

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Date of Decision-13.11.2018

1. CR No.785 of 2016(O&M)

Freedom Park Life Resident Welfare Association (Regd.)

... Petitioner

Versus

Sunil Kumar and others

... Respondents

2. CR No.789 of 2016(O&M)

Freedom Park Life Resident Welfare Association (Regd.)

... Petitioner

Versus

Rajender Parkash Chandna and others

... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Ms. Pooja Aganpal, Advocate
for the petitioner.

Mr. Amit Jain, Advocate and
Mr. Hemant Saini, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. Vide this common order, CR No.785 of 2016 titled Freedom Park Life Resident Welfare Association (Regd.) Vs. Sunil Kumar and others and CR No.789 of 2016 titled Freedom Park Life Resident Welfare Association (Regd.) Vs. Rajender Parkash Chandna and others are being disposed of. Since common facts are involved in both the revision petitions, therefore, the facts are being noticed from CR No.785 of 2016.

[2]. Petitioner has challenged the order dated 12.01.2016 passed by Additional District Judge, Gurgaon, whereby the order dated 25.09.2015 passed by Civil Judge (Junior Division), Gurgaon, dismissing the application under Order 39 Rules 1 and 2 CPC was set aside.

[3]. Brief facts of the case are that plaintiff/respondent No.1 Sunil Kumar filed a suit for permanent and mandatory injunction against the petitioner association and others. Plaintiff sought decree for permanent injunction, restraining the defendants and any other person acting on behalf of defendant No.1 from interfering, restricting the movement, creating any restriction in carrying out the fit out, dispossessing or causing any type of interference or restrictions in the peaceful occupation, use and peaceful running of business in the shops fully detailed in the plaint. Plaintiff also sought mandatory injunction, directing the defendants from removing interference and restrictions on the exit and entry point of the commercial shop and also in the group housing complex Freedom Park Life, Sector 57, Gurgaon. Along with the suit, an application under Order 39 Rules 1 and 2 read with Section 151 CPC was also filed for granting *ad interim* injunction, restraining the defendants from interfering, obstructing, causing any restriction in the fit out work of the shops, stopping the exit and entry point at the shop and also at the gate of the group housing complex and creating any type of interference into the peaceful occupation and enjoyment of the property.

[4]. Trial Court vide order dated 25.09.2015, dismissed the application under Order 39 Rules 1 and 2 read with Section 151 CPC primarily on the ground of pendency of CWP No.22243 of 2012, wherein restraint order was passed. It was also observed that the plaintiff has not been able to prove his physical possession over the suit property prior to order dated 29.04.2014 passed in the aforesaid civil writ petition. It was also observed that any restraint order shall amount to violation of directions issued by the High Court. In the appeal filed by the plaintiff/respondent No.1, the order dated 25.09.2015 passed by the trial Court was reversed by the Lower Appellate Court vide order dated 12.01.2016 and the defendants were restrained from obstructing the plaintiff from using the suit property/shop.

[5]. In order to appreciate the controversy in brief, the pleadings and interim orders passed in CWP No.22243 of 2012 are necessary to be quoted. The aforesaid civil writ petition was filed by the petitioner herein for issuance of writ in the nature of mandamus commanding the respondents (State of Haryana, Haryana Urban Development Authority (HUDA), Director General, Department of Town and Country Planning and Dakshin Haryana Bijli Vitaran Nigam and others) to perform their respective statutory obligations cast upon them under the Haryana Development and Regulation of Urban Areas Act, 1975, Haryana Development and Regulation of Urban Areas Rules, 1976 and Haryana Apartment Ownership Act, 1983. The

directions were sought against the official respondents to stop the sale of common areas/parking spaces demarcated in the approved plan and directing them to ensure that the open areas being converted to other uses by the builders is stopped forthwith. Directions were also sought directing the official respondents to remove the unauthorized structures/buildings forthwith which have come upon on the sites not meant for said purpose. Other reliefs were also sought in the aforesaid civil writ petition.

[6]. At the time of issuance of notice of motion on 08.11.2012 in CWP No.22243 of 2012, following order was passed:-

“The petitioner is a Society representing the residents of Freedom Park Life, Sector 57, Gurgaon. By making reference to the terms & conditions of a licence granted to respondents No.5 to 19, it is stated that as per the approved plan, stilt and basement area was to be used for parking purpose. The allottees have also been charged towards construction of those areas. It is averred that the stilted area has been converted into shops and gymnasium etc. and instead of two, only one basement was constructed, even in that very less space has been left for parking purpose. It is further averred that green area left outside is now being used as a paid parking for the residents. No space has been provided for free parking of the cars to the allottees which was promised by the builders when the flats were allotted. It is stated that to bring violations committed by the developers of the colony

(respondents No.20 & 21), many representations were sent, one such representation dated 8.1.2010 (Annexure P12) has been brought on record but no action has been taken.

Notice of motion.

On asking of the Court, Mr. Kshitij Sharma, Assistant Advocate General, Haryana accepts notice on behalf of respondent No.1, Mr.Gitish Bhardwaj, Advocate on behalf of respondents No.2 and 3, whereas Mr. Mohnish Sharma, Advocate on behalf of respondent No.4. Counsel for the petitioner is directed to furnish four copies of the writ petition to counsel for the respondents, during the course of day. Service upon respondents No. 5 to 21 be effected through dasti process.

In the meantime, it is ordered that respondents No.5 to 21 shall not create any third party interest in the shops etc. which they have constructed in the stilt area and further atleast free parking should be provided for one car, to each allottee in the open area now being used for parking.

On request, adjourned to 3.12.2012.”

[7]. Vide order dated 03.12.2012, respondents No.2 and 3 in the civil writ petition i.e. Haryana Urban Development Authority (HUDA) and Director General, Department of Town and Country Planning were directed not to sanction any revised building plan for the licence in dispute in the case.

[8]. After completion of pleadings in the aforesaid writ petition, the same came up for consideration and High Court vide order dated 27.01.2014 passed the following order:-

“It is beyond controversy that the members of petitioner association purchased the flats on the basis of the original plan sanctioned by the Town and Country Planning Department which included stilt and covered parking for each allottee.

After these allottees have made huge investments, the sanctioned plan has been revised behind their back and the 'covered parking' has been converted into commercial shops. The allottees, admittedly, were not heard before the revision of sanctioned plan.

Prima facie, the modus operandi behind revision of building plan appears to grant undue benefit to the private builders, who mislead the general public by issuing advertisements and allured the allottees to invest as per their original plans which are then got modified to the detrimental of their interest.

Let the Principal Secretary, Town and Country Planning, file an affidavit as to in how many cases since the year 2010 onwards, the original building plans have been modified without any notice to the allottees.

Till further orders, the original plans of any Licensee in the State of Haryana shall not be modified without inviting objections from their allottees or investors.

Adjourned to 25.03.2014.

Last opportunity to respondent No.4, i.e. Dakshin Haryana Bijli Vitaran Nigam, is granted to file its reply, failing which the petitioner shall be at liberty to seek adverse inference against them.

Order dasti.”

[9]. On 29.04.2014, following order was passed in the aforesaid writ petition:-

“CM No.5253 of 2014

For the reasons mentioned in the application, the same is allowed subject to all just exceptions and the affidavit alongwith documents, Annexures R20/8 to R20/15 is taken on record. Copy given to counsel for the petitioner-Association.

CM stands disposed of.

Main

Learned senior counsel for the petitioner seeks time to file counter affidavit.

In the interest of justice, adjourned to 30.06.2014.

Interim order to continue.

Keeping in view the peculiar facts and circumstances of the case, it is directed that respondents No.20 and 21 will not handover physical possession of any site/shop in dispute to a third party.

It is further directed that no criminal case shall be registered against respondents No.20 and 21 for not delivering the physical possession of the above-mentioned sites and/or for any action resultant to the interim orders passed by this Court.”

[10]. The writ petition was ultimately admitted on 25.11.2014 and the following order was passed:-

“Challenge in the present writ petition is to the change of lay out plan affecting the use of common areas. The grievance is also in respect of non-providing of regular maintenance and electricity sub-station as well as sale of parking lots out of the area originally depicted in the lay out plan as green belt.

On the other hand, Mr. Saini points out that lay out plan was sanctioned and approved on 23.07.2008 and that parking has been allotted to each of the allottees in terms of the flat buyers' agreement. It is contended that wrong statement was made at the time of hearing of the petition that parking was to be provided free of cost.

The State Government issued a circular providing opportunity of hearing to the residents while framing a policy on 28.01.2013.

The question; whether the allottees are entitled to opportunity of hearing when a colonizer seeks revision of lay out plan even in the absence of policy, requires consideration.

Admitted.

In modification of the interim orders passed from time to time, it is ordered that further sale of any common area to the residents shall be subject to the decision of the writ petition. The building lay out plan, if necessary to be modified in future, shall be revised in terms of the policy dated 28.01.2013.”

[11]. Evidently, the earlier interim orders passed by the High Court from time to time were modified and it was ordered that further sale of any common area to the residents shall be subject to the decision of the writ petition. The building lay out plan was required to be revised in terms of the policy dated 28.01.2013.

[12]. In pith and substance, the controversy herein was also sought to be espoused in CR No.4343 of 2015 filed by the petitioner association against the order dated 29.05.2015 passed by Additional District Judge, Gurgaon vide which order dated

07.02.2015 passed by Civil Judge (Junior Division), Gurgaon granting temporary injunction in favour of the petitioner/plaintiff therein was set aside. Vide order dated 07.02.2015, Civil Judge (Junior Division), Gurgaon had restrained defendants No.1 and 2 in the suit from taking over possession of the shop in question. The interpretation of order dated 25.11.2014 passed in Civil Writ Petition No.22243 of 2012 was also bone of contention in the aforesaid CR No.4343 of 2015. While relying upon the aforesaid interim order passed in the civil writ petition, it was held in the order dated 30.03.2017 passed by the High Court in CR No.4343 of 2015 that the order passed by the Lower Appellate Court was perfectly justified and the restraint order granted by the trial Court at the instance of the present petitioner was set aside. In the aforesaid CR No.4343 of 2015, the present petitioner was the plaintiff before the trial Court and on the basis of interpretation attached to the order dated 25.11.2014, the interim protection granted to the petitioner was set aside.

[13]. CR No.785 of 2016 has arisen from the orders passed in the suit filed by respondent No.1. Respondent No.1 was allotted a shop by conveyance deed dated 07.04.2015 by M/s Countrywide Promoters Pvt. Ltd and M/s BPTP Ltd. As per para No.2 of the conveyance deed, the vacant and peaceful possession of the Unit was handed over by the seller to the purchaser who had also acknowledged to have taken over the possession of the area after detailed inspection of the Unit.

Further as per para No.27 of the conveyance deed, following recital was made:-

“27. That notwithstanding anything contained hereinabove, since the Unit is located in the stilt area, though the part of FAR for which all the Government fees and charges have been paid at the commercial rate, the sale deed, possession and usage of the Unit shall be subject to final outcome of CWP No.22243 of 2012 pending before the Hon’ble High Court of Punjab & Haryana.”

[14]. Perusal of the aforesaid para No.27 of the conveyance deed would show that pendency of CWP No.22243 of 2012 was specifically recited and it was recorded that the sale deed, possession and usage of the Unit were subject to final outcome of CWP No.22243 of 2012 pending in the High Court.

[15]. Against the order dated 30.03.2017 passed in CR No.4343 of 2015, even review application was filed by the petitioner association and the same was also dismissed on 23.08.2017.

[16]. In pith and substance, the controversy involved in the present revision petitions is the same. The only difference is that in the subject matter of CR No.4343 of 2015, the petitioner association was the plaintiff before the trial Court, whereas in the present revision petition, respondents were the plaintiffs before the trial Court. The appreciation of controversy arising out of pendency of CWP No.22243 of 2012 cannot be disputed. Perusal of the interim order dated 25.11.2014 passed in the aforesaid civil

writ petition would show that earlier interim orders passed in the civil writ petition were modified. At the time of admission of the civil writ petition, it was ordered that further sale of any common area to the residents shall be subject to the decision of the civil writ petition and the building lay out plan if necessary to be modified in future, shall be revised in terms of the policy dated 28.01.2013.

[17]. By taking note of the aforesaid order passed in the civil writ petition, CR No.4343 of 2015 was dismissed and even the said order was maintained in RA-CR No.99-CII of 2017 in CR No.4343 of 2015 vide order dated 23.08.2017. At the time of initial consideration of the present revision petitions, this Court also dismissed the revision petitions as having become rendered infructuous in the light of order passed in CR No.4343 of 2015. Since there was no representation on behalf of the petitioner on 21.11.2017, therefore, liberty was granted to the petitioner to file appropriate application in case statement of fact given by the respondents is found to be unfounded. In view of liberty granted to the petitioner, petitioner ventured to file an application for recalling of the order by pleading that the controversy involved in the present revision petitions is slightly different. In order to appreciate the contention of learned counsel for the petitioner, the order dated 21.11.2017 was recalled and the present revision petitions were restored to its original number.

[18]. Learned counsel for the respondents sought to argue the case on the basis of photographs of the shops by demonstrating that the shops are in operation. *Prima facie*, this Court cannot record any factual finding on the basis of projected version, lest it may prejudice the case of either sides at the trial. *Prima facie* consideration of material on record would demonstrate that the plaintiff/respondent No.1 in CR No.785 of 2016 appears to be in possession of the shop.

[19]. Without observing anything on the merits of the case, these revision petitions are being decided on the basis of golden principles of Order 39 Rules 1 and 2 CPC i.e. existence of *prima facie* case, balance of convenience and irreparable loss in the event of non-grant of *ad interim* injunction in favour of the plaintiff.

[20]. Consideration of facts on record would show that there exists a *prima facie* case in favour of the plaintiff on the basis of recital in the conveyance deed in which factum of pendency of CWP No.22243 of 2012 was duly recorded. As per recital in the conveyance deed, delivery of possession was recorded in favour of the plaintiff.

[21]. In the light of aforesaid *prima facie* documentary evidence, consideration of the photographs would be on *prima facie* note and credence ought to be given in favour of the plaintiff, though subject to outcome of the suit on merits.

[22]. Having heard the controversy in detail, I find that the controversy involved in the present revision petitions cannot be distinguished on facts as well as on legal proposition from CR No.4343 of 2015. The factual position in both the cases is dependent upon the interpretation of order dated 25.11.2014 passed by the Division Bench of this Court while admitting CWP No.22243 of 2012. It makes no difference whether CR No.4343 of 2015 has arisen from a suit filed by the petitioner or otherwise. CR No.4343 of 2015 was filed by the petitioner who is also petitioner in the civil writ petition.

[23]. In view of ingredients of Order 39 Rules 1 and 2, the factual position arising from conveyance deed and interpretation of interim order dated 25.11.2014 passed in CWP No.22243 of 2012 would answer the controversy in favour of respondent No.1 for grant of ad interim injunction in favour of the plaintiff/respondent No.1. Consequently, these revision petitions are found to be totally devoid of merits and the same are accordingly dismissed.

(RAJ MOHAN SINGH)
JUDGE

13.11.2018

Prince

Whether Reasoned/Speaking

Yes/No

Whether Reportable

Yes/No