred in the suit that on 17.11.2013, the plaintiff and the second defendant, the other brother, as usual, took some clothes in the morning for their mother, who was at that time in the Intensive Care Unit (ICU) at the Mool Chand Hospital. Upon reaching there, the sons were informed that the mother was no more. They immediately notified Atul, the appellant and the other relatives about this sad news. The suit averred that upon the plaintiff and the second defendant reaching back home with their mother's body, to their utter shock, they found the living room on the ground floor locked. They alleged that the appellant had locked the property. The body was kept in the verandah as the appellant along with his two major sons and wife did not open the living room. Later, however, due to the intervention of the police, the appellant, it was alleged, opened the ground floor living room, where the body was kept. Apprehending that the appellant would again try to create a disturbance and obstruct the use of the property, the plaintiff approached this Court and filed a suit.

4. The plaintiff argued before the learned Single Judge that he was entitled to free use and occupation of the entire ground floor to the exclusion of all others in accordance with the Will which he assessed to be true. He also alleged that he used to look after his mother and that she was admitted to the Mool Chand Hospital on 14.11.2003 in a critical condition. Only he along with the second and third defendants attended upon the mother in hospital. The plaintiff alleged that the present appellant took advantage of this circumstance and did not even visit his ailing mother in the hospital and instead hatched the plan to usurp the ground floor while the others were busy attending to their mother. It was alleged that the appellant stole the keys of the living room on the ground floor and consequently was in a position to bar the entry to the other siblings and consequently keep them out, leading to a situation where his dead mother's body had to be kept outside for a while. The plaintiff stated that he was and continues to remain a resident of ground floor of the property during the time that his mother was unwell, out of two bed rooms in the ground floor, one bed room was used by his mother and the other was occupied by nurses attending upon her.

5. The suit averred that the entire family has been living in the property since 1959. Being a bachelor, the plaintiff continued to live with his mother on the ground floor while the second floor was constructed by the second defendant out of his own funds in 1995-96 and the first defendant/appellant was living on the first floor. The plaintiff apparently adopted an infant and continued to live on the ground floor with his mother. It was alleged that the first defendant/appellant owns various residential properties, including two properties in the New Friends Colony and a property in Gurgaon. To show that the plaintiff is a permanent resident living in the suit property, reliance

is placed upon a Passport issued in 1972, an Electoral Identity Card issued by the Election Commission of India, a Driving License issued in 1998 and renewed thereafter, and a joint account along with mother in the Central Bank of India with the plaintiff, all of which show that the plaintiff's address is that of the suit property. The plaintiff also relied upon some documents of other properties purchased by him to show his address disclosed was consistently that of the suit property. It was also stated before the learned Single Judge that besides these property documents, the bus card and other documents/papers pertaining to the school of the adopted daughter also bore the address of the suit property. The plaintiff further relied upon documents such as photographs showing that the mother's body had been kept in the verandah on 17.11.2013 when the drawing room of the ground floor was lying locked.

6. The plaint urged that each floor in the suit property is a self-contained dwelling unit. The plaintiff averred that he was living with the mother and daughter on the ground floor, while the appellant resided on the first floor and the other brother, i.e. the second defendant resided on the second floor. The plaintiff contended that on the strength of these documents he was entitled to the *ad interim* temporary injunction sought by him.

7. The suit was resisted by the appellant/first defendant, who in the written statement disputed the plaintiff's averments with respect to possession of the ground floor of the suit property. It was urged that the plaintiff in fact lived at No.12, First Floor, Jaipur Estate, New Delhi, which is evident from a bare scrutiny of the directory of the Nizamuddin East Residential Welfare Society for the years 2009 and 2011. The appellant alleged in the written statement that the plaintiff resided in the said Jaipur

Estate property for the last 10 years – and supported it with his contention by relying upon copies of the directories of the Delhi Golf Club of which the plaintiff was a member, the electricity, the telephone and the water bills and other documents relating to the Jaipur Estate property etc. The first defendant/appellant also alleged that the plaintiff never resided in the suit property which is further established by the fact that few hours before the death of late Sheela Ashok Nath, the plaintiff tried to break the locks of the doors of the living room leading to the ground floor after locking the living room of the mother's portion. The appellant specifically alleged that the plaintiff as well as the other brother, i.e. the second defendant and the sister, the third defendant tried to forcibly enter the ground floor of the property on 17.11.2013 by breaking the lock and dispossess him, i.e. the first defendant. The appellant relied upon another set of photographs alleged to have been taken by him. The written statement also referred to a police complaint in the form of a Daily Diary entry to say that the plaintiff did not possess the keys to open the door or let in anyone through the drawing room and that it was produced by him, i.e. the first defendant.

8. The first defendant/appellant alleged that he along with his deceased mother and other members of the family were residing and were in exclusive possession of the ground floor as well as the first floor for more than 30 years. He relied upon several photographs and contended that after the demise of his father, he was taking care of his mother and that she was under his care and protection and living on the ground floor. Earlier, he allowed the plaintiff and other defendants to visit their mother without any restriction. Nevertheless, on account of several forgeries committed by plaintiff in connivance with the other brother, i.e. the second defendant and

the attendant discord, the plaintiff and others were allowed to visit their mother through side entrance without entering other areas of the second floor.

9. The first defendant/appellant had contended in the course of the hearing before the learned Single Judge that the ground floor and first floor were in fact a single unit and that there was no living room on the first floor. This was recorded in the order dated 26.02.2014. Due to this assertion and the dispute by the plaintiff, a Local Commissioner was appointed. The report of the said local commissioner was taken on record and considered by the learned Single Judge.

Impugned judgment

10. The learned Single Judge considered the submissions of the parties; they reiterated the stands taken in their pleadings. He also considered the documents placed on the record as well as the report of the Local Commissioner. Indeed a reading of the impugned order would show that the scanned site plan filed by the Local Commissioner has been reproduced. The learned Single Judge accepted the plaintiff's submission that he was *prima facie* in possession of the ground floor. In doing so, the Court considered the submissions of the first defendant, especially that he was not in possession of merely the first floor but also the ground floor. An important element in this submission was that there was no living room on the first floor. Learned Single Judge noted that the scanned site plan and the local commissioner's report showed that there was a huge living room on the first floor undercutting the appellant's submission that there was no living room and that he was using the living room of the ground floor. The Single Judge also noted that what was termed as an admission with respect to the use of the

living room by the first defendant/appellant in the suit, was not really so. In doing so, the learned Single Judge not only noticed but reproduced para 10 of the plaint. Construing it, the learned Single Judge noted that the plaintiff merely averred that on account of the deteriorating health of his mother and that he was shuttling between the house and hospital, the appellant/first defendant “*with ulterior motives and mala fide intentions has unauthorisedly started using the living room and in order to avoid mental agony and tension to his mother, the plaintiff no. 1 was tolerating this act of Defendant No.1.*”

11. The learned Single Judge took note of the decisions of the Supreme Court in *Hindustan Petroleum Corporation Ltd. v. Suiman Narayan* 2002 (5) SCC 760; *Darab Caswaji Warden v. Coomi Sorab Warden* 1990 (2) SCC 117 and *Gangubai Babiya Chaudhary and Ors. v. Sitaram Bhalchandra Sukhantar and Ors.* 1983(4) SCC 31. After duly noting the relevant statements of law elucidated in those decisions and analysing the facts perceived from the record, the learned Single Judge was of the opinion that the plaintiff had been able to establish strong *prima facie* case in the light of the documents adduced and the arguments made. He stated that the fourth defendant’s statement in his defence duly supported by those of the other defendants, i.e. Anshu Chopra and Achal in fact revealed that the plaintiff was looking after his mother. Learned Single Judge relied upon the hospital bills, pharmacists’ bills, existence of four bed rooms and large living room on the first floor etc. to so conclude that possession of the ground floor was with the plaintiff. The impugned order, however, even while restraining the appellant from using any portion of the ground floor enabled access to him to the kitchen on the ground floor. The appellant was,

however, restrained from causing any hindrance, inconvenience or obstruction to the peaceful enjoyment of the entire ground floor except the kitchen. This was on account of the fact that the Single Judge apparently felt that the kitchen was being used by the first defendant – since there was none on the first floor.

Submissions of parties

12. The appellant/first defendant urges that the learned Single Judge fell into grievous error in the appreciation of facts. It is argued that the claim by the plaintiff that he was exclusively taking care of his mother ought not to have been believed. In this regard, the appellant relies upon averments in the rejoinder filed by him to the application made for vacation of the interim order under Order XXXIX Rule 4 CPC. It was stated in those pleadings that the appellant never claimed that he was exclusively paying for medical treatment. It is an undisputed position that the plaintiff never paid for the medical treatment and that it was in fact always paid by the family company – M/s. Ashok Manufacturing Company Private Limited. Learned counsel points out that the largest shareholder of that company was the deceased mother – Sheela Ashok Nath. The company was in fact jointly managed by the appellant and the second defendant – Achal Nath. This, however, it was argued, did not have any bearing on the question of possession of the property. Learned counsel also pointed out that the appellant/first defendant's possession of the ground floor was also inferentially established because in fact there was no living room on the first floor. It was pointed out in this context that the Local Commissioner who submitted the site plan was guided to do so by the plaintiff's representatives who had even handed it over to her. However, the Local Commissioner had noted her own

observations with a pen and the area of the so-called living room was not 470 square feet but in fact 320.18 square feet. It is significantly argued that the Local Commissioner was appointed to find out whether there was a drawing room or dining room on the first floor which she clearly reported was absent.

13. The appellant argues that the plaintiff was unable to show through any single document that he was in active possession of the ground floor. Concededly, he was owner of other residential properties, including the Jaipur Estate property which is situated 200 metres away from the suit property. The production of documents, created according to his own will and convenience, such as the adopted daughter's school papers and other documents in the submission of the appellant do not amount to much. On the other hand, learned counsel for the appellant relied upon the DD entry No.38-B dated 17.11.2013 where Achal on the one hand and Anshu's late husband on the other admitted that the appellant/first defendant was in possession of the property. Furthermore, the annual return of the Delhi Warehousing Private Limited shows that the plaintiff was in occupation of the other property and not the suit property. He also relies upon the complaint made by Achal against the appellant which clearly lists that the plaintiff lived at No.12, Jaipur Estate.

14. Learned counsel for the appellant argued that the materials in fact placed on record to show possession were not taken into account in the impugned order. In this context, the documents relied upon were: (a) electricity bills for the last five years; (b) photographs of various functions held by the appellant in the suit property for the last 25 years; (c) directories of the local Residents Welfare Association and (d) the Delhi Golf Club, to

establish that his residential address was of the suit property and the various identification documents pertaining to him and his family. Learned counsel urged that the plaintiff tried to create false evidence by allegedly applying for something at the passport office which led one SI Dinesh to visit the suit property on 13.12.2013 for verification of address. The said police official recorded the statement of neighbours, who lived adjacent to the suit property who also supported the appellant's argument that in fact the plaintiff did not live in the suit property. These submissions were also produced before the learned Single Judge in the course as documents. This was in fact admitted in the rejoinder to the application seeking injunction and should have been taken into account.

15. It is submitted that apart from the *prima facie* nature of the case, the elements of balance of convenience and the irreparable injury also clearly lie in the appellant's favour. In this regard, it is highlighted that the learned Single Judge has permitted the use of the kitchen joining the dining room – implicitly acknowledging that the appellant has been in possession of that area. The resultant situation, it is submitted, is rather strange because the family would have to cook its food on the ground floor and take it upstairs for consumption. It is pointed out that the appellant has recently been blessed with a granddaughter and it is impossible for the family to undergo this ordeal with an infant. It is contended that since the plaintiff owns a sprawling 600 sq. yards house merely 200 metres away from the suit property which he admittedly uses according to his convenience, the balance of convenience clearly lies in appellant's favour.

16. Counsel for the plaintiff (first respondent) urges that this Court should not disturb the exercise of discretion by the learned Single Judge who

appreciated all circumstances and took into account the materials on record. More or less reiterating the submissions made before the learned Single Judge, counsel for the plaintiff submitted that his contentions received the support of the other siblings, i.e., Achal and Anshu. More significantly, the maternal uncle Myer, it is submitted, supported the plaintiff's case. The said defendant averred that each child of late Sheela Ashok Nath was provided for in her Will, executed on 24.04.2009 - which was videographed at his behest, and also registered. The bequests under this will were described by the said fourth defendant, which clearly envisioned the plaintiff bequeathing the ground floor. Plaintiff's counsel relied on the fourth defendant's written statement, which had highlighted and adversely reflected the behavior of Atul, the appellant, soon after the mother's cremation and on being informed of the registered will dated 24.04.2009.

17. Counsel submitted that the maternal uncle, had no interest except the welfare of the parties and that the plaintiff Aman and second defendant (Achal) took care of their mother. The plaintiff had averred that a kitchen on the first floor was converted into a bed room and later unauthorizedly started to use a room below the staircase, which was objected by his late mother, (i.e., Sheela Ashok Nath). It was submitted that the production of medical bills, and evidence of nurses' payment, as well as other documents *prima facie* amounted to sufficient materials to establish possession by the plaintiff, of the ground floor. Furthermore, the fact that the appellant was director or shareholder of the company - a family concern - which paid some of the bills, did not alter the soundness of the Single Judge's reasoning. Here, it was urged that the appellant was restrained by orders of the Company Law Board from interfering with affairs of the said concern.

Analysis and conclusions

18. It is revealed from the above discussion that the parties are litigating over the use of family property. It is not disputed that the suit property originally belonged to the parents of the appellant, the plaintiff, and the second and third defendants. They were all living together in it from 1959 onwards, apparently. The father died long back; he bequeathed the suit property to his wife, the late Sheela Ashok Nath. She in turn appears to have made a bequest; as to what was her last Will appears to be disputed. On the one hand, the plaintiff and the other two siblings (Achal and Anshu) assert that the Will of 24.04.2009 provides that the ground floor would devolve upon the plaintiff and the first floor, upon the appellant; the appellant on the other hand asserts that this was not the last Will but rather another later will was the last testament.

19. An interesting feature in this dispute is that the maternal uncle (*mama*) impleaded as the fourth defendant, has completely supported the plaintiff; he has commented critically on the behavior of the appellant and further stated that he showed the Will, relied upon by the plaintiff after the death of his sister.

20. The appellant defendant's argument – as can be seen from the pleadings and submissions is that the plaintiff was never in possession of the ground floor of the suit property and that he occupied it. To show this, the appellant relied on some materials, in the form of RWA directory, Delhi Golf Club directory and some documents, to say that plaintiff is resident of the Jaipur Estate property. The learned Single Judge observed that *prima facie*, the nature of the accommodation available on the first floor as well as

the documents produced along with the suit showed that the plaintiff was in possession of the ground floor. This Court is of the opinion that there is no infirmity with the observations. In relation to the arguments of the defendant/appellant that the medical bills were paid by a company of which the deceased was a share holder, this Court notices that the plaintiff has placed on the record materials in the form of an order of the Company Law Board, to say that the appellant is restrained from asserting his rights in its management. The learned Single Judge also had the benefit of looking into the entire records, including the medical bills and the evidence of amounts paid to the nurses, who were employed to look after the deceased Sheela Ashok Nath. The fact that these materials were with the plaintiff is a significant factor.

21. This Court is unpersuaded with the appellants submissions to re-appraise the materials and substitute its opinion. The impugned order is a fairly detailed one; it has taken into account the pleadings, materials on the record and the submissions of the parties. The appellant's main grievance is that the plaintiff was never in possession of the ground floor; rather he always was and even now continues to be in possession of the first and ground floor. In assessing the rival strengths of positions taken by the parties, the order of the court of first instance is ordinarily given great weight. *Sans* a clear and manifest error in application of law or patent overlooking of a vital or material piece of evidence, the appellate court should not, in interlocutory proceedings (especially in temporary injunction matters) carry out a broad appellate review. That the plaintiff owns other properties and might be showing that to be his residential address in some instances cannot lead to a conclusion that in fact he is not in possession of

the ground floor of the suit property. Equally, the defendant/appellant's assertion that he is in possession of the first floor cannot be undermined by the fact that he owns other properties. The Court, while assessing the strengths of parties' position at a preliminary stage, only looks at broad *prima facie* probabilities. In the present case, considering the nature of the materials placed on the record, and the pleadings of the parties – especially the written statement of Myer, this Court is unconvinced that interference is called for in appeal.

22. This Court's opinion is fortified by the previous decision of the Supreme Court in *Wander v Antox* 1990 (1) SCC 727, where it was observed that:

"The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

23. To this Court's mind, the above principles squarely apply to the

circumstances of this case. Consequently, holding that the impugned order does not disclose any infirmity calling for interference, this Court observes that the appeal is unmerited. It is, therefore, dismissed without order on costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

OCTOBER 08, 2015

