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

Date of Decision : 12th February 2018

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RFA 461/2016

NEETA SARDA & ORS.

..... Appellants

Through: Mr. Amit S. Chadha, Senior Advocate
with Mr. Ashok Jain, Mr. Arjun
Aggarwal, Mr. Aniket Bhattacharyya
and Mr. Sahil Mangia, Advocates.
(M:9873632138)

versus

ADITYA SARDA & ORS.

..... Respondents

Through: Ms. Geeta Luthra, Senior Advocate
with Mr. Sachin Datta, Mr. Rajat
Sehgal, Mr. Shakil Ahmed and Ms.
Shivani Luthra Lohiya, Advocates
(M:9810386403) with R-1, 2 & 3.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

RFA 461/2016

1. The Court spent considerable time in hearing this matter on the last date and today. On the last date, a Local Commissioner was also appointed to report on the exact status of the property. Parties almost agreed on the terms and conditions during the course of these hearings. However, while the Court was dictating the order recording the terms of settlement, parties did not wish to give consent to the terms. In view of the same, there appears to be no possibility of settlement between the parties.

2. Admit. List in due course.

CM Nos.25296/2016, 39189/2017 & 45405/2017

3. By CM Nos.39189/2017 & 45405/2017, Appellants have prayed for stay of the execution proceedings in Execution Petition No.751/2017 pending before learned ADJ-05 (South), Saket Courts, New Delhi, till final disposal of the appeal. By CM No.25296/2016, the Appellants are seeking stay of judgment and decree dated 25th May, 2016, till final disposal of the present appeal.

4. Present appeal has been preferred challenging the impugned order dated 25th May, 2016 by which the Trial Court was pleased to direct division of the suit property as per the report dated 23rd April, 2016 of the architect Sh. S. M. Soni. The Trial Court accepted the said report and disposed of the suit by directing that the additions/alterations as per the report of the architect would be carried out and further directed that the expenses for the same would be borne equally by both the parties. The Trial court also directed that neither party would create any hindrance in the implementation of the report of the architect.

5. The litigation has a long and chequered history. Parties are brothers and are in occupation of property bearing no.244, Westend Marg, Saidulajab, Tehsil Saidulajab, Mehrauli, New Delhi (*hereinafter, 'suit property'*). The same is jointly owned by the parties. A suit for permanent injunction was filed by the Appellants with the following prayers:

“a) Leave under Order 2 Rule 2 of the Code of Civil Procedure;

b) Pass a Decree for permanent injunction restraining the defendants and their men, agents and associates from inducting and/or permitting any outsider or any third party who are not the

family members of Sarda Brothers to come inside the property and to occupy any portion of the suit property and to indulge into any such act which cause nuisance and annoyance to the family members;

c) A decree for permanent injunction restraining the defendants, their men, agents and associates from selling, assigning, transferring, parting with possession and/or creating any third party interest in the suit property of the Sarda Brothers and/or from changing the nature of user of the suit property from residential to commercial purpose;

d) Temporary Injunction.

e) Receiver

f) Cost of the suit.

g) Such further and other relief or reliefs to which the Plaintiff is entitled to under the law and on equity.”

6. An application was filed seeking interim relief. On 10th March, 2011, an interim order was passed restraining the Respondents from inducting or permitting any stranger from occupying the suit property and from transferring, alienating, or creating any third party interest. Defendants filed an appeal against the said order which was registered as FAO 233/2011. On 23rd May, 2011 in the said appeal, a learned Single Judge of this court passed the following order:

“Learned senior counsel for the parties as also Advocates on record are requested as officers of the Court to suggest an agreed modality which will entitle both the parties to use the premises, but simultaneously not affecting the others right to use the property also.

List on 26th May, 2011.”

7. Thereafter, the parties agreed to give the name of an architect for suggesting the division of user/occupation/enjoyment of the suit property. This was recorded on 27th July, 2011 in the following terms.

*“Counsel for the parties state that they will give an agreed name of the Architect to suggest the division of user/occupation /enjoyment of the suit premises.
List for hearing on 8th August, 2011.”*

8. On 8th August, 2011 a consent order was passed in the following terms:

“1. It is agreed between the counsel for the parties that M/s. Kothari Associates (Pvt.) Ltd., G-65, Connaught Place, Above J and K Bank, New Delhi-110001 (Phone Nos.23325040 and 23324628) are appointed as Architects to suggest a mode/modality so that each party can enjoy his respective share without hindrance by other party. Counsel for the parties agree that they will bear the expenses of the Architect equally. The Architect shall prepare his report within a period of 3 months from today. The Architect will hear the appropriate representations which would be made by the respective parties or their representatives for deciding the enjoyment and use of the property. Counsel for the parties also agree that on the whole, the report of the Architect would be acceptable to them, except in case of grave prejudice.

2. List for further proceedings on 30.11.2011, the date already fixed.

3. Counsel for the parties also agree that they will seek adjournment in the suit pending before the Trial Court.

4. Dasti to counsel for the parties.

CM No.11561/2011(for recalling of order)

No orders are required to be passed in this application. The application is disposed of accordingly.

Cm No.9349/2011 (stay)

List on 30.11.2011, the date already fixed.”

9. The appeal, accordingly, was settled, except that a common architect was to be appointed. The said settlement is binding on all the parties. On 15th April 2014, it was directed in the appeal, that further proceedings in respect of appointment of an architect and further work of modalities in terms of the order dated 8th August, 2011 would continue before the Trial Court where the suit was pending.

10. Several hearings were held before the Trial Court in respect of nomination of the architect, and despite efforts, no common name could be arrived at. The Court then appointed 3 architects to inspect the property and suggest modalities to implement order dated 8th August, 2011 in FAO 233/2011. Shri S. M. Soni was one of the architects appointed by the Court, who submitted his report. This report was accepted by the Trial Court vide the impugned order.

11. In this appeal, since a settlement appeared to be possible, the matter was referred to mediation, however the same did not work out. On 31st October, 2017, by an interim order, personal appearance of Appellant No.1 was exempted before the Executing Court. On 15th December, 2017 stay of execution was ordered.

12. On 29th January, 2018 the following order was passed:

“CM APPL. 39189/2017

This is an application seeking early hearing of

the appeal and for grant of interim stay. A subsequent application has already been filed seeking stay of the execution of the impugned decree and judgment being CM Application No. 45405/2017.

2. In view thereof, the present application has been rendered infructuous. The documents filed along with this application shall however, be considered at the time of final hearing of this appeal.

3. Mr. Sachin Datta, learned Senior Counsel appearing for the Respondents submits that reply to this application be treated as reply to CM Application No. 45405/2017. Ordered accordingly.

4. This CM Application stands disposed of accordingly.

CM APPL. 25296/2016

5. This application was filed at the initial stage in this appeal seeking stay of the impugned order and subsequently in CM Application No. 45405/2017, the execution proceedings of the impugned order have been stayed by this Court.

6. Accordingly, this application has also been rendered as infructuous and is disposed of as such.

RFA 461/2016 & CM APPL. 45405/2017

7. Arguments heard for sometime on behalf of both the parties. One of the points of contention between the parties is as to whether any of the parties is living in the suit premises bearing No. 244, Westend Marg, Saidulajaib, Tehsil Saidulajaib, Mehrauli, New Delhi and there are conflicting submissions being made by the Appellant and the Respondent in this respect.

8. The Appellant submits that his family has been living in the suit property in the first floor except in one room. The Respondent, on the other hand submits that he is being forced to live in the rented accommodation

and the Appellant is also not residing there. The Appellant and the Respondent are brothers.

9. Parties agree that a Local Commissioner could be appointed in the matter who would ascertain the actual status of the suit property, as to who is in the possession and residing in which part of the suit property.

10. In view of above, it is deemed appropriate to appoint a Local Commissioner in the matter who will visit the suit premises today itself at 2.00p.m and would ascertain the following:

- (i)The status and condition of the suit property;*
- (ii)The number of rooms in each of the floors of the suit property;*
- (iii)Whether anyone resides in the suit property or not;*
- (iv)Who is in possession of which portions of the suit property.*

11. The Local Commissioner is permitted to take photographs and videos, if needed.

12. Accordingly, Mr. Rajan Tyagi, Advocate (M-9958523388), who is present in Court, is appointed as Local Commissioner in the matter to inspect the suit premises today itself and submit a report to this Court on the above aspects within a week from today. The fee of the Local Commissioner is fixed at Rs.50,000/- (Rupees Fifty Thousands) to be shared equally by both the parties.

13. A copy of this order be given dasti under the signature of the Court Master.

14. Interim orders to continue till the next date of hearing.

15. Relist on 12th February, 2018.”

13. Local Commissioner's report was received which captures the status of the suit property as under:

*“i. The Status and condition of the suit property;
The Suit property is in habitable condition, however, whitewash is required with very minor repair at one or two point and that is in outside area of main (residential building).*

ii. The number of rooms in each of the floors of the suit property;

Ground Floor:-

- *Nine (9) rooms with attached bathroom/toilet*
- *One (1) Kitchen*
- *Hall/ Lobby with Toilet at main entrance of main building and all nine rooms open to this Hall/ Lobby and stair goes to first floor from this Hall/ Lobby. And height of this Hall/ Lobby goes upto top floor.*

First Floor-

- *Similar set of rooms at Ground Floor exist on First Floor.*

Copy of the description of rooms at ground floor which is admitted and signed by both the parties is annexed hereto and marked as ANNEXURE L-2.

*iii. Whether anyone resides in the suit property or not;
It is admitted by both the parties that no one resides at Ground Floor. Mr. Aditya Sarda/ respondents do not resides at Ground Floor and on looking inside the room, I found them vacant except some covered furniture in rooms, there is nothing, therefore, it is clear that no one is residing presently at Ground Floor.*

However, on First floor Ms. Saumya is residing who has shown her room and articles/belonging with some

ID proofs and electricity bills. She is residing there with her domestic help i.e. Mr. Sharwan, male servant and also Ms. Rajeshwari Halda, Cook who is also residing in one room at Top Floor of the suit premises.

In separate discussion with her domestic helps, it was revealed by them Ms. Saumya, Mr. Ghanshyam Dass and his son visit weekly/ quarterly to property in question and resides in the property on their visit.

Mr. Aditya Sarda's servants also occupies the servant quarters in the suit property.

Copy of the ID proofs and Electricity bills of last three months are annexed hereto and marked as ANNEXURE L-3.

iv. Who is in possession of which portions of the suit property.

It is admitted by both the parties that the Ground floor is in possession of Aditya Sarda/ respondents. And the Second Floor is in possession of appellant. It is also admitted by the parties, present at the suit property that one room on second floor is under the lock and in possession of Mr. Aditya Sarda/ Respondent. On top floor, there are three rooms. Out of these three, one room is in possession of Ms. Rajeshwari Halda, Cook of Ms. Saumya D/o Sh. Ghansyam Dass and other two room are vacant but open without any lock. Out side the main building but inside the premises, there are total 10 rooms/ servant rooms and out these 10 rooms 4 rooms are claimed by Mr. Aditya Sarda and 5 are claimed by appellant(first floor) and one room is claimed to be common by the parties present at site.

Copy of the description of rooms at First Floor (Signed by parties) and Top floor with Photographs and CD are annexed hereto and marked as ANNEXURE L-4 and L-5 respectively.”

14. The matter was taken up again today for hearing, and based on the Local Commissioner's report, submissions were heard. It appeared that the parties had consented to the portions which they intended to occupy, and the manner in which separate access could be provided to the first floor of the property. However, as recorded already there appears to be no consensus.

15. The question, thus, remains as to whether the execution of the impugned order ought to be stayed or not. Admittedly, several predecessor Courts and the Trial Court have made a number of attempts to bring the parties to an amicable resolution, however the same is of no avail. Clearly impediments are being caused in the demarcation of the property for use and enjoyment by both the sides and it appears that the parties do not wish to have an amicable resolution of the same. Enormous judicial time is being spent in this litigation and despite repeated orders, the matter continues to remain pending.

16. The Trial Court has followed the earlier orders passed in FAO 233/2011 and the said order is prima facie neither perverse nor illegal. As recorded by the Trial Court, parties failed to arrive at an understanding even on the name of the architect and thus, the Trial Court proceeded with the matter by appointing an architect on its own. The said architect has submitted his report which has been accepted by the Trial Court. There is no reason as to why the order ought not to be given effect to. The appeal FAO 233/2011 had already been settled between the parties, except for appointment of an architect and appointing an architect was the right thing to do for the trial court.

17. In view of the above facts and the chronology of events, no interim protection deserves to be granted. The order of this Court passed in FAO

233/2011 has attained finality and merely modalities had to be worked out. That order was a consent order and neither party can be permitted to wriggle out of the same. The Trial Court has merely implemented the said order. Stay of execution proceedings granted vide order dated 15th December, 2017 is, accordingly, vacated. Proceedings in Execution Petition no 751/2017 shall continue.

18. In order to ensure that neither party causes any hindrance or nuisance in the occupation and possession of the other party, both parties are directed not to induct any third party into the suit property or allow any persons except their own family members to occupy or use the portions of the suit property which are currently in their occupation.

19. Stay applications are disposed of in the above terms.

CM 204/2017 (direction)

20. By this application, Appellants have prayed for issuance of directions to the Respondents to hand over the keys of the first floor to the Appellants. As per the report of the Local Commissioner, one bed room on the first floor is in the possession of the Respondent. Since the Respondent is in full possession of the ground floor of the property, it is directed that the keys of the first floor be handed over to the Appellant so that the ground floor of the property is in exclusive possession of Respondents and first floor of the property is in exclusive possession of the Appellants.

21. Application is disposed of in the above terms.

PRATHIBA M. SINGH
Judge

FEBRUARY 12, 2018/dk