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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 920/2017
SAVITA KHATRI Petitioner

Through: Mr. G.S. Khatri, Adv.

Versus

RAHUL CHOPRA & ORS Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **28.08.2017**

CM No.30806/2017 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

CM(M) 920/2017 & CM No.30805/2017 (for stay)

3. This petition under Article 227 of the Constitution of India impugns the order [dated 10th July, 2017 in CS SCJ No.325/2017 of the Court of Senior Civil Judge (SCJ)-cum-Rent Controller (South), Saket Courts, New Delhi] on an application of the petitioner / plaintiff under Section 151 of the Code of Civil Procedure, 1908 (CPC).
4. The application aforesaid though labelled as under Section 151 CPC was in fact seeking interim relief and on which an interim arrangement has been made by the Court.
5. The remedy under Order XLIII Rule 1(r) of the CPC against interim orders is by way of an appeal and once the appeal is provided for in the CPC, a petition under Article 227 of the Constitution of India would not be maintainable.

6. The counsel for the petitioner / plaintiff is unable to rebut, save for reiterating that his application was under Section 151 of the CPC and not under Order XXXIX Rules 1&2 of the CPC.
7. Merely because the counsel chooses to give a wrong nomenclature to the application would not change the substantive nature of the relief claimed and the remedy thereagainst.
8. Be that as it may, the matter has also been considered on merits.
9. The petitioner/plaintiff is in occupation of the second floor of a three storied residential flats and by the said application sought a direction to the respondents/defendants not to hinder the access of the petitioner / plaintiff to the terrace above the third floor.
10. The learned SCJ, in the impugned order, has reasoned that the petitioner / plaintiff, as per documents in her favour, is not entitled to the terrace above the third floor and has right of access thereto only for installing, maintaining and repairing the essential and vital services and to secure which an arrangement has been made by vesting the key of the terrace in a neighbour, who on request of the petitioner / plaintiff is to permit access to the petitioner / plaintiff to the terrace for the said purposes. It has further been reasoned that the respondent / defendant who is in occupation of the third floor, as per documents of title in his favour, has rights to the terrace.
11. I have enquired from the counsel for the petitioner / plaintiff the error in the order owing where to this petition has been preferred.
12. The counsel for the petitioner / plaintiff has contended that as per the Delhi Apartment Ownership Act, 1986, the terrace is a common area.

13. On enquiry. it is stated that the building was constructed in 2013.

14. It will have to be decided finally in the suit, whether owing to the provisions of the Delhi Apartment Ownership Act and notwithstanding the documents of title of the petitioner / plaintiff and the respondent / defendant, the petitioner / plaintiff and the respondent / defendant have equal or common rights to the terrace and at the interim stage, when admittedly the document of title in favour of the petitioner / plaintiff does not entitle the petitioner / plaintiff to the terrace and vests the same in the respondent / defendant, no error is found in the impugned order.

15. The counsel for the petitioner / plaintiff then contends that the neighbour in whom the key has been vested is not even a party to the suit.

16. If at all the interim arrangement made by the learned SCJ is not working, it is always open to the petitioner /plaintiff to approach the suit Court.

17. There is no merit in the petition.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

AUGUST 28, 2017

‘gsr’..