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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 330/2022, & CM APPL. 17456/2022, CM APPL.
17457/2022, CM APPL. 17458/2022

ANIL KUMAR SETH Petitioner
Through: Mr. Jain Sahai Endlaw with Mr.
Ashish Kumar, Advs.

versus

LALIT KUMAR SETH AND ANR Respondents
Through: None

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

% **07.04.2022**

1. The impugned order, dated 4th April, 2022, passed by the learned Additional District Judge-01 (“the learned ADJ”) has issued summons on CS 234/2022 and notice in the application filed in the said suit under Order XXXIX Rules 1 and 2 of the Code of Civil Procedures, 1908 (CPC), returnable on 19th July, 2022.

2. The petitioners are the plaintiffs, and the respondent is the defendant, in the said suit. The petitioners are aggrieved by the fact that the learned ADJ did not grant *ex-parte ad interim* injunction, as sought by the petitioner.

3. The suit relates to a property situated at H-17, Maharani Bagh, New Delhi. The plaintiffs are in possession of the first and second floors, whereas the defendant is in possession of a part of the ground

floor of the suit property, comprising two bedrooms.

4. According to the averments in the plaint filed by the petitioners, the respondent had filed Suit 688/1969, before the learned Senior Sub-Judge, Delhi, against the petitioners and his parents, Salig Ram Seth and Bhagwati Devi Seth. In the said suit, the respondent contended that the suit property, though the self-acquired property of Salig Ram Seth, had been constructed out of joint family funds and that, on 1st April, 1968, an oral partition of the property had taken place, following which the parties were in possession of the properties which fell to their share under the oral partition. The suit was disposed of, *vide* order dated 17th October, 1969, on the basis of the following consent decree:

“That the partition effected between the parties to the suit in respect of joint Hindu Family property No. C-74 (old), 17-H (New), Maharani Bagh, New Delhi on 01.04.1968 and physical possession taken by the respective parties of their share is delineated in the plan annexed and agreement regarding payment of property taxes, income taxes, wealth taxes, etc. and also water and electricity charges is perfectly legal and binding on the parties; and plaintiffs are the exclusive owners with possession in equal shares as per the said petition of the portion shown in colours 'red' in the plan attached i.e. Ground Floor complete, right hand garage and servant room over it with lawns. And similarly it be held that defendant No. 1 is the owner with possession of portion shown in brown colour in the plan i.e. drawing-cum-dining kitchen verandah, latrine on 2nd floor and two bed rooms, verandah and bath on third floor over the garages together with the right of passage from the main entrance as well as in the back; and defendants No. 2 and 3 are owners with possession in equal shares of the portion shown in yellow colour in the plan attached. i.e. first floor complement barsati floor complete, left hand garage and servant room over it together with the right of passage from the main entrance and use of stair cases for going on the floor and barsati, and

portion in joint possession shown in green colour in the plan i.e. baths-cum-latrines, attached with garages, servant quarters, and also kitchen and verandah attached with the servant quarters over the garage and that each one of the parties is responsible for the payment of property taxes, income-taxes, wealth taxes, etc, and also water and electricity charges etc, for their respective shares be and the same Is hereby passed in favour of the plaintiff and against the defendant.”

5. According to the petitioners, whose case is espoused by Mr. Jai Sahai Endlaw, learned Counsel, the afore-extracted partition decree partitioned only the superstructure constructed on the land comprising the suit property, and did not partition the land underneath the superstructure. Apropos the land underneath the superstructure, Mr. Endlaw’s contention is that, *vide* a registered Will dated 26th June, 2008, Salig Ram Seth had bequeathed the entire suit property in favour of Petitioners 2 and 3 who, thereby, had become absolute owners thereof. The right of the defendant, according to Mr. Endlaw, extended only to the part of the superstructure which fell to the respondent’s share under the partition, read with the decree dated 17th October, 1969. He submits that the settlement agreement, which formed the part of the partition decree, noted the fact that Salig Ram Seth was residing in one of the rooms on the ground floor of the suit property. No right, to any part of the land under the suit property was, therefore, assigned to Salig Ram Seth, under the decree dated 17th October, 1969. His right of possession, in respect of the room in which he was residing was only permissive in nature.

6. Mr. Endlaw points out that the decree sheet dated 17th October, 1969 specifically delineated the portions of the suit property which fell

to the ownership of the parties in the suit and enjoined the parties from interfering with the peaceful enjoyment of each other, of the portion which fell to their respective shares.

7. The decree dated 17th October, 1969 being, as he submits, restricted to the superstructure constructed on the suit property, Mr. Endlaw submits that the land underneath the superstructure was bequeathed equally to Petitioners 2 and 3 by Salig Ram Seth under the Will dated 26th June, 2008. Salig Ram Seth, according to him, was competent to do so, as the land under the suit property had not been partitioned by the consent decree dated 17th October, 1969.

8. The petitioners, therefore, submits Mr. Endlaw, had exclusive right to use and enjoyment of the land underneath the suit property, the rights of the respondent being restricted to the portion which fell to his share under the partition deed read with the decree passed on the basis thereof.

9. Without any right to the land underneath the suit property, the respondent, submits Mr. Endlaw, was carrying out construction on the suit property. Relying on photographs placed with the plaint, the petitioners sought an injunction against any such construction being carried out by the respondent. Additionally, the suit sought (i) a decree of possession, in favour of the petitioners and against the respondent, of two bedrooms on the ground floors, which, according to the defendant, were being illegally occupied by the respondent, (ii) a decree of mandatory injunction directing the respondent to provide free access, to the petitioners, to the entirety of the ground floor and

(iii) mandatory injunction restraining the respondents from creating any third party interest in respect of the suit property.

10. An application for interim relief, under Order XXXIX Rules 1 and 2 CPC, was also filed with the plaint.

11. The impugned order has, as already noted, issued summons in the suit and notice in the application for interim relief, preferred under Order XXXIX Rules 1 and 2 CPC.

12. The petitioner has approached this Court, invoking its jurisdiction under Article 227 of the Constitution of India, submitting that, in failing to grant *ex parte ad interim* relief to the petitioner, the learned ADJ has erred.

13. Having considered the submissions advanced by Mr. Endlaw, and perused material on record, no case for interference by this Court, in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India, is, in my view, made out.

14. The jurisdiction of this under Article 227 of the Constitution of India is neither appellate nor revisional. It is merely supervisory in nature. The High Court, acting under Article 227, supervises the functioning of the courts below, while exercising their judicial powers. If, therefore, the courts below are functioning in a manner which calls for correction in the exercise of the supervisory jurisdiction vested in the court under Article 227 of the Constitution of India, the court would interfere; else, the court would hold its hands.

15. The scope of Article 227 jurisdiction stands delineated by the Supreme Court in several decisions. One may note, for this purpose, the judgment of the Supreme Court in *Estralla Rubber v. Dass Estate (P) Ltd.*¹ which has subsequently been followed in *Garment Craft v. Prakash Chand Goel*² and *Puri Investments v. Young Friends & Co.*³.

16. Apropos the impugned order, the question of whether to grant, or not to grant, injunctive relief under Order XXXIX Rules 1 and 2 CPC, is, at all times, discretionary. There is no right that inheres, in any party, to interim injunction under Order XXXIX. If, however, in granting, or rejecting an application preferred under Order XXXIX Rules 1 and 2 CPC, a court acts arbitrarily or illegally, or in irregular exercise of the jurisdiction vested in it, the hierarchically superior court may interfere.

17. Where, however, the order passed is interlocutory, and in exercise of the discretionary jurisdiction vested by Order XXXIX Rules 1 and 2 CPC, the scope of interference, even in appeal, is restricted. One may refer, for this purpose, to the following passages from *Wander Ltd. v. Antox India P. Ltd.*⁴

“13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion

¹ (2001) 8 SCC 97

² 2022 SCC OnLine SC 29

³ 2022 SCC OnLine SC 283

⁴ 1990 Supp SCC 727

in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph*⁵:

“... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton*⁶, 1942 AC 130 ‘...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case’.”

The appellate judgment does not seem to defer to this principle.”

⁵ AIR 1960 SC 1156

⁶ 1942 AC 130

18. Even more restricted, therefore, would be the scope of interference by the High Court, in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India, with an order passed by the court below under Order XXXIX Rules 1 and 2. It is only where the court below has exercised its jurisdiction in a palpably erroneous manner, as would call for correction by the High Court, as a supervisory court, that the High Court would act under Article 227.

19. In the present case, the scope of interference is even more constricted, as the impugned order does not either grant or refuse the injunction sought by the petitioner under Order XXXIX Rules 1 and 2. It merely issues summons in the suit and notice on the application for interim injunction. To my mind, an order of the court below, which issues notice on an application filed by a party before it, without taking a decision either to grant or refuse the prayer contained in the application prior to issuance of notice, would ordinarily be immune from interference by the High Court in exercise of its supervisory jurisdiction under Article 227.

20. It is difficult to imagine a situation in which the High Court, under Article 227, would interfere with an order, passed by the court below, issuing notice on an application filed before it, without either allowing or rejecting the application.

21. Having said that, there may be a situation in which the failure,

on the part of the court below, in passing *ex parte* order as sought, results in serious or irreparable prejudice to one of the parties. Possibly, the High Court, even in exercise of its supervisory jurisdiction under Article 227, may interfere in such a case. For a case for interference to be made out, however, the standard to be set is extremely high. *It would have to be shown that the court below was duty bound, in law, to pass the order sought by the petitioner before the High Court, in its application, even without notice to the opposite party and that, in issuing notice to the opposite party without passing ex-parte orders, the court below acted in patently illegal or perverse, exercise of the jurisdiction vested in it.* The standard, to reiterate, is extremely high.

22. In the present case, the main issue in controversy, before the learned ADJ, is as to whether the partition deed, crystallized by the decree dated 17th October, 1969, partitioned the entire suit property or only the superstructure, leaving out the land underneath.

23. This, essentially, is a matter of interpretation. No final view, in that regard, is expected to be taken by the learned trial court at the Order XXXIX stage. Where the issue is one of interpretation, ordinarily, there is nothing irregular in a court calling for a response from the opposite party before taking a *prima facie* view. All that the learned ADJ has done, by the impugned order, is to seek such a response.

24. Mr. Endlaw seeks to contend that the partition deed partitioned

only the superstructure on the suit property, leaving out the land underneath. The learned ADJ has, in para 9 of the impugned order, opined, *prima facie*, otherwise. According to the learned ADJ, the decree dated 17th October, 1969 did not distinguish between the land underneath and the superstructure built thereon and partitioned the entire suit property.

25. The issue of whether the decree dated 17th October, 1969 partitioned the entire suit property, or only the superstructure constructed thereon, is at large before the learned ADJ. The learned ADJ would have to take a *prima facie* view in that regard when deciding the petitioners' application under Order XXXIX Rules 1 and 2, and a final view when adjudicating on the suit. It would be extremely improper for this Court, in exercise of its jurisdiction under Article 227 of the Constitution of India, which is merely supervisory in nature, to express even a *prima facie* view on this issue, as it is bound to influence the proceedings in the court below.

26. Suffice it to state that, having read the partition deed read with the decree dated 17th October, 1969, the view taken by the learned ADJ cannot be said to be patently illegal or perverse. It cannot be said that the contention of Mr. Endlaw, regarding the interpretation of partition decree dated 17th October, 1969 is so impregnable that the learned ADJ could be held to have acted with manifest irregularity in not granting *ex parte* interim relief as sought by the petitioners. At the very least, it is arguable.

27. A reading of para 10 of the impugned order reveals that the

learned ADJ has also examined the aspect of whether a permanent structure was being erected on the suit property, as would justify an *ex parte* injunction on the ground of irreversible prejudice. He has taken stock of the photographs filed by the petitioners, and has opined that they do not reflect any permanent structure or construction being carried out on the suit property, though it appears that some temporary structure or sheds were contemplated by the respondent. He has also observed that the petitioners had not made out any case of blocking of their right to passage from the main entrance or for the use of staircase to go to the first or second floor.

28. The issue of ownership being debatable, the learned ADJ has deemed it appropriate to call for a response from the respondent before taking a decision even *prima facie*, for grant of interim relief.

29. It is on these considerations that the learned ADJ has issued notice to the respondent, without deeming it appropriate to grant *ex-parte ad interim* relief.

30. No jurisdictional error, or other illegality, as would justify interference by this Court, in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India, can be said to exist.

31. For the reasons aforesaid, this petition is dismissed. However, it is clarified that, the observations contained in the impugned order shall not in any manner influence the learned trial court while deciding the petitioner's application under Order XXXIX Rules 1 and 2 CPC.

32. It is also clarified that, if the respondents are erecting any structure or construction on the suit property, such erection or construction would remain subject to further orders in the suit by the Court below and that, if they are found to be illegally erected or constructed, they would be liable to demolition. No plea of equities would, in such event, be available to the respondents.

33. Given the urgency expressed by Mr. Jai Sahai Endlaw, it would be open to the petitioner to move the learned trial court for ante-dating the date fixed in the application for hearing of the petitioner's application under Order XXXIX Rules 1 and 2.

34. Any such request, if made, would be considered with the urgency it deserves, keeping in mind the board of the learned ADJ.

35. No costs.

C. HARI SHANKAR, J.

APRIL 7, 2022

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