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

Date of Decision: 06th August, 2021

+ **O.M.P.(I) 8/2021**

NANDITA SENGUPTA & ORS.

..... Petitioners

Through: Mr. Prashanto Sen, Senior Advocate with Mr. Bindra Rana, Mr. Nihit Nagpal, Mr. Anuj Jhavar, Ms. Devika Mehra, and Mr. Kaustubh Singh, Advocates.

versus

SEEMA DASGUPTA & ORS.

..... Respondents

Through: Mr. Anupam Lal Das, Senior Advocate with Mr. Krishanu Barua, Advocate for Respondent No.1. Mr. Ujjwal Jha, Advocate for Respondent Nos. 2 and 3. Mr. Mohd. Zohaib, Advocate for Respondent No. 5.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 9 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as 'the Act'*], has been filed seeking the following interim reliefs:

"PRAYER

1. Pass an interim order directing the Respondents to not obstruct and create any hindrance in the use of the Terrace over the Third Floor of the Property No. J-1878, Chittaranjan Park, New Delhi-110019 by the Petitioners and their family members and domestic helpers in any manner

whatsoever;

2. Pass an interim order directing the Respondents to not initiate any construction on the terrace above the Third Floor of the Property No. J-1878, Chittaranjan Park, New Delhi-110019;

3. Pass an interim order for directing the Respondents to maintain status quo of the Third Floor as well as the Terrace as was prior to the sale deed dated July 7, 2021; and

4. Pass an interim order for directing the Respondents to provide keys to the terrace and not to interfere the usage of terrace by the Petitioner; and

5. Restrain the Respondent No. 1 from leave the country with the documents, as mentioned in Paragraph 44 Ground (h) of this Petition, in her possession;

6. Direct the Respondent No. 1 to produce the essential documents before this Hon'ble Court;

7. Allow the Petitioners to inspect the essential documents in possession of the Respondent No. 1; and

8. Pass such other orders as this Hon'ble Court may deem fit in the interest of justice."

2. The factual background is as follows:

2.1. The Property No. J-1878, Chittaranjan Park, New Delhi-110019 (in short 'suit property') was leased by the L&DO in the name of Shri Amalendu Sengupta vide Deed dated 25th January, 1977. He executed a Will dated 4th July, 2000, bequeathing the suit property amongst his three children, i.e., Mrs. Monimala Biswas, Mr. Jagannath Sengupta, and Mrs. Seema Dasgupta (Respondent No. 1). On 2nd January, 2003, Shri Amalendu Sengupta passed away. His children entered into a Memorandum of Family Settlement ('MoFS') on 22nd December, 2004, agreeing to divide the suit property in terms of the afore-said Will.

2.2. The suit property was converted from lease-hold to free-hold by way of a conveyance deed dated 23rd May, 2007, executed by the L&DO in the joint names of the three children of Late Shri Amalendu Sengupta.

2.3. On 4th July, 2008, the three siblings entered into a Collaboration Agreement ('CA') with a builder for reconstruction of the suit property with separate floors; after reconstruction, in 2009, they moved in with their family members.

2.4. Later, on 19th January, 2020, Shri Jagannath Sengupta expired leaving behind three legal heirs: his wife, namely, Smt. Nandita Sengupta (Petitioner No. 1) and two daughters, namely, Ms. Diya Mehta (Respondent No. 4) and Ms. Amrita Sen Sharma (Respondent No. 5).

2.5. The dispute, relating to the filing of the present petition started brewing with the Respondent No. 1 issuing a legal notice dated 7th April, 2021 to Mrs. Monimala Biswas and in the name of deceased- Late Shri Jagannath Sengupta. In the said notice Respondent No. 1 claimed exclusive terrace rights of the suit property.

2.6. On 7th July, 2021, the Respondent No. 1 sold the third floor with terrace of the suit property to Respondent Nos. 2 and 3.

2.7. When Petitioners first came to know about the above sale, a legal notice invoking arbitration under Clause 21 of the MoFS was issued to the Respondents on 26th July, 2021.

2.8. The Respondent Nos. 1-3 changed the lock of the terrace door thereby causing obstruction and hindrance in the Petitioners' free use and access to the terrace.

2.9. In this background, the Petitioner has approached this Court seeking

interims reliefs as extracted above.

Petitioner's contentions

3. Mr. Prashanto Sen, learned Senior Counsel for the Petitioner submits as follows:

3.1. The claim of exclusive terrace rights by Respondent No. 1 is in complete contradiction and violation of the terms of the MoFS dated 22nd December, 2004. Respondent No. 1 taking advantage of the death of her brother Shri Jagannath Sengupta in January, 2020 and ill-health of her sister Mrs. Monimala Biswas in March- April, 2021, with a malafide intent sent the notice dated 7th April, 2021.

3.2. The documents on record, demonstrate that the terrace rights, are common to all and Respondent No. 1 cannot claim any exclusivity on the same. The Will dated 4th July, 2000 of Late Shri Amalendu Sengupta, does not mention terrace rights and only refers to '*Space in the 2nd Floor which is vacant now.....*'

3.3. Under paragraph 16 of the CA, it was clearly recorded that the terrace will be jointly owned by the three siblings who are parties to the CA. Neither did the MoFS nor the CA, grant any exclusive right to the Petitioner over the terrace, but instead indicated that the terrace was to be enjoyed by the three children of Shri Amalendu Sengupta, who were beneficiaries of the Will. Post the CA with the builder, Respondent No. 1 was given Third Floor instead of Second Floor since the Second Floor was taken by the builder. Respondent No. 1 has nowhere been given exclusive rights over the terrace, and the same were jointly enjoyed by the three siblings and the legal heirs

till the issuance of the legal notice dated 7th April, 2021 by Respondent No. 1.

3.4. The Petitioner Nos. 2 and 3 received a draft NOC from Respondent No. 1 over e-mail for the purpose of selling the third floor and the terrace. This is a clear acknowledgment of the Petitioners' right over the terrace in question.

3.5. The sale of the Third Floor and terrace to Respondent Nos. 2 and 3, by the Respondent No. 1 is in clear violation of the MoFS as the pre-emptory right of offering at the market price was not done.

3.6. The conduct of the parties clearly demonstrates that they understood that the terrace was common to all. The family functions and other activities on the terrace were being done by all the parties without interruption. In fact, the domestic helpers of the occupants of all the floors of the suit property were using the restroom located on the terrace. The water tanks located on the terrace are also common to all. The mutation document in respect of the suit property does not indicate that the terrace is the exclusive property of Respondent No.1.

Respondent's contentions

4. Mr. Anupam Lal Das, learned Senior Counsel on behalf of Respondent No. 1 and Mr. Ujjwal Jha, learned counsel on behalf of Respondent Nos. 2 and 3, strongly oppose the petition and make the following submissions:

4.1. All the title documents clearly indicate that terrace exclusively

belongs to Respondent No. 1. The Will in question, being the first title document confers complete and exclusive ownership of terrace/ roof rights in favour of Respondent No. 1.

4.2. The interpretation sought to be given to Clause 16 of the CA is incorrect. If such an interpretation is accepted, it would mean that all parties to the CA would have an equal share in the Ground Floor and other Floors of the property in question. This is evidently not the intention or understanding of the parties.

4.3. The right to access the terrace has to be determined in light of title documents and not the CA which was only an agreement with the builder for re-construction of the suit property.

4.4. The three siblings occupied separate floors of the reconstructed property as identified in the CA. The floors were divided in such a way that the terrace rights came along with Third Floor which has been exclusively enjoyed by Respondent No. 1 ever since.

Findings

5. The Court has considered the contentions of the parties. The dispute pertains to the terrace of the suit property which was in occupation of Respondent No. 1 and has now been sold alongwith the Third Floor to Respondent Nos. 2 and 3. Petitioner Nos. 1 and 2 are occupying First Floor and Ground Floor respectively. While Petitioner No. 3 is not presently residing in the suit property however, Petitioner No. 2 is also asserting rights on his behalf. They want unhindered access to the terrace.

6. Pending constitution of the Arbitral Tribunal, the Court has to

consider whether grant of interim measures is necessary in the given facts of the case. It is settled law that for grant of interim injunction, the three important elements are (i) *Prima facie* case, (ii) Balance of convenience and (iii) Irreparable injury. On all these three counts, the Petitioners do not satisfy the test. The documents placed on record *prima facie* do not support the Petitioners' right of unrestricted access to the terrace of the suit property. The first title document i.e., the Will dated 4th July, 2000 indicates that the testator bequeathed the vacant Second Floor to Respondent No. 1 in the following words:

"Space in the 2nd Floor which is vacant now, will go to my daughter Smt. Seema Dasgupta wife of Shri Monojit Dasgupta."

The vacant Second Floor would *prima facie* mean the roof/terrace rights were bequeathed to Respondent No. 1 which included the right to raise further floors. This understanding is further amplified by the parties in the MoFS. This document clearly delineates Respondent No. 1's share in the Property as follows:

"That all three Parties have unequivocally agreed that the Third Party- Smt. Seema Dasgupta shall be the sole, undisputed and absolute owner of the Second Floor premises of the property of J -1878, Chittaranjan Park, New Delhi- 110019. Smt. Seema Dasgupta may carry out construction on the Second Floor premises (i.e, on the roof of the First Floor of the said property) at J -1878, Chittaranjan Park, New Delhi from her own resources and Smt. Seema Dasgupta shall have all rights and liabilities as owner including the right to transfer, alienate, sale, gift, assign, mortgage, pledge, lease etc. to the complete exclusion of any right and or objection from the First and / Second Party but for the sake of maintaining the unity in the family, shall not exercise such right without offering to transfer the same to the First Party & Second Party at the first instance, at the then prevailing market price."

(emphasis supplied)

Lastly, the CA too reinforces the *prima facie* view that the party enjoying

the Third Floor would also have the right to enjoy the terrace as the two have been mentioned together therein. The relevant part reads as under:

“17. That to be more specific, the proposed Floors, shall be divided by the First Party and Second party in the following manner: -

- a. Ground Floor : First party's share*
- b. First Floor : First party's share*
- c. Second Floor : Second party's share*
- d. Third Floor with Terrace thereupon : First party's share”*

It appears that the segregation of shares is being done between the parties to the CA who were the three siblings on the one hand, defined as the ‘First Party’ and the builder as the ‘Second Party’. After reconstruction, the three siblings have been occupying their respective floors and living in the suit property in accordance with the above-noted arrangement. Concededly, Respondent No. 1 had been living on the Third Floor, which *prima facie* indicates that she has an exclusive right over the terrace. In any event CA is not the document of title or indicative of the fact that the terrace is jointly owned by the parties.

7. Further, Petitioners use of the terrace on some occasions, does not mean that they have acquired any vested right over the same. Petitioners are also not complaining of any infliction of easementary rights over the terrace. They are in fact asserting ownership rights. Any such right would have to be ultimately adjudicated by the Arbitral Tribunal as and when the same is constituted. At this juncture, in absence of any clear title, Petitioners cannot claim right of access as owners. Limited access, say for inspection of water

tanks installed on the roof is not being denied by the Respondents. However, the Petitioners are not entitled to injunction for restraining the Respondents from creating a hindrance for the use of terrace for them and their family members and domestic help. Further, the Petitioners also cannot restrain Respondents from raising construction over the terrace if the same is permissible under law.

8. Thus, in absence of clear title in favour of the Petitioners or of any document that could suggest that the terrace is a common area, the Court is not inclined to pass such an order of restraint as an interim measure under Section 9 of the Act. Petitioners' contention that the sale of the property by Respondent No. 1, without affording them the right to pre-empt is illegal, would have to be adjudicated before the Arbitral Tribunal. As of now, the Court is unable to draw a *prima facie* presumption that the sale is void. The balance of convenience thus does not lie in favour of the Petitioners. The unhindered access to the terrace is also not necessary for beneficial enjoyment of the floors in occupation by the Petitioners. No irreparable harm or injury would result to them if the access is restricted to the terrace of the suit property. Only such interference that would have materially caused grave discomfort or prevented the Petitioners from enjoying their share in the suit property, would have given them a cause of action to seek interim measure. The prayer for restraining Respondent No. 1 from leaving the country is entirely misconceived, made perhaps to instill fear in her mind. Remaining prayers for direction to Respondents to furnish essential documents is without foundation, vague and misconceived.

9. Needless to say, the observations made by this Court are on a *prima*

facie basis. As and when the Arbitral Tribunal is constituted, the disputes/claims between the parties shall be adjudicated on merits uninfluenced by any observations or views expressed hereinabove.

10. The Court does not find any merits in the present petition and accordingly, the same is disposed of. All the pending applications are also disposed of.

AUGUST 6, 2021

as

SANJEEV NARULA, J