

(2011) 08 DEL CK 0420

In the Delhi High Court

Case No : IA No"s. 14193, 14672 and 14957 of 2007 in CS (OS) No. 2416 of 2007

Shri Shashibir Singh Sarang

APPELLANT

Vs

Shri Kanwal Sunir Singh Sarang and Others

RESPONDENT

Date of Decision : 11-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, Order 7 Rule 11, 151

Citation : (2011) 08 DEL CK 0420

Hon'ble Judges : A.K. Pathak, J

Bench : Single Bench

Advocate : Ashim Vachher, for the Appellant; J.P. Sengh Kuldeep Kumar and Zafar Ali and Party-in-Person in Contemnor No. 2, for the Respondent

Judgement

A.K. Pathak, J.—By this order I shall dispose of above noted three applications. Vide IA No. 14193/2007 Plaintiff has prayed that the Defendant be restrained from interfering in peaceful enjoyment of Plaintiff in respect of the annexee at the first floor of the property situated at C-108, South Extension, Part II, New Delhi (for short hereinafter referred to as "annexee") and from forcibly dispossessing him from the suit property.

2. Vide order dated 11th December, 2007, parties were directed to maintain status quo with regard to the title and possession in respect of the suit property. Mr. R.S. Rathi, Advocate was appointed as Local Commissioner to verify the possession in respect of the annexee. On the very next, day that is, 11th December, 2007, Local Commissioner visited the suit property in the presence of Plaintiff and Defendant. He found two locks on the main entrance of the suit property. Defendant claimed that one lock was his and second lock had been put by the Plaintiff over his lock. Local Commissioner noted in his report that he could not succeed in gaining entry into the suit property as two locks were affixed at the main entrance inasmuch as, both the parties were quarrelling with each other in the presence of police officials.

3. Defendant entered appearance in the Court and filed IA No. 14957/2007 praying therein that status quo order dated 11th December, 2007 be vacated; report dated 11th December, 2007 of Local Commissioner be taken off the record; a new Local Commissioner be appointed with the direction to unlock the common passage leading to the annexee on the first floor, to enter into the said annexee and conduct the inspection thereof to verify as to who was in the actual physical possession. It was also prayed that the suit be dismissed under the provisions of Order 7 Rule 11 of the Code of Civil Procedure.

4. Another application bearing IA No. 10839/2008 under order 26 Rule 9 read with Section 151 CPC was also filed by the Defendant praying therein for appointment of a Local Commissioner to verify the possession in respect of the annexee. This application was disposed of vide order dated 19th May, 2011 and Ms. Padma Priya, Advocate was appointed as Local Commissioner to visit the suit property i.e. annexee and to report as to whether any lock was there on the door of the annexee and also to inspect the rear portion of the suit property. Local Commissioner was directed to get the locks opened after obtaining the keys from the representatives of both the sides and if keys were not made available, to get the locks break open, and to inspect the annexee and prepare an inventory of the goods lying therein. Local Commissioner visited the suit property on 20th May, 2011. She has reported that white wooden door which led to the passage to the annexee was locked. It had two locks. The first lock (which was under the other lock) was square in shape and had a red colour slip on it. The second lock (which was above the square shaped lock) was round in shape. Defendant claimed that lock of square shape belonged to him; while the other lock was of Plaintiff. Defendant opened the lock, however, Plaintiff's servant failed to open the lock. Round lock was broken open and thereafter, she entered in the passage which was about 5.5 feet long. After climbing about 7 stairs she reached upto the door of annexee. There was another white wooden door, bearing the name plate of Defendant. Door was knocked, and it was opened by Mr. Gulneer S. Sarang and Mrs. Gurwant Sarang, son and wife of Defendant who were present inside the annexee. She prepared an inventory of the articles lying in the annexee.

5. After this visit of Local Commissioner, Plaintiff has filed IA No. 9154/2011 on 23rd May, 2011 praying therein that Defendant be restrained from entering in the annexee; Defendant be directed to restore the status quo which was existing as on 11th December, 2007 in respect of the two locks installed in the front door of the annexee; Defendant be restrained from installing his locks in the rear entry door of the annexee; and Plaintiff be permitted to put his lock on the rear door of the annexee. As per the Plaintiff, Defendant has forcibly taken possession of the annexee after the visit of earlier Local Commissioner. This fact has been vehemently disputed by the Defendant.

6. Plaintiff and Defendant are real brothers. Initially, other brothers of parties were impleaded as Defendant Nos. 2 and 3 but since no relief was claimed in the suit against them, Plaintiff subsequently dropped them from the array of parties

on 5th April, 2011. Dispute is between the Plaintiff and Defendant in respect of the annexee. Case of the Plaintiff is that his mother was in the possession of annexee all throughout till she died on 15th November, 2007; his mother was residing with him all throughout. She had executed a General Power of Attorney on 3rd July, 1996 thereby admitting her possession over the annexee; she gave powers to Plaintiff to deal with the annexee in the manner he deems fit. She has also left behind a registered Will dated 9th March, 2006 thereby bequeathing her entire share in favour of Plaintiff. Alleged family settlement dated 7th April, 1992 was never acted upon. Defendant, in utter disregard to the family settlement, had surreptitiously executed the transfer documents in favour of Mr. Shahzad Jaffar Ali with respect to the first floor of the suit property except the annexee. Purported family settlement was challenged by Shri Sarbir Singh Sarang, who filed a suit bearing No. 1356/1994 titled "Sarbir Singh Sarang v. Kanwal Sunir Singh Sarang and Ors." In the said suit, Defendant had admitted the possession of his mother in respect of the annexee. A Local Commissioner was appointed in the said suit who had visited the property on 30th August, 1994 and found the annexee to be in possession of Late Smt. Sushila Sarang. Defendant had sold first floor to Shahzad Jaffar Ali in violation of the injunction order passed in the said suit. Defendant was never in possession of the annexee. After the death of their mother, Defendant tried to forcibly occupy the annexee compelling the Plaintiff to file the present suit.

7. Case of the Defendant is that in terms of the family settlement dated 7th April, 1992, first floor came in his possession. As regards annexee is concerned, same was to remain in possession of their mother during her life time and thereafter it was to vest in Defendant. In CS(OS) No. 1356/1994, Local Commissioner Mr. Ravi Gupta had confirmed the physical possession of the Defendant over the annexee even at the time when first floor was sold by him to Shahzad Jaffar Ali. Plaintiff had himself given a "No Objection Certificate" on 8th August, 1995 with regard to the sale. Their mother, Smt. Sushila Sarang had filed CS(OS) No. 1334/1994 in respect of the suit property wherein a compromise agreement was executed on 20th June, 1996 between Smt. Sushila Sarang and the Defendant. In the said agreement, had acknowledged the genuineness of the family settlement dated 7th April, 1992. It was further mentioned therein that the Defendant shall hand over partial portion of the annexee on the first floor to Smt. Sushila Sarang. This agreement has been witnessed by the Plaintiff and this fact itself shows that Defendant was in physical possession of the annexee. On 4th December, 2007 Shri Virender Kumar, Advocate-cum-Notary Public had also visited the annexee and taken its photographs. Report of Notary together with photographs not only shows presence of Defendant in the annexee but also his goods lying there. During the life time of Smt. Sushila Sarang, annexee was in joint possession of Defendant and his mother. After her death Defendant has been in exclusive possession of the annexee.

8. There are allegations and counter allegations leveled by the parties regarding

their possession over the annexee. However, documents placed on record including report of the Notary Public and photographs taken by him coupled with reports of Local Commissioner, prima facie, makes it clear that it is the Defendant who was earlier in joint possession of the annexee with his mother and in exclusive possession after the death of his mother. Plaintiff had even failed to open the lock which he claimed to be his. In the family settlement, it has been categorically stated that annexee on the first floor shall remain in possession of Smt. Sushila Sarang during her life time and thereafter will vest in Defendant. Agreement dated 20th June, 1996, which has even been witnessed by the Plaintiff, makes it clear that it is the Defendant who was in possession of the annexee; he had agreed to hand over partial possession of the same to his mother. Admittedly, this agreement has yet not been declared as null and void even though it is under challenge in different proceedings. Photographs of the annexee and report of the Notary Public dated 4th December, 2007 also, prima facie, show that it is the Defendant who had been in possession of the annexee. That apart, when Ms. Padma Priya, Local Commissioner visited the premises, Defendant No. 1 had produced the keys of the lock which he claimed to be his and had succeeded in opening the same. As against this, Plaintiff could not open the lock which he claimed to be his. Even otherwise, locks had been put on the entrance to the passage and not on the door of annexee. There was another door of the annexee which was opened by the wife and son of Defendant, inasmuch as, name plate of Defendant was also found on the door. At this stage only a prima facie case has to be seen.

9. Grant of temporary injunction is a discretionary relief to be granted based on sound judicious principles depending upon facts and circumstances of each case. The sound judicial principles which regulate the discretion conferred under Order 39 Rules 1 and 2 are that the party seeking temporary injunction must satisfy that there is a serious question to be tried in the Suit to dispel the doubt relating to their entitlement and there being probability of it being entitled to the relief sought. Secondly, the Court's interference is necessary to protect it from the threatened injury, which according to the Court is irreparable one before a legal right can be established on trial. It has also to be seen that balance of convenience lies in favour of the parties seeking relief of interim injunction. All these three conditions should co-exist before a temporary injunction is granted. The principles with regards to the grant of temporary injunction can be summed up as under:

- (i) There has to be prima facie case
- (ii) There will be irreparable loss and injury if injunction prayed for is not granted and
- (iii) Balance of convenience lies in favour of the party claiming injunction.

10. For the foregoing reasons, in my view, Plaintiff has failed to disclose a, prima facie, case in his favour inasmuch as, he has failed to show that he was in

possession of annexee at the time of filing of suit. In the facts of this case, Plaintiff shall also not suffer any irreparable loss or injury in case injunction as prayed for is declined. Balance of convenience is also not in favour of Plaintiff. Consequently, applications of Plaintiff are dismissed. Interim order is vacated. Application for vacation of interim order is disposed of as infructuous, since applications of the Plaintiff have been dismissed and interim order has already been vacated.

11. As regards relief of rejection of plaint as prayed for by the Defendants, in my view, same cannot be granted in the facts of this case. It cannot be said that plaint does not disclose any cause of action. It has been categorically stated in the plaint that mother of the Plaintiff was residing with him all throughout. She was in possession of "Annexee". After her death annexee came in the possession of Plaintiff. Defendant made an attempt to take forcible possession of annexee on 4th December, 2007 and 6th December, 2007, thus, giving rise to a cause of action for filing the suit. It is well settled that for the disposal of application under Order 7 Rule 11 CPC Court has to only see the plaint and the supporting documents filed along with it in order to find out as to whether any cause of action had arisen in favour of the Plaintiff for filing the suit or not. Averments in plaint are germane and written statement has not to be looked into nor any other material placed on record by the Defendant along with it. Averments made in the plaint do disclose cause of action. Veracity of version of the Plaintiff as contained in the plaint can be tested during the trial. Merely, because Defendant has disputed the allegations in the plaint will not be sufficient to discard the same without a trial. Allegations and counter allegations can be tested only after a full fledged trial. At the initial stages one party cannot be disbelieved by accepting the version of other as a gospel truth. Prima facie view formed by the Court on the basis of documents for the purposes of disposal of application under Order 39 Rules 1 and 2 will not be sufficient to hold that plaint does not disclose any cause of action.

IA No. 12710/2011 (Section 151 Code of Civil Procedure) in CS(OS) No. 2416/2007

Reply be filed by the Defendant within four weeks with an advance copy to the counsel for Plaintiff, who may file rejoinder, if any, within two weeks thereafter.