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

Judgment Reserved on: 07.08.2018

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Judgment Pronounced on: 04.09.2018

+ **FAO(OS) 178/2016 & CM APPL. 22333/2016 (for stay)**

SHIKHA CHAKRABORTY & ORS

..... Appellants

Through: Mr. Santosh Mishra with Ms.Rohini Prasad,
Advocates.

versus

MAJOR SAUMITRA SARKAR (RETD) & ORS..... Respondents

Through: Mr.Manoj K. Singh, Mr.Bharat Singh, Mr.
Rupesh Gupta and Mr.Umesh Prasad, Advocates for
R-1.

Mr. Ajay Bahl and Mr. Vikash Sharma, Advocates for
R-3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K.CHAWLA

S.RAVINDRA BHAT, J.

1. By this appeal, the first, second, fourth and sixth defendants (hereafter referred to as “the appellants”) challenge the order made by a learned Single Judge in a suit for permanent injunction; the impugned order allowed I.A.No.758/2016 by which Major Saumitra Sarkar (“plaintiff” – who is arrayed as the “respondent” in this appeal) had prayed for interim orders *pendente lite* that defendants should not interfere in the construction and dismissed I.A.No.3670/2016 (u/O XXXIX Rule 4 CPC) by the present

appellants) seeking vacation of the *ex parte* injunction granted by the court on 18.01.2016 and 25.02.2016.

2. The suit allegations are that the plaintiff is the son of late Major Samarendra Nath Sarkar, who owned the entire property bearing No.I-1782, Chittranjan Park, New Delhi (hereafter referred to as “the subject property” or “suit property”). Late Major Sarkar entered into a Collaboration Agreement dated 07.11.1988 with one M/s S.S. Developers Pvt. Ltd. for construction upon the suit property. Under the collaboration agreement, different portions after reconstruction of the entire property were allocated as shares of Major Sarkar and the builder. The plaintiff urged that Major Sarkar never transferred the terrace/third floor i.e. the portion above the second floor of the suit property to the builder or to anyone else. The plaintiff filed the suit, claiming permanent injunction to restrain the defendants (who were occupiers in different portions of the suit property, having acquired rights, pursuant to agreement to sale, and related documents- some of which were executed by late Major Sarkar, or his power of attorney holders, and some of which were subsequent transfers from those who had entered into agreement to purchase the individual separate residential units concerned) from interfering with the construction of the third floor proposed to be built by him.

3. The plaintiff filed and relied on several documents including the collaboration agreement and different agreements of sale showing that neither his late father nor the builder sold the third floor/terrace floor of the suit property to any person. The plaintiff argued that though different portions of the property – in terms of various agreements, in respect of flats

constructed in different floors, were transferred to different persons including the appellants, yet the third floor and terrace floor was never so transferred to the appellants. The plaintiff argued that the appellants were objecting to construction (on the third floor) by him, and sought an order of restraint against them from interfering with the construction on the terrace floor/third floor being so carried out. The plaintiff stated that the construction so undertaken would be in terms of a sanctioned plan of the concerned South Delhi Municipal Corporation.

4. The defendant/appellants resisted the suit, by filing written statements and also moved the court by a separate application, resisting an *ex parte ad interim* injunction, seeking its vacation. They argued that the Agreement to Sell dated 06.03.2007 between late Major Sarkar through his attorney, transferring a portion of the property to them comprised of the flats on the ground and first floor, front portion of the suit property was, along with rights to the servant quarter and common toilet on the terrace floor/third floor. It was argued that once the appellants acquired rights to the servant quarter and common toilet on the terrace floor, they also had a right to the terrace floor/third floor and consequently, the plaintiff cannot claim any right to legally construct on the terrace floor/third floor. The appellants relied on Clauses 7 and 13 of the Agreement to Sell dated 06.03.2007. Besides, it was argued that the plaintiff was not in possession of the suit property and the suit for perpetual injunction did not lie. It was also argued that no reasons were given by the court, when the *ex parte* order was initially made and consequently, the later order needed to be vacated. It was

argued that the interim injunction in this case would result in grant of final relief, which could not be resorted to.

5. After noticing the previous orders and the case laws cited by the appellants, the learned single judge rejected the defendant's plea, while confirming the injunction. The single judge reasoned *inter alia*, as follows:

“9. The argument of learned senior counsel for the defendant nos. 1, 2, 4 and 6 is that the Agreement to Sell in favour of these defendants dated 6.3.2007 gives these defendants the ownership of the terrace, is in my opinion a completely dishonest argument to say the least. The argument flies in the face of categorical language of the Agreement to Sell dated 6.3.2007 whereby the defendants no. 1, 2, 4 and 6 have only got rights to a particular flat on the first floor along with one servant quarter and common toilet on the terrace. Having a servant quarter and common toilet on the terrace cannot mean that the entire terrace will become of these defendants and the owner of the terrace is prevented from using or constructing upon such terrace floor/third floor if municipal bye-laws permit construction on the third floor. I also reject the argument urged on behalf of these defendants no. 1, 2, 4 and 6 relying upon Clauses 7 and 13 of the Agreement to Sell dated 6.3.2007 because Clauses 7 and 13 of the agreement to sell when read, they do not give rights of the terrace floor/third floor to the defendants no. 1, 2, 4 and 6. Clauses 7 and 13 of the agreement to sell which are relied upon by the plaintiff (on the basis of which of the argument defendant nos. 1, 2, 4 and 6 is rejected) read as under:-

10. In fact, I fail to understand as to how even Clauses 7 and 13 of the Agreement to Sell dated 6.3.2007 could at all have been referred to by the defendant nos. 1, 2, 4 and 6 because these clauses in no manner give any title rights or possession rights

to these defendants to the terrace floor/third floor. The argument of the defendants no. 1, 2, 4 and 6 therefore that they have the title rights in the terrace floor or have possession rights in the terrace floor by virtue of the Agreement to Sell dated 6.3.2007 and its clauses, being wholly misconceived, is rejected.

11. It was then argued on behalf of the defendant nos. 1, 2, 4 and 6 that plaintiff in para 13 of the plaint, as also in para 5 of reply given to the application under Order XXXIX Rule 4 CPC of the defendants no. 1, 2, 4 and 6, have admitted that defendants are in possession of the terrace floor, and thus the suit for injunction which admits that defendants are in possession is liable to fail. The relevant paras of the plaint and the reply to the injunction application which are relied upon read as under:-

"Para 13 of the plaint

13. That in terms of the documents executed above, although the subsequent Agreement holders/purchasers do not have any perfected title to the respective portion of the suit property agreed to be sold to them since no sale deed(s) have been executed in their favour, they have only an interest in the suit inasmuch as they are in possession and residing in their respective portions on the strength of agreement to sell in their favour coupled with possession of their respective portions and certain Power of attorneys which were contemporaneously executed in their favour.

Para 5 of the reply on behalf of the plaintiff

5. That the contents of paragraph 5 of the application under order XXXIX Rule 4, CPC, 1908 are denied. It is reiterated that servant quarter is provided to the Defendants on the roof of the suit property as per the said tripartite agreement, however exclusive right over and above the 2nd floor was never transferred to the Defendants vide the said tripartite agreement. The

terrace/roof over and above the Second floor of the Suit property was retained by late Major Samarendra Nath Sarkar which includes all rights to build and raise any lawful construction thereon as may be permitted by the concerned authorities. The subsequent Agreement holders/purchasers neither had nor presently have any right, title or interest whatsoever in respect of the terrace above the Second floor of the suit property."

12(i) Once again the argument urged on behalf of the defendant nos.1, 2, 4 and 6 is totally frivolous because I do not find in para 5 of the reply of the application under Order XXXIX Rule 4 CPC that plaintiff has admitted that plaintiff is not in possession of the terrace floor/third floor. In the reply filed to the application under Order XXXIX Rule 4 CPC by the plaintiff, it is seen that in fact it is stated that the exclusive right to terrace floor/third floor was never transferred to defendant nos. 1, 2, 4 and 6 and in fact the roof/terrace i.e. the third floor portion was retained by late Major Samarendra Sarkar. Similarly, para 13 of the plaint only states that the defendant nos. 1, 2, 4 and 6 are in possession of the respective portions, and which expression cannot be interpreted to mean that defendant nos. 1, 2, 4 and 6 are in possession of the terrace floor/third floor and the respective portion of the defendant nos.1, 2, 4 and 6 will only be the portion which is the subject matter of the Agreement to Sell dated 6.3.2007 and by this agreement, no right or possession is given to the defendant nos. 1,2,4 and 6 of the terrace except of course to the extent of servant quarter and use of common toilet on the terrace floor/third floor.

(ii) I therefore fail to see any "admission" in the subject paras as is contended on behalf of the defendant nos. 1, 2, 4 and 6 that the plaintiff admits not to be in possession of the terrace floor/third floor/roof of the property. The second argument of the defendant nos. 1, 2, 4 and 6 is therefore rejected."

6. Learned counsel for the appellants argued that the impugned judgment on one hand recognizes that the plaintiff is not in possession; yet it

grants an injunction which has a lasting effect. It was argued that the question of granting injunction can arise, only if the plaintiff establishes, *prima facie*, that he or it is in possession. It was argued that the learned Single Judge had to desist in view of the express pleadings in Para 13 of the suit, and Para 5 of the replication, which unambiguously showed the picture with respect to possession on and in respect of the third floor. The learned counsel relied on *Thammaiah v Shabira & Ors* 2008 (4) SCC 182. It was submitted that given these circumstances, the appellants' plea that the conveyance deed and mutation documents, relied on by the plaintiff, could not have been the basis of the learned Single Judge's decision that the *prima facie* merits of the case were in favour of the plaintiff, for grant of injunction. Questioning the documents as having been obtained by fraud and misrepresentation the appellants' counsel submitted that the plaintiff could not have asserted any title to any portion of the property, given the express nature of the stipulations in the documents, which the appellants had with them; those stipulations unequivocally stated that the predecessor in interest had no share or interest left in the property and that the transferees had proportionate interest in the land.

7. The plaintiff's counsel submitted that the exercise of discretion by the learned single judge should not be interfered with in this case. It was emphasized that even *prima facie*, the recitals and stipulations relied on by the appellants only show that they had proportionate undivided right in respect of the parts which went to them, i.e. the area of the units. This did not mean that they had any rights over the third floor or any other portions, for which no interest was ever transferred. It was submitted that mere

permission to use the servant quarter or other constructed portion on the third floor did not translate into any right in their favour, and that the plaintiff's right was unquestionable. Learned counsel submitted that the conveyance deed executed in the plaintiff's favour as well as the mutation documents and the sanction to construct the building proved the *prima facie* case; the learned Single Judge had protected the appellants' interest by stating that the constructions, if any, would be subject to outcome of the proceedings.

8. The two stipulations relied on by the appellants (extracted from the Agreement to Sell dated 06.03.2007) are as follows:

"7. That the First party has been left with no right, title or interest of any nature whatsoever in the said portion of the said property nor any heir of the First party shall be having any right, title or interest in the said portion of the said property in question and the same will become the absolute property of the Second party, with the right to transfer the same or any part thereof by way of sale, mortgage, gift, lease or otherwise, use and enjoy the income, sale proceeds etc. as his own income for which the first party shall not claim the same under any circumstances.

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13. That the passage, stair case, common services like Municipal water and other common services/amenities in the said property shall be commonly enjoyed by the Second party along with other occupants/owners and the Second party shall pay/share the maintenance expenses for the maintenance of such common services in equal proportion with other occupants/owners of the building."

9. Interestingly, the copies of these documents are available on record; the suit records are part of this appeal; the appellants have filed copies of those. The recitals in some of the said documents, as well as their terms are discussed hereafter. The Agreement to Sell dated 03.07.1991 between late Major Sarkar and Ms.Sumitra Gupta, provides, by Clause 1 that:

“The Vendor shall sell and the purchaser having confirmed the said sale and agreed to do work as confirmed party in this, agreement as well as the subsequent agreements including the conveyance deed executed/ at a price of Rs.7,75,000/- in respect of flat No.102 in the ground floor (front side) at plot No.I-1782, EPDP Colony, Kalkaji, New Delhi with proportionate rights in and around, the common passage. Common stairs, pumps and other easements – and also of one room in the roof known as Servant's quarter together with proportionate area of land in the said demised premises”

The relevant condition, clause 1 of the Agreement to Sell dated 18.05.1994 in respect of the rear portion of Flat No. 102 (Ground Floor) reads as follows:

“The Vendor shall sell and the purchaser having confirmed the said sale and agreed to do work as confirmed party in this, agreement as well as the subsequent agreements including the conveyance deed executed/ at a price of Rs.3,25,000/- in respect of flat No.102 in the ground floor (front side) at plot No.I-1782, EPDP Colony, Kalkaji, New Delhi with proportionate rights in and around, the common passage. Common stairs, pumps and other easements -and also of one room in the roof known as Servant's quarter together with proportionate area of land in the said demised premises”

Even later documents reflected this intention, as is evident from this stipulation in the registered agreement to sell with Amalendu Roy, dated 06.03.2007:

“AND WHEREAS the First party for his bonafide needs and requirements has agreed to sell, transfer and convey his rights/ interests and titles in the Flat No. 201 on First Floor (Front Portion) with, one servant quarter with common toilet on top terrace, having an area of 1125 sq. ft. (super, area), of Property bearing No. I-1782, Chittaranjan Park, New Delhi.”

10. These conditions, in the opinion of this court had to be compared and seen along with the suit averments. The learned Single Judge had extracted para 13 of the plaint, which reads as follows:

"13. That in terms of the documents executed above, although the subsequent Agreement holders/purchasers do not have any perfected title to the respective portion of the suit property agreed to be sold to them since no sale deed(s) have been executed in their favour, they have only an interest in the suit inasmuch as they are in possession and residing in their respective portions on the strength of agreement to sell in their favour coupled with possession of their respective portions and certain Power of attorneys which were contemporaneously executed in their favour."

Para 5 of the reply on behalf of the plaintiff to the appellant's injunction vacation application (which too was discussed) reads as follows:

"5. That the contents of paragraph 5 of the application under order XXXIX Rule 4, CPC, 1908 are denied. It is reiterated that servant quarter is provided to the Defendants on the roof of the suit property as per the said tripartite agreement, however exclusive right over and above the 2nd floor was never transferred to the Defendants vide the said tripartite agreement. The terrace/roof over and above the Second floor of the Suit property was retained by late Major Samarendra Nath Sarkar which includes all rights to build and raise any lawful construction thereon as may be permitted by the concerned authorities. The subsequent Agreement holders/purchasers neither had nor presently have any right, title or interest

whatsoever in respect of the terrace above the Second floor of the suit property."

11. The judgment cited by the appellant/defendants *Thammaiah*, emphasizes that the plaintiff is under a duty to prove that he or it is in possession. The relevant extract of *Thammaiah* is as follows:

"5. Undisputedly, the suit was one for permanent injunction and in such a suit the plaintiff has to establish that he is in possession in order to be entitled to a decree for permanent injunction. The general proposition is well settled that a plaintiff not in possession is not entitled to the relief without claiming recovery of possession. Before an injunction can be granted it has to be shown that the plaintiff was in possession.

6. In the instant case, Issues Nos. 1 and 3 which were framed on 1.10.1988 clearly refer to this vital aspect. The trial Court while answering the aforesaid issues held in the negative. Unfortunately, the High Court did not consider the effect of these findings and even did not record any finding regarding possession. Therefore, as rightly contended by learned counsel for the appellant, the High Court could not have allowed the appeal."

12. The plaintiff has nowhere shown his possession of any portion of the suit property; much less exclusive possession of the third floor or any area over the second floor. No doubt, he relies on a conveyance deed, executed in 2012 and mutation of the property. However, it is not apparent how he could have claimed that conveyance in respect of the entire property, once his predecessor entered into binding arrangements over several built up residential units, for periods ranging from 27 to 11 years ago. Those arrangements were in the forms of agreements to sell, with the purchasers

being put in possession of the respective units; all indications are that such individuals were also given rights over the second floor and *proportionate share in land* – in relation to the units and also, apparently in relation, proportionately to the area of the servant quarters and above. The suit nowhere stated that the plaintiff ever exercised domain or possession or asserted such rights over those portions. In these given circumstances, the impugned order, to the extent it held that the plaintiff had a property right and was entitled to *prima facie*, an *ad interim* injunction, was clearly erroneous.

13. During the hearing of the suit, the plaintiff's counsel had submitted that the construction is complete and in accordance with the sanction given. In these circumstances, even while vacating and setting aside the *ad-interim* injunction, the parties are directed to maintain *status quo* with respect to construction over the second floor and third floor; the plaintiff shall also not further transfer or part with possession of those portions of the suit property. The appeal is allowed in these terms. No costs.

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S. RAVINDRA BHAT
(JUDGE)

A.K.CHAWLA
(JUDGE)

SEPTEMBER 4, 2018