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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 783/2022 & CM APPL. 34638/2022, CM APPL.
34639/2022, CM APPL. 34640/2022

GHULAM SARWAR Petitioner
Through: Mr. M. Hasibuddin, Adv.

versus

SMT. NILOFAR KHAN & ORS. Respondents
Through: None

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

J U D G M E N T

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05.08.2022

1. This petition, under Article 227 of the Constitution of India, challenges order dated 27th July 2022, passed by the learned Additional District Judge (“the learned ADJ”) in MCA DJ/12/2021 (*Nilofar Khan & Ors. v. Ghulam Sarwar & Anr.*).

2. The proceedings emanate out of a suit bearing No. CS SCJ 492/2020 instituted by the respondents, as the plaintiffs, against the petitioner and other defendants.

3. The parties to the suit were occupants of different areas of the property located at C-187, Abul Fazal Enclave, Part-2, Shaheen Bagh, Jamia Nagar, New Delhi (“the suit property”).

4. The respondents, as the plaintiffs in the suit, complained that the

petitioner had installed a locked iron gate on the terrace of the fourth floor, thereby restraining access of the respondent to the terrace.

5. As such, the suit sought a decree of permanent and mandatory injunction in favour of the respondents and against the petitioner and other defendants in the suit, restraining the petitioner and other defendants from interfering with the access, by the respondents, to the suit property, creating third party interest in respect of the suit property or from restraining access, by the respondent, to the rooftop of the suit property.

6. A decree of mandatory injunction, directing the petitioner to forthwith remove the iron grills installed above the fourth floor of the staircase, which prevented access, by the respondent, to the rooftop and the terrace, was also sought.

7. The suit was accompanied by an application under Order XXXIX Rules 1 and 2 of the CPC, seeking an *ad interim* injunction in favour of the respondents and against the petitioner, restraining the petitioner from illegally and forcefully fixing iron grills on the passage to the rooftop and for a direction to the petitioner to remove the said grills and permit access, by the respondents, to the rooftop of the suit property.

8. By order dated 15th March 2021, the learned Senior Civil Judge (“the learned SCJ”) disposed of the application of the respondents under Order XXXIX Rules 1 and 2 of the CPC.

9. On a *prima facie* examination of the evidence before him, the learned SCJ upheld the right of the respondents to access to terrace for the purpose of use of common amenities such as fixation of antenna, water connection, electricity connection etc.

10. As such, it was held that, while no interim direction restraining the petitioner and other defendants from parting possession with the suit property or any portion thereof could be granted, the respondents did have a right to access the terrace for the aforesaid limited purposes. In view thereof, the learned SCJ held that it was expedient in the interests of justice that the respondents “be given the right to access the terrace on reasonable hours, as and when the need arises, between 09.00 a.m. and 05.00 p.m. (when defendant no.1) (the present petitioner), shall provide the keys of the terrace for the purposes of fixing antenna, sewer connection, water connection, electricity etc. as specifically mentioned in the GPA of the plaintiff (i.e. the present respondent)”.

11. For this purpose, the respondents were also required to intimate the petitioner, at least one hour in advance.

12. Aggrieved by this order, the respondent appealed to the learned ADJ *vide* MCA DJ/12/2021 (*Nilofar Khan & Ors. v. Ghulam Sarwar & Anr*), in which the impugned order has come to be passed by the learned ADJ on 27th July 2022.

13. The learned ADJ has held, in the impugned order, that, once the learned SCJ has recognised the right of the respondents to have access to the terrace at all reasonable hours, it was unreasonable on the part of the learned SCJ to grant limited access to the terrace and to require the respondents to intimate the petitioner an hour in advance of their requirement. The learned ADJ has held that the learned SCJ ought to have kept in mind the fact that the parties were locked in acrimonious litigation.

14. In these circumstances, in order to balance the equities, the learned ADJ has modified the directions issued by the learned ASCJ by requiring the petitioner to hand over one set of the keys, to the respondents, to the lock affixed on the gate at the fourth floor so that the respondents would have independent access to the terrace at all reasonable times during the pendency of the suit.

15. Aggrieved thereby, the petitioner is before this Court, invoking the jurisdiction vested in this Court by Article 227 of the Constitution of India.

16. It is obvious, at a bare glance, that the present case is not which justifies invocation of the jurisdiction vested in this Court by Article 227 of the Constitution of India.

17. The impugned order is purely discretionary in nature. It has been passed by the learned ADJ in exercise of the discretion vested in him, and the directions issued by the learned ASCJ have been modified by him in the manner which, according to him, were best

suited to the interests of equity and justice.

18. Such a discretionary order, which cannot be said in any manner to suffer from perversity, is completely immune from challenge under Article 227 of the Constitution of India.

19. This Court, in exercise of its jurisdiction under Article 227 of the Constitution of India, cannot substitute its subjective satisfaction or exercise its discretion subjectively in such a manner as to substitute the discretion and subjective satisfaction of the court below. Where the order under challenge is discretionary in nature, Article 227 can justify interference only where the exercise of discretion is perverse. By no stretch of imagination can it be said that the impugned order passed by the learned ADJ suffers from any perversity.

20. I am constrained to observe that, if the High Court were to start interfering with such orders under Article 227 of the Constitution of India, it is bound to shake the confidence of the district judiciary and seriously impede the dispassionate exercise, by them, of the discretion that the law vests in them.

21. In my considered opinion, it is only as a matter of chance hierarchal circumstance that this Court is “above” the district judiciary. Else, the district judiciary, and the learned Courts of which it is comprised, exercise jurisdiction which, subjectively, is co-equal to the jurisdiction exercised by this Court.

22. The High Court is required, at all times, to respect the exercise

of discretionary powers by the district judiciary and not to act in a manner as could convey an impression that the court is playing the role of headmaster.

23. In this context, I may reproduce, with advantage, the following passage from *Sadhana Lodh v. National Insurance Co. Ltd.*¹:

“7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision.”

24. In that view of the matter, I do not find the present case one to be warranting interference by this Court under Article 227 of the Constitution of India.

25. The order passed by the learned ADJ is well reasoned, and reflects a proper appreciation of the rival equities in the case. It is a discretionary order and does not suffer from perversity of any kind.

26. Having said that, it is made clear that the respondents, while availing of the facility that the learned ADJ grants them, shall not abuse the said facility. They have been permitted access to the terrace only for limited purposes such as fixation of antenna, sewer

¹ (2003) 3 SSC 524

connection, water connection, electricity etc. Save and except when such need arises, the respondents do not have unrestricted access to the terrace.

27. It is made clear, therefore, that, if the respondents take undue advantage of the access to the terrace, granted by the learned ADJ by the impugned order, it shall be open to the petitioner to seek modification of the aforesaid direction by moving an appropriate application before the learned ADJ for that purpose.

28. In that event, the learned ADJ would be free to modify the aforesaid direction keeping in view the facts and circumstances of the case.

29. Subject to the aforesaid caveat, this petition is dismissed in *limine*.

C. HARI SHANKAR, J.

AUGUST 5, 2022

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