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

Date of Decision: 31st January, 2020

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CM (M) 1690/2019

DEEPTI SHARMA @ ANU SHARMA & ANR. Petitioners

Through: Ms. Savita Aggarwal, Advocate.
(M:9818324717)

versus

ASHA KASHYAP & ORS.

..... Respondents

Through: Ms. Gouri Karuna Mohanti, Advocate
for R-5. (M:9810183180)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

CM APPL. 4047/2020

1. Allowed, subject to all just exceptions. Application is disposed of.

CM APPL. 4044/2020

2. This is an application for restoration of CM(M) 1690/2019. For the reasons stated in the application, the CM(M) is restored. Application is disposed of.

CM (M) 1690/2019 & CM APPLs. 4045-46/2020

3. The present petition was disposed of on 27th November, 2019. In view of the subsequent orders passed by the Trial Court, which, according to the Petitioners (*hereinafter, the "Sharmas"*), has mis-read the order of this Court, these applications seeking clarification and further orders have been filed.

4. A suit for recovery of damages was filed by the Sharmas, which was decreed by the Trial Court vide order dated 27th November, 2013 and a decree of Rs. 1,61,960/- was passed in their favour. Thereafter two suits

have been filed and are pending between the parties which relate to the same properties, i.e., BG-5A/42B and 42-C, Paschim Vihar, New Delhi-110063.

5. The first suit (CS No. 10133/2016), which is pending before the Id. ADJ, is a suit for recovery of damages and permanent injunction, filed by Ms. Asha Kashyap and Mr. Shivankit Kashyap (*hereinafter, the “Kashyaps”*) against the Sharmas, praying for a sum of Rs.4,00,000/- and a decree restraining the Sharmas from using the suit property in any manner that causes damage to the suit property.

6. The second suit (CS No. 350/2018), which is pending before the Id. ASCJ, is a suit for permanent injunction filed by the Sharmas against the Kashyaps, Mr. Shyam Chadha and Ms. Sapna Chadha, praying that they be restrained from damaging the suit property, covering the open area around their flat and from encroaching upon the public land surrounding the suit property, without requisite permissions. A prayer has also been made for the illegal structure raised by the Defendants to be demolished by the DDA and for damage already done to the suit property to be repaired. In the said suit, an interim injunction was granted on 26th July, 2018, which continues to operate.

7. The present petition has arisen out of the suit pending before the Id. ASCJ filed by the Sharmas. The Kashyaps wanted to carry out repairs in the suit property. They moved applications under Order 26 Rules 9 & 10 CPC in both suits, seeking appointment of a Local Commissioner. The Trial Court had, vide order dated 17th September, 2019 in the suit by the Sharmas, permitted the repairs to be carried out under the supervision of a Local Commissioner. The said order reads:

“This is an application filed by the defendant no. 1

and 2 under Section 151 CPC for seeking permission for necessary repairs.

Present: - None.

Arguments have already been heard.

It is the contended by the applicants/defendants that they are the owners and in possession of the property no. BG-5A/42-B, First Floor, Paschim Vihar, New Delhi and the plaintiffs are residing on the second floor of the same. That the plaintiffs in order to harass the applicants, have not cared to take care of their portion for a long period, resulting into severe seepage problem for the plaintiffs. That the property of the applicants got severe damages and therefore, they had to file a suit for recover of damages and permanent injunction which is pending before the Court of Ld. ADJ, Delhi. That the property of the applicants has become unfit for living due to seepage of water. That due to seepage from the floor of the plaintiffs, part of the ceiling of a room of the applicants fell down in April, 2019. That they have filed an application for appointment of LC before Ld. ADJ, Delhi. That the house of the applicants i.e. interior part requires urgent repairs otherwise, there is every apprehension that the other portions of the ceiling may fall at any time by causing injury to anyone and the same has become dangerous.

The application is opposed by the non-applicants/plaintiffs on the grounds that it is the applicants themselves, who have damaged the property of the non-applicants/plaintiffs. It is also contended that they cannot be permitted to get the portion repaired, which was damaged by the applicants themselves. That the application is devoid of merits and liable to be dismissed.

Record perused.

This is a suit for permanent and mandatory injunction pending since March 2018, wherein issues were settled on 03.11.2018. The evidence is yet to

commence. Admittedly, the applicants/defendant no. 1 and 2 are residing over the first floor, whereas, the plaintiffs are residing over the second floor of the same property. The non-applicants/plaintiffs did not dispute the internal condition of the property of the applicants as reflected in the photographs annexed with the application under consideration. No prejudice shall be caused to the non-applicants, in case the application is allowed. Moreover, the internal repairs may strengthen the building itself.

Accordingly, the application is allowed. However, the cost/expenses shall be borne by the applicants/defendants themselves.

Application stands disposed off.

Be listed for arguments on the remaining applications on the date fixed i.e. 09.12.2019.”

8. Aggrieved by the said order dated 17th September, 2019, the present petition had been preferred. The petition was disposed of vide order dated 27th November, 2019. The said order reads:

“1. The contention of ld. counsel for the Petitioner is that there are two suits pending – one before the ld. ASCJ and one before the ld. ADJ in respect of the same property. It is submitted that the ld. ASCJ did not have the mandate to pass an order permitting the Respondents to repair the property as under the garb of repair, the Respondents are likely to encroach upon the open areas.

2. A perusal of the two complaints copies of which have been filed before this Court shows that both the suits are being proceeded with before different forums and hence there is complete chance of conflicting orders, multiplicity of proceedings and further judicial time being wasted.

3. Insofar as the issue of seepage and repairs thereof is concerned, an apprehension is expressed that under

the garb of repairs, common areas may be encroached upon. It is accordingly directed that a Local Commissioner shall supervise the repair which has been permitted by the impugned order.

4. The matter be listed before the ld. ASCJ on 9th December, 2019. On the said date, the Court shall pass orders directing supervision by the Local Commissioner of the seepage work that is to be repaired in terms of the impugned order. No further orders are required to be passed in the petition. The Petitioner shall make her submissions before the ld. ASCJ, when the request for Local Commissioner is to be considered.

5. With these observations, petition and all pending applications are disposed of.
Dasti.”

As per the above order, proper directions for supervising the repairs was to be passed by the Trial Court.

9. Thereafter, the matter was listed before the Trial Court. On 16th December, 2019, the ld. ASCJ has passed the following order:

“ Further arguments heard.

By this order, the short point to be decided by this Court is qua bearing the expenses/fees of Local Commissioner.

Briefly stated facts forming the backdrop are that the defendant no. 1 and 2 had moved an application for permission to carryout necessary repairs in the suit property which was allowed by Ld. Predecessor vide order dated 17.09.2019. In the said application, the defendant had mentioned that he had also moved an application for appointment of Local Commissioner to ascertain the damage to the property before Ld. ADJ (west), THC, Delhi which was dismissed as withdrawn. Aggrieved by the order dated 17.09.2019, the plaintiff filed appeal before Hon'ble High Court of Delhi and vide order date 27.11.2019, Hon'ble High Court of

Delhi directed the undersigned to pass an order for appointment of Local Commissioner for supervision of the repair work in terms of the order dated 17.09.2019.

While both parties have agreed for appointment of Local Commissioner for supervising the repair work the bone of contention between them is bearing the expenses of Local Commissioner. The plaintiff has submitted since the repair work is being done by the defendants, it is them who shall bear the expenses/fees of Local Commissioner. Per contra, Ld. Counsel for the defendant contends that it was the plaintiff, who had approached Hon'ble High Court of Delhi for appointment of Local Commissioner and her prayer was accordingly allowed. Hence, she shall bear the expenses/fees of Local Commissioner.

Heard. Record perused.

*The Court agrees with the submissions made by Ld. Counsel for the defendant and Local Commissioner was appointed by Hon'ble High Court of Delhi on her prayer. Accordingly, naturally the plaintiff shall bear the cost of Local Commissioner. Accordingly, the advocate namely **Sh. Sidharth Raj**, Chamber No. 113, Civil Wing, Tis Hazari Courts, Delhi having mob. no. **9711218668** is hereby appointed for supervision of the seepage work that is to be repaired in terms of the order dated 09.12.2019 at the property of the defendant no. 1 and 2. The fees of the Local Commissioner is fixed as Rs. 20,000/- which shall be paid by the plaintiff within 10 days, in case the plaintiff fails to pay the same, the defendant no. 1 and 2 would pay the said fees and get the repair done and shall be at liberty to recover the said amount from the plaintiff.*

Be listed for report of Local Commissioner on 11.02.2020."

As per the above order, the Trial Court has directed that the fees of the Local Commissioner appointed be borne by the Plaintiffs, i.e., the Sharmas. In view of this order, which according to the Sharmas amounts to a mis-reading

of this Court's order dated 27th November, 2019, the present application seeking clarification has been preferred.

10. Vide order dated 17th September 2019, the Trial Court had permitted the Kashyaps to carry out the repairs and the expense for the same was to borne by the Kashyaps. This Court, in the previous order dated 27th November 2019, had directed that the repairs shall be done under the supervision of a Local Commissioner. This could not have been read by the Trial Court to mean that the expense for the Local Commissioner has to be borne by the Sharmas. The observation of the Trial Court that since the Sharmas approached the High Court, the fee of the Local Commissioner ought to be borne by them is erroneous. Clearly, the request for repairs was made by the Kashyaps. The aspect of payment of fees and expenses of the Local Commissioner was already decided by the Trial Court in its order dated 17th September 2019 while observing, *"the cost/expenses shall be borne by the applicants/defendants themselves"* and this was not disturbed by this Court. The party who seeks to carry out the repairs ought to bear the expense for the Local Commissioner. There was thus no occasion to shift the burden of the Local Commissioner's fees upon the Sharmas. The order dated 16th December 2019, is therefore not sustainable.

11. Further, considering the confusion that has been caused due to the pendency of two separate proceedings before two separate Courts, in relation to the same properties, it is directed that both the suits be placed before the District Court (West), Tis Hazari Courts, Delhi, so that the matters are listed before the same judicial officer.

12. The prayer for appointment of a Local Commissioner, if made, shall be considered afresh and a fresh order would be passed directing the

Kashyaps to bear the expenses of the Local Commissioner.

13. Accordingly, the impugned order dated 16th December, 2019, which misreads the order dated 27th November, 2019, is set aside. Let the matter be listed before the District Court (West), Tis Hazari Courts, Delhi on 24th February, 2020. The files of both the suits, i.e., Suit No. 350/2018 and Suit No. 10133/2016, shall be placed before the Id. District Judge.

14. The present petition, along with the pending applications, is disposed of in the above terms. Copy of this order be communicated to the Id. JSCC-cum-ASCJ-cum-GJ (West), Tis Hazari Courts, Delhi in Civil Suit No.350/2018 titled *Deepti Sharma & Anr. v. Asha Kashyap & Ors.* and to the Id. ADJ-05/West/THC/Delhi in Civ. DJ No. 610133/2019 (Old No. 10133/2016) titled *Asha Kashyap & Anr. v. Deepti Sharma & Anr.*

**PRATHIBA M. SINGH
JUDGE**

JANUARY 31, 2020/dj

Corrected and released on 7th February, 2020