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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
Decided on: 11th July, 2019

**+ CM(M) 1249/2018 & CM APPL. Nos. 42522/2018, 42524/2018,
4572/2019**

BHARAT BHUSHAN KATARIA & ANR Petitioners
Through: Petitioners in person

versus

ANITA VASHISHT & ORS Respondents
Through: Mr.J.C.Mihindroo, Mr.Shubham
Aggarwal & Ms.Cherry Singh,
Advocates for R-1.
Mr.Shailender Dahiya, Advocate for
R-2.
Ms.Saroj Bidawal, Std. Counsel for
R-3.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. This is an unfortunate case which has travelled to this Court on the issue of an interim order in a suit regarding placement of water tanks of the occupants of the first floor and second floor of the suit property, i.e., H-160, Ashok Vihar Phase-I, New Delhi-110052.

2. The suit is between neighbours. The respondents herein are the plaintiffs in the suit and the occupants of the first floor and second floor of the suit property. The petitioners are the defendants in the suit, and owners of the third floor of the property. They claim to have roof rights as well. The plaintiffs filed the suit for a mandatory injunction against the defendants directing them to remove/demolish certain alleged unauthorised

constructions and to restrain them from raising any further unauthorised construction on the suit property.

3. In the course of the proceedings, a controversy arose about whether the plaintiffs have a right to place their water tanks on the terrace of the suit property or not. It is the contention of the petitioners/defendants that, in terms of a consent order dated 01.12.2014, it was agreed between the parties that the water tanks of the respondents plaintiffs would be installed on a *mumty*, which is above the staircase of the suit property (above the terrace). Although the plaintiffs made an application for review of the consent order, that application was disposed of by an order dated 20.02.2016. The Trial Court did not find any reason to review the order, but granted liberty to the plaintiffs in the following terms:

“Thus, the application under Section 114 CPC read with Section 151 CPC stands dismissed. The observations made in this order are for the purpose of deciding the present application only and have no bearing on the merits of the case. The liberty is given to the plaintiffs that if mumpty is not found sufficient for their 500 liters water tanks, then they have to file a certificate of an approved architect to this effect.”

4. Pursuant to the liberty so granted, the plaintiffs filed a further application, purportedly under Section 151 of the Code of Civil Procedure, 1908, contending that they had obtained advice from Structural Engineers that the placement of the water tanks on the *mumty*, in its present state, was structurally unsafe and therefore unfeasible. Certificates of the Structural Engineers were also placed on record. The petitioners/defendants placed a contrary report on record.

5. The Trial Court, therefore, directed vide the impugned order dated 04.08.2018 that the plaintiffs are entitled to have one water tank of a

maximum capacity of 550 ltrs., for each floor to be placed on the terrace of the suit property. The reasons recorded by the Trial Court are as follows:

*“10. In view of the above discussion, the water tanks cannot be allowed to be kept either on the mumty or on the lift floor for the following reasons, **firstly**, both are unauthorized structure and Court cannot allow unauthorized structure to be used in any way, **secondly**, if water tanks are allowed to be kept on either of these places then it will hinder any demolition action which is to be taken place in future. **Thirdly**, if water tanks are allowed to be kept on mumty then it will create hindrance during emergency situation and **lastly** keeping the water tanks on the already punctured structured is an open invitation to the accident or mis-happening.*

11. Another place i.e. suggested by the defendants to keep the water tanks was on the roof over the open urinal which is constructed on the terrace of the suit property. The roof of the open urinal is also an unauthorized structure and for the reasons discussed above, Court cannot direct water tanks to be kept on the unauthorized structure.

12. Water is an essential requirement for sustaining life and is a basic requirement and necessity without which nobody can have a dignified life, therefore, provision for storing water for ground, 1st and 2nd floor occupants of the suit property has to be made. The sale deed of plaintiff no. 1 i.e. owner of 1st floor of the suit property shows that at the time when it was purchased the water tanks were kept on the terrace of the suit property. Photographs dated 24.12.2012 are also filed on the record which clearly shows that overhead water tanks are installed on the terrace of the suit property with necessary connections. Judicial notice can also taken of the fact that in a flat system constructed by DDA or any other builder, normally all the water tanks are kept on the terrace of the building and all the occupants in a vertical stack served by the same stair case and having the same terrace have a common right to access the terrace for maintenance and checking of overhead water tanks. The sale deed of first floor of the suit property and photographs shows that overhead water tanks were previously installed on the terrace of the suit property but at

present no overhead water tank is installed on the terrace of the suit property which clearly shows that overhead water tanks have been removed from the terrace. The defendants have stated to have the roof/terrace rights of the suit property and it is alleged by the plaintiffs that defendants have without permission have removed their overhead water tanks from the terrace. The presumption can be drawn that overhead water tanks on the terrace would have been removed by the defendants as they are only one, who have interest in removing them.

The defendants have not filed any order passed by any court or permission from any concerned authority by which they have removed the overhead water tanks of the plaintiffs. So, defendants have removed the overhead water tanks from the terrace without any permission or following due process of law, therefore, overhead water tanks have been removed unlawfully by the defendants and therefore, status which was present on the date of filing of the suit need to be restored, therefore, the water tanks are needed to be placed at the same place where they existed before they were removed by the defendants.

As per DDA Rules the maximum storage capacity of water tank for each house in the vertical stack of the building can be 550 ltr, therefore, plaintiffs are allowed to install their water tanks having maximum capacity of 550 ltr each on the terrace of the suit property and defendants are directed to provide access to the plaintiffs to get their water tank install on the terrace.

13. Plaintiffs are directed to inform the defendants three days in advance about the day, date and time when they will get their water tank installed on the roof and defendants are directed to provide the key of the terrace to the plaintiffs on the day, date and time fixed for the installation of the water tanks and are directed not to create any hindrance in accessing the terrace and in the installation of the water tanks.

Plaintiffs are directed to file the photographs of the water tanks installed on the terrace of the suit property on the NDOH and it is also expected out of the plaintiffs that they will get the water tanks installed in such a manner that minimal

space of the terrace is occupied by water tanks and no hindrance or obstruction is created in using the terrace.”

6. The said order has been assailed by the petitioners/defendants on various legal and factual grounds including with relation to the effect of the consent order dated 01.12.2014 and the order dated 20.02.2016, passed in review.

7. While issuing notice in this petition, the operation of the impugned order was stayed vide an order of this court dated 10.10.2018. The respondents/plaintiffs have made an application for vacation of that order. Considering the nature of the controversy, the Court has made some attempt to find a solution which is acceptable to all the parties and has also, by the last order dated 01.07.2019, requested the counsel appearing for the parties to visit the suit premise and try to locate the place where, as an interim measure pending final disposal of the suit, the water tanks could be installed. Those efforts were unsuccessful.

8. The petitioners/defendants appear today in person. They state that they have, since the last date of hearing, discharged their counsel and wish to argue the matter themselves.

9. I have heard the petitioners/defendants in person and learned counsel for the respondents/ plaintiffs. The contention of the petitioners/defendants is that the plaintiffs are bound by the orders dated 1.12.2014 and 20.02.2016 passed by the Trial Court whereby it was directed that their water tanks be placed on the *mumty* and not on the terrace of the suit property. They contend that, even today, water tanks have been installed on the said *mumty* and are only required to be connected to the first and second floors of the suit property, which are occupied by the respondents/ plaintiffs. They state that they have no objection to the said water tanks being so connected or to the plaintiffs installing their own water tanks of

500 ltr. each on the *mumty* and connecting it to their respective premises. However, the petitioner/defendants have strongly contested any interference with their alleged exclusive rights over the terrace, either by way of placing the tanks on the terrace or the plaintiffs' water pipes being laid through the terrace.

10. Learned counsel for the respondents/plaintiffs submit that their clients are only interested in having access to water and have been suffering by reason of the fact that, as of today, they have no water tanks at all. However, they dispute the assertion of the petitioners/defendants as to the suitability of the *mumty* for this purpose. It is submitted that the *mumty* has been partially demolished as a result of unauthorized construction carried out by the petitioners/defendants and that it is also liable to be demolished as it is itself an unauthorized structure.

11. Upon a consideration of the above submissions, I am of the view that the order of the Trial Court dated 20.02.2016 had the effect of holding the parties to the consent order dated 01.12.2014, but also granted liberty to the plaintiffs to re-open the question if the *mumty* was not found sufficient for the said purpose. In the face of contradictory expert opinions produced before the Trial Court, it cannot be said that the directions contained in the impugned order are wholly in excess of its jurisdiction or are perverse. It is not appropriate for this Court, in exercise of power under Article 227 of the Constitution of India, to enter into a determination of such disputed questions of fact. The suit remains pending before the Trial Court and the rights and claims of the parties will be adjudicated in the suit. As observed by the Trial Court, the right of a person to have convenient and sufficient access to water is essential. The order of the Trial Court seeks to effectuate that right during the pendency of the suit.

12. However, in view of the orders dated 01.12.2014 and 20.02.2016, it would also be appropriate that the petitioner's/defendant's claim of exclusive rights of enjoyment of the terrace is not interfered with, if a safe and viable alternative is reasonably possible. An independent determination of this question is required. In these circumstances, I am of the view that the interest of both the parties can be protected, and the balance of convenience maintained by passing the following directions to be implemented prior to the implementation of the impugned order:

- a. Mr. Shishu Chauhan, Civil Engineer, G-154, Govindpuram, Ghaziabad-201013 [Mob.9711159781] is appointed as a Local Commissioner, to inspect the suit premises and to certify whether the installation of the plaintiffs' water tanks on the *mumty* would be structurally safe and would not pose a particular danger to the safety of the residents of the suit property.
- b. In the event the *mumty* cannot be used for this purpose in the present condition, the Local Commissioner shall estimate the extent of repairs/renovation required and the cost involved.
- c. The Local Commissioner will file a report on the above aspects before the Trial Court within three weeks from today.
- d. The Trial Court shall hear the parties regarding the feasibility of carrying out repairs in terms of the report, if any, and the sharing of expenses between them. The Trial Court will pass necessary orders if it appears that a reasonable solution is possible in this regard. The aforesaid exercise will be carried out within three weeks after the submission of the report by the Local Commissioner. It is made clear that these directions are not intended to cover any major reconstruction of the *mumty*.

- e. Thereafter, if so directed by the Trial Court, the respondents/plaintiffs will, at their expense, have their water tanks installed on the *mumty* under the supervision of the Local Commissioner. The Local Commissioner will also give directions as to the connection of the water tanks to the first and second floors of the suit premises.
 - f. In the event the Trial Court comes to the conclusion that it is not possible to install the water tanks on the *mumty* in terms of the aforesaid directions, it shall give directions for the implementation of the impugned order dated 04.08.2018. Installation and connection of the tanks in terms thereof shall also be supervised and be carried out under the directions of the Local Commissioner.
 - g. The Local Commissioner shall be entitled to a remuneration of ₹45,000/- for the purposes of aforesaid; one-third each to be paid by the occupants of the first, second and third floors.
13. These directions are passed without prejudice to the rights and contentions of the parties at the trial and are passed in order to ensure that during the pendency of the suit, the respondents/plaintiffs have access to water without any unnecessary disruption of the petitioners'/defendants' asserted right to the exclusive enjoyment of the terrace.
14. The parties are directed to cooperate with each other for the implementation of this order. If any further directions are required, they may approach the Trial Court.
15. The petition is disposed of with the aforesaid directions.

PRATEEK JALAN, J

JULY 11, 2019/ 'hkaur/j'