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

+ **C.R.P. 101/2024**

ABDUL GAFFAR

..... Petitioner

Through: Mr. Sanjoy Ghose, Sr. Adv.
with Mr. Javed Ali and Mr.
Farheer Johan, Advs.

versus

ASGAR AND ORS

..... Respondents

Through: Ms. Manish Tyagi, Standing
Counsel for MCD with Mr.
Harsh Chaudhary, Adv. for R-6.

CORAM:

HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

% **22.03.2024**

CM APPL. 15317/2024 (exemption)

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

C.R.P. 101/2024 & CM APPL. 15318/2024

3. Petitioner, who is defendant No.1 in the suit instituted by respondent No.1/plaintiff, is aggrieved of order dated 27.01.2024 passed by learned Additional Senior Civil Judge, North-East District, Karkardooma Court, Delhi, whereby his application under Order VII Rule 11 CPC has been dismissed.

4. Having heard learned counsels for the petitioner and respondent No.6/MCD and on perusal of the record, at the outset, there are no grounds made out to interfere with the impugned order dated 27.01.2024 passed by the learned Trial Court.



5. Shorn of unnecessary details, the plaintiff/respondent is the owner and in possession of a shop forming part of the suit property, whereas the petitioner/defendant is the owner and in possession of the first floor in the same.

6. The plaintiff is aggrieved that the defendant No.1 has been hell-bent on raising construction of a multi-storeyed building over the first floor despite the fact that the property is very old and shall have no structural stability. The plaintiff therefore filed a suit for mandatory and permanent injunction seeking the following reliefs:

“(a). Pass a decree of mandatory injunction in favour of the plaintiff and against the defendants thereby directing the defendant No.2 to demolish/remove the illegal/unauthorized construction made by the defendant No. 1 in property bearing No. C - 71, Gali No. 10, Old Mustafabad, Delhi, specifically shown in red colour in the site plan attached.

(b). Pass a decree of permanent in favour of the plaintiff and against the defendants thereby restraining the defendants their legal heirs, agents, servants, employees, relatives friends etc etc. from raising illegal and unauthorized construction over the property bearing No. C-71, Gali No. 10, Old Mustafabad, Delhi, specifically shown in red colour in the site plan attached.”

7. The petitioner/defendant filed an application under Order VII Rule 11 CPC *inter alia* bringing to the fore that the action has already been taken by defendant No.2/MCD and construction over the first floor has since been demolished; and that the suit is left with no cause of action and the same is also barred by Section 347-E of Delhi Municipal Corporation Act, 1957. The application was dismissed by the learned Trial Court making the following observations:

“The applicant /defendant no. 1 contents that the plaintiffs did not disclose about the existence of a pillar to make the base/foundation of the building strong, so the plaint be rejected. The plaintiffs only stated in the plaint that the foundation of the shops was weak and the shops were old constructed property. Existence or otherwise of pillars would not ipso-facto negate or bring into



dispute the issue of weak foundation and old construction of shops. In any case no relief on this basis is sought. It is not the case of the plaintiffs that the construction on the first floor of property and upwards be restrained on account of the foundations of their shops being weak. So the issue of non mentioning of existence of pillar in suit property cannot be construed as concealment of material fact. The plaintiffs are not guilty of suppressio veri or suggestio falsi. The second issue is that of non disclosure of cause of action in the plaint. The plaint (including supporting documents) had been thoroughly perused. It is evident that construction on the first floor of the suit property was going on and columns at second floor were being built. The authorities concerned i.e. MCD and SHO PS Dayal Pur were moved but apparently no action was taken by them. It is also clear that no sanction or permission for construction at first and second floor was taken from MCD by defendant no. 1. So, finding no recourse the plaintiffs filed this suit.

The third issue raised by defendant no. 1 is that a show cause notice u/S 343 & 344(1) of DMC Act, 1957 is issued by defendant no. 2 /MCD to defendant no. 1 on 12.01.2024 and therefore in terms of Sec. 347 E of the Delhi Municipal Corporation Act, 1957 this court ceases to have jurisdiction over the subject matter of the suit. The suit was filed on 11.01.2024. At the time of filing of suit and at the time of issuance of summons of suit to defendant no. 1, no order of any kind qua the recent construction at suit property was issued. This court has no hesitation in observing that prayer (a) in the prayer clause of the plaint i.e. seeking a decree of mandatory injunction against defendants thereby directing defendant no. 2 / MCD to demolished / remove the illegal / unauthorised construction made by defendant no. 1 in property bearing no. C-71, Gali no. 10, Old Mustafabad, has gone out of the purview of this court in view of the notice issued by the MCD u/S 343 of the DMC Act. The issue of built up illegal construction and demolition thereof shall be exclusively dealt by the MCD and the appellate tribunal or administrator under the DMC Act. However, the relief of permanent injunction still survives whereby this court has been asked to restrain the defendant no. 1 from carrying out illegal construction at the suit property. Furthermore, perusal of Sec. 347E of the Delhi Municipal Corporation Act shows that no suit application or other proceedings in respect of any order or notice u/S 343 of DMC Act can be entertained by a court. In the matter at hand, the proceedings conducted by defendant no. 2 or the notice issued u/S 343 of DMC Act is not in question or under challenge. Accordingly, for the limited relief / purpose as already mentioned, the suit is still maintainable, hence the application u/O VII Rule 11 CPC filed by defendant no. 1 is dismissed being devoid of merit.



Now the application u/O XXXIX Rule 1 & 2 t/w Sec. 151 CPC is taken up for consideration. This application is to be decided on the basis of three principles i.e. (i) Prima facie case; (ii) Irreparable loss or injury & (iii) Balance of convenience.

Prima facie case is shown by the plaintiffs as construction on the suit property right above the roofs of shops of plaintiffs was being done by defendant no. 1 without having any sanction or permission from the MCD. This is also clear from the notice u/S 343 DMC Act given by the MCD to defendant no. 1. If the defendant no. 1 is not restrained from carrying out further construction at first floor and upward then he may construct any number of floors which may put excessive load on the foundations and walls of the shops of plaintiffs. Such illegal construction may even test the load bearing capacity of the foundation of the building and may render the shops of the plaintiffs unsafe for use and occupation and may in an extreme case cause the whole building or part thereof to collapse thereby causing destruction of property or even loss of human life. Whereas preventing the defendant no. 1 from carrying out further illegal construction would not cause any loss or injury to defendant no. 1 in the use and occupation of his property. Lastly, the balance of convenience also favours the plaintiffs as it is quite cumbersome to demolish an illegal construction or building whereas it is not as difficult to direct a person not to indulge in illegal construction. Hence, the application u/O XXXIX Rule 1 & 2 r/w 151 CPC filed by the plaintiffs is allowed to the effect that the defendant no. 1, his legal heirs, agents, servants, employees, relatives, friends and assigns etc. are restrained from carrying out any further construction over the first floor and upwards of property bearing no. C-71, Gali no. 10, Old Mustafabad, Delhi till the disposal of this suit or till procurement of a valid sanction from MCD for construction at suit property.

However, it is clarified that this order shall in no way affect the power of defendant no. 2 or any authority under the DMC Act to regularize the illegal construction done till date and to grant sanction for construction over the suit property as per the extant applicable laws and rules. If an application is made by the defendant no. 1 to authority concerned for regularization of illegal construction or for seeking permission to construct building over the suit property, then the same be considered by the appropriate authority as per law without being influenced by this order.

List for filing of WS, if any, by defendant no. 2 as well as for further proceedings on 30.03.2024.”

8. A careful perusal of the above observation would show that although apparently illegal construction has since been demolished,



petitioner/defendant is yet to obtain any sanctioned plan for raising construction over the first floor. Learned Trial Court has committed no infirmity in holding that insofar as relief of permanent injunction is concerned, the cause of action still survives so that no illegal/unauthorised construction is attempted by the petitioner/defendant. The plea raised by learned counsel for the petitioner that he cannot be vested with two parallel proceedings on the same cause of action, does not cut any ice.

9. Therefore, the learned Trial Court has neither committed any illegality, perversity nor has adopted an incorrect approach in passing the order dated 27.01.2024.

10. The revision petition is dismissed along with the pending application without prejudice.

DHARMESH SHARMA, J.

MARCH 22, 2024/ck