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

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Delivered on : 15th May, 2019

+ **CM(M) 945/2018, CM Appl. No. 33107/2018**

MOHD SALEEM QURAISHI & ANR Petitioners
Through : Mr.Darpan Wadhwa, Sr Advocate
with Mr.Nikhil Singhvi, Mr.Amit
and Mr.Mohit Seth, Advocates.

versus

N K SOMANI & ANR Respondents
Through : Ms.Geeta Luthra, Sr Advocate
with Mr.Bipin Bihari Singh,
Mr.Pranav Vashisth and
Mr.Anshul Duggal, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition challenges the order dated 17.07.2018 passed by learned Additional District Judge-01, South East District, Saket Courts, New Delhi in MCA No.32/2017 whereby the order dated 30.10.2017 passed by the learned Trial Court in CS No.53032/2016 on application under Order XXXIX Rule 1 & 2 CPC filed by the respondents No.2 & 3 was affirmed.

2. The necessary facts as set out in petition read as under:-

a) the petitioners claim to be owners in possession of the third floor of the property bearing number S-70, Greater Kailash-II, New Delhi-48 (hereinafter referred as the 'said property') with roof rights and constructions thereon, built on plot of land admeasuring 300 square yards

by virtue of an agreement to sell dated 05.04.1997. Thereafter the sale deed dated 29.06.2010 was got registered in favour of the petitioners;

b) the plot of land of said property originally belonged to M/s Pawha Builders Pvt. Ltd. i.e. respondent no.2 through its director-Pankaj Pawha. Subsequently they developed the said property between the year 1994-1997 and sold the portions/floors of the said property to different purchasers;

c) the petitioners purchased the terrace rights above the second floor with right to construct thereupon, excluding the servant quarters vide agreement to sell dated 05.04.1997;

d) the respondent No.1 by way of sale deed dated 22.10.2001 purchased Ground floor of the Property including a right to park one car in the common drive way and right to access terrace for purpose of maintenance;

e) similarly First Floor and Second Floor of the property were sold to different buyers;

f) Petitioners allegedly, between the years 1997-1999 constructed a floor admeasuring approximately 1300 sq feet on the terrace above second floor without any objection from any of the occupants of the building;

g) all the occupants of the building had been living in their respective floors peacefully till the year 2013. Sometime in the middle of 2013 when the Petitioner were in the process of renovating their floor, the Plaintiff for the first time started creating ruckus and started harassing Petitioners by filing complaints before various agencies. It was for the first time plaintiff started harassing the petitioners and complaining that

petitioners have no right to park their car in the common driveway and that they can also not be permitted to park their car in front of the gate. It is pertinent to mention that driveway of the property is about 24 feet long and was originally meant to accommodate two cars when the property was constructed. It is only recently when everyone has big car that two cars have become difficult to be parked and some portion of the car stays slightly outside the boundary of the plot. However this situation exists in almost every part of Delhi and does not give one person more rights over the other;

h) it was though always an admitted position that petitioners had been staying on the third floor of the property, plaintiff/respondent No.1 mischievously started complaining as if petitioner only now are started erecting construction on the terrace above second floor;

i) it was the case of the Plaintiff/ Respondent No.1 that he came to know about the sale Deed in favour of the Petitioners only in 2013. That the Plaintiff(respondent No.1 herein) clearly lied on oath since he had been staying in the same building since the year 1999 and the said plea was clearly an afterthought, non sustainable and time barred;

j) the plaintiff (Respondent No.1 herein) has himself admitted the Petitioner's (Defendant no.1&2 therein) are in possession and occupation of the third floor in the said property;

k) the Plaintiff (Respondent No.1 herein) deliberately concealed the fact in his Suit that he already had the knowledge of built up area on the terrace of third floor of the said property which was in power and possession of the Petitioners herein and the same is evident from the application dated 30.03.1999 filed before the Executive Engineer, MCD,

Plaintiff (Respondent No.1 herein) himself wherein along with the application, he had enclosed copy of the plan clearly stating built up area of 1357.08 on the third floor. A copy of the Letter dated 30.03.1999 filed by the Respondent No.1 before the Executive Engineer, MCD, is annexed herewith and marked as Annexure-A-4 (Colly); and

1) the electricity connection at the premises of the Petitioners (Defendants no. 1&2 therein) was installed way back in 1999 and has date of energization as 20.05.1999. The passport of Petitioner No.1 (Defendant No.1 therein) got made from the same address in the year 2002. Certain other documents further show the Petitioners were in power and possession of their portion at third floor since long and not as alleged by the Plaintiff (Respondent no.1 herein). It is submitted that vide rectification order dated 28.03.2010 passed by Dy. Assessor and Collector, Central Zone, New Delhi, the rateable assessable value was fixed at Rs.77,000 which clearly shows that the Petitioners have been residing therein along with their family since the construction of third floor in the year 1999.

3. The suit bearing CS No. 53032/2016 was filed by the Plaintiff/ Respondent No.1 on 23.12.2016 seeking *inter alia* the following reliefs:-

“(i) A decree of declaration thereby declaring that defendant No.3 had not any right or title in the property situated and bearing No. S-70, Greater Kailash, Part-1, New Delhi-1 10048 admeasuring 300 Sq. Yards for further sale after selling of total flats ground floor, first floor and second floor and basement of the said properties for further sale to defendant no.1 & 2 or any other person for construction right above the second floor or any other part of the suit property consequently sale deed dated 02.07.2010 executed by defendant no.3 in favour of defendant nos.1 & 2 registered with fourth defendant i.e. Registrar-V is illegal and the same is null and void and construction there under is illegal and unauthorized which is without title, and plaintiff is legally entitled to enjoy his owned part of the suit property and parking therein; and
(ii) xxx xxx

(iii) Injunct defendant no.1, 2 & 3 jointly and severally or any other person from parking their vehicle in the parking reserved for the plaintiff or in driveway or in front of the gate of the plaintiff and they cannot create any type of hindrance in peaceful enjoyment of parking in driveway by the plaintiff or any other type of enjoyment of the suit property for which he is legal owner of the concerned part of the said property and other common place including staircase, lift and lift well etc.; or/ and”

4. The respondent No.1/plaintiff also filed an application under Order XXXIX Rule 1 & 2 CPC against the defendants No.1 to 3, which application was allowed and the petitioners were restrained from parking their cars in the driveway/parking area or in front of the gate till the disposal of the case before learned Trial Court and also restrained from creating any third party interest in the suit property since the plaintiff has challenged the legality of the sale deed.

5. The respondents thereafter preferred MCA No.32/2017 against order of the learned Trial Court, which was also dismissed vide order dated 17.07.2018, as noted above.

6. I have heard the arguments.

7. The learned senior counsel for the petitioner has taken me through the various documents annexed to this petition supporting assertions made in sub para (k) and (l) of para No.2 above to show the possession of the petitioners prior to the year 2013.

8. The reference was also made to a letter dated 22.11.2013 written by the plaintiff/ respondent No.1 to the Station House Officer, Greater Kailash-I Police Station, New Delhi wherein he *admitted* the possession of the third floor by the petitioner No.1. Reference was also made to the sale deed dated 29.06.2010 executed by the same builder who sold the

ground floor portion to the plaintiff / respondent No.1 in the year 2001 and such sale deed do give petitioners a space for car parking on the driveway. However, the same concession was given even to the respondent No.1 way back in the year 2001.

9. A bare perusal of the impugned order passed by the learned Trial Court would clarify the ground floor has only one car parking space as referred to in registered sale deed dated 22.10.2001 in favour of respondent No.1. Though the petitioners claim their parking right on the driveway by virtue of their sale deed dated 29.06.2010, but the respondent No.1 has a right prior to him in such space. The photographs of the parking area reveal it is meant only for parking of one car and as the right of the respondent No.1 existed prior to the creation of alleged right of car parking space in favour of the petitioner No.1 herein, so the learned Trial Court thus rightly held once the property has been sold, it could not be sold to any other person as the person cannot transfer a property which he does not have and thus restrained the petitioners from parking their car in the driveway or in front of the gate as if they park their car in front, it would cause hindrance for the ingress or egress of the car of the respondent No.1 herein. Hence, the impugned order to this extent needs no interference.

10. A prayer in the suit is also qua declaration to declare sale deed dated 26.09.2010 in favour of the petitioners herein as null and void. It is alleged by the petitioners such a prayer would be hit by limitation, though the respondent No.1 attributes his knowledge to such document only in the year 2015.

11. However, there are certain documents on record to prima facie show the petitioners have been residing at the third floor prior to the year 2010 viz the electricity bill showing the energisation date of 20.05.1999; the copy of the passport of petitioner No.1 showing the same address in the year 2002 as also the rectification order dated 28.03.2010. The petitioners also contend any construction done prior to the year 2007 would stand protected and hence a status quo order was passed against demolition notice dated 29.04.2016 by the Assistant Engineer (Building) VI, Central Zone, South DMC under Section 343 of the DMC Act 1957.

The notice *inter alia* notes:-

“6. For unauthorised construction at third floor, against which complaint as well as court case was filed by Shri N.K.Somani, the owner of the third floor Shri Mohd. Saleem Quareshi contended that he applied for regularization of existing construction. But the record placed before the undersigned indicates that his application, submitted vide File No.26/B/UCR/CZ/2013 dated 15.03.2016, was rejected by the Department for the reason that the applicant Shri Mohd Saleem Qureshi was / is not the owner of the entire property and the application was required to be submitted duly signed by all the co-owners of entire property. The rejection of application was duly communicated to Shri Mohd Saleem Qureshi vide letter No.D/1596/AE(Bldg)-VI/Central Zone/2016 dated 30.03.2016.”

12. The learned senior counsel for the respondent No.1 vehemently argued *a)* the only reason for putting *status quo* on creation of new title over the third floor of said premises was to safeguard the bonafide purchaser; and *b)* once the courts below have given a concurrent finding this Court ought not to interfere under Article 227 of the Constitution. Heard. The powers under Article 227 of the Constitution, admittedly, are to be exercised only for the superintendence and not as a Court of appeal. However, if there is a manifest failure of the justice or perversity in the orders passed by the Court below, then such powers may be exercised. The question before this Court is if a person who has a concern with his

neighbour can secure an order of stay against sale of the premises of his neighbour? I doubt if such an order can be given. However the purpose for which the status quo was granted appear to be laudable viz to protect the bonafide purchaser to purchase an illegally constructed floor but.

13. Admittedly, the petitioners are fighting for regularization of their construction on third floor, so the interest of justice shall suffice only if the petitioners are directed to intimate the learned Trial Court as also the prospective purchaser(s) in writing about the pendency/nature of litigations concerning the said floor, prior to an alleged sale of the flat so that the bonafide purchaser, if any, may not later raise objection qua his bonafide(s) etc. In view of this, the order dated 30.10.2017 qua *status quo* stands modified to the above extent, as both the parties herein are owners in their own rights of their respective portions; having purchased their respective floors from the same builder.

14. With the above observation, the petition stands disposed of. Pending application, if any, also stands disposed of. No order as to costs.

15. Copy of this order be communicated to the learned Trial Court for information.

YOGESH KHANNA, J.

MAY 15, 2019

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