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

+ **FAO(OS) 117/2019**

ANIT KOUR

..... Appellant

Through: Mr. K. Sunil, Ms. Akshita Salampuria
& Ms. Chinki Ojha, Advocates.

versus

GURVINDER SINGH & ORS

..... Respondents

Through: Mr. Shiv Charan Garg & Mr. Imran
Khan, Advocates for respondent
No.1.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

ORDER

08.07.2019

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CM APPL. 30212/2019

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

FAO(OS) 117/2019 & CM APPL. 30211/2019

3. The petitioner has preferred the present appeal to assail the order dated 03.05.2019 passed by learned Single Judge in I.A. No. 6360/2019 in CS (OS) No. 381/2017.
4. The appellant is the plaintiff in the said suit. The suit had been

preferred by the plaintiff, inter alia, to seek the relief of possession against the defendants. Vide order dated 03.12.2018 passed in I.A. Nos. 9445/2017 and 13314/2017, the Court directed maintenance of status quo regarding title and possession of the suit property. The defendant No. 1 moved the aforesaid application i.e. I.A. No. 6360/2019 to seek a direction to the plaintiff/ appellant not to create obstruction in separate shutter for entrance to the mezzanine floor as well as shop on ground floor and also to seek a restraint against the plaintiff and her husband against locking of the main gate at point 'Z' in the site plan. The defendant also sought restraint against the plaintiff from locking the main gate of the terrace floor. Defendant No. 1 sought an alternate key in respect of the shutter at points 'A' and 'B' shown in the plan.

5. The learned Single Judge noticed the fact that in paragraph 10 of the plaint, the plaintiff had admitted that the first floor and the mezzanine floor and half of the top floor were in possession of defendant No. 1. Taking note of the grievance of defendant No. 1 that the plaintiff often blocks egress and ingress of the defendant No. 1 to the portion in which the defendant is in possession and the fact that the plaintiff occasionally locks the main gate of which the duplicate key is not provided to defendant No. 1, the learned Single Judge restrained the plaintiff from blocking the egress and ingress of the applicant/ defendant No. 1 in the suit property and also directed that, in case, the lock is fixed on the main gate for security reasons, duplicate key would be given to defendant No.1 on proper receipt. The application itself has been kept pending since notice was issued therein.

6. The submission of learned counsel for the appellant, firstly, is that the

appellant is not causing any obstruction in the access of defendant/ respondent in accessing the portions of which he is admittedly in possession. If that is the case, we see no reason why the appellant should feel aggrieved by the direction issued by the learned Single Judge in the impugned order.

7. The further submission of learned counsel for the appellant is that the impugned order gives unfettered right of access to the respondent/ defendant No.1 and he is carrying on commercial activity even during the night time in the portion in his occupation. If that is the appellant's grievance, it is for him to bring it to the notice of the learned Single Judge by moving an appropriate application and seek directions from the Court.

8. Learned counsel for the appellant has also sought to place reliance on decision of ***Bachhaj Nahar Vs. Nilima Mandal & Another***, Civil Appeal Nos.5798-5799/2008 decided on 23.09.2008. He has sought to place reliance on paragraphs 9, 13, 14 & 17 of the said decision, which read as follows:

“9. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

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13. A perusal of the plaint clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the schedule property. The facts to be pleaded and proved for establishing title are different from the facts that are to be pleaded and proved for making out an easementary right. A suit for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an easementary right, relates to a right possessed by a dominant owner/occupier over a property not his own, having the effect of restricting the natural rights of the owner/occupier of such property.

14. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a water course etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an

easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to water course. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence.

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17. In the absence of a claim by plaintiffs based on an easementary right, the first defendant did not have an opportunity to demonstrate that the plaintiffs had no easementary right. In the absence of pleadings and an opportunity to the first defendant to deny such claim, the High Court could not have converted a suit for title into a suit for enforcement of an easementary right. The first appellate court had recorded a finding of fact that plaintiffs had not made out title. The High Court in second appeal did not disturb the said finding. As no question of law arose for consideration, the High Court ought to have dismissed the second appeal. Even if the High Court felt that a case for easement was made out, at best liberty could have been reserved to the plaintiffs to file a separate suit for easement. But the High court could not, in a second appeal, while rejecting the plea of the plaintiffs that they were owners of the suit property, grant the relief of injunction in regard to an easementary right by assuming that they had an easementary right to use the schedule property as a passage."

9. In our view, reliance placed on the aforesaid decision is misplaced in the present context. In the said decision, the Supreme Court held that the plaintiff could not be granted relief which he had not pleaded and sought in

the plaint. In the present context, it is the plaintiff who has filed the suit for possession, wherein he admits that the defendant is in possession of the portions taken note of hereinabove. The plaintiff cannot seek to obstruct the egress and ingress of the defendant, who admittedly, is in possession of certain portions of the property during the pendency of the suit particularly when the Court has directed maintenance of status quo.

10. Thus, we find absolutely no merit in the present appeal and the same is dismissed. The observations made in this order shall not prejudice the case of either party in the pending proceedings in the suit.

VIPIN SANGHI, J

RAJNISH BHATNAGAR, J

JULY 08, 2019

B.S. Rohella