(3)

A- 6

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

% *Judgment reserved on:23.4.2013*
Judgment delivered on:30.4.2013

\+ **CM(M) No.380/2013 &C.M. No.5690/2013**

NITIN GARG & ANR. .....Petitioners

Versus

RATNA KAPOOR & ANR. .....Respondents

Appearance: MrR.K.Chawla, Advocate for the petitioner.
Mr.Tridep Pais with Mr.Shivam Sharma,
Advocates for the respondent.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

For orders see CM(M) No.379/2013.

INDERMEET KAUR, J.

APRIL 30, 2013
nandan

(3)

A-5 & 6

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

% *Judgment reserved on:23.4.2013*
Judgment delivered on:30.4.2013

\+ **CM(M) No.379/2013 &C.M. No.5685/2013**

AND

\+ **CM(M) No.380/2013 &C.M. No.5690/2013**

NITIN GARG & ANR. .....Petitioners
Through: MrR.K.Chawla, Adv.

Versus

RATNA KAPOOR & ANR. .....Respondents
Through: Mr.Tridep Pais with Mr.Shivam Sharma, Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The petitioner is aggrieved by the impugned order dated 26.02.2013 which had reserved the finding of the Civil Judge dated 08.6.2012 on the application filed by the respondents along with his statement-cum-counter claim under Section 39 Rule 1 and 2 of the Code of Civil Procedure (hereinafter referred to as the Code).

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2 Record shows that the present suit has been filed by the petitioner seeking perpetual and mandatory injunction against the respondents. Petitioner is the legal owner of the second floor with the terrace right in property No.856, Block-D, New Friends Colony. He had purchased it from Meena Seth vide a registered sake deed dated 03.8.2006. Respondent/defendant no.1 is the owner and in possession of the first floor of the same property also having purchased it from the same erstwhile owner vide registered sale deed dated 02.01.2006.

3 Suit was accordingly filed. The prayer in the plaint was that the respondents should be restrained from encroaching any part of the terrace in the second floor of the aforenoted property by affixing any fixture. This suit had been filed as the plaintiff was under apprehension that a solar water heater was proposed to be installed by the respondents; this is clear from the averments made in the plaint.

4 A written statement-cum-counter claim along with an application under Order 39 Rule 1 & 2 of the Code had been filed. The submission of the respondent is that the installation of the water tank would be in the common area which is available to both the parties being the top terrace of the property which is distinct from the terrace. Even otherwise the water tanks and the geysers of the respective parties also form part of the first floor; right of construction is available to the petitioner to construct on the terrace floor but in terms of Clause 18 and Clause 19 of the sale deeds of the respective parties in such an eventuality where construction is carried out by the petitioner it would

be incumbent upon him, at his own cost and expenses to remove the water tanks and geyser to the top terrace; the top terrace would remain open to the sky and having in area of more than 11 metres, the respondent should be permitted to install his solar heater which would not be more than 2.5 metres. To support this submission on the dimension of the solar heater report of "Seema Solar Enterprises" has been placed on record.

5 Arguments have been addressed at length by the learned counsel for the parties. On behalf of the petitioner, it is pointed out that the impugned order suffers from a clear illegality as the discretion exercised by the Civil Judge is fair and reasonable; the Appellate Court could not have substituted its own factual view upon the view of the Civil judge as an appeal in such circumstances is limited in its scope. Counsel for the petitioner has placed reliance upon AIR 2005 SC 1444 *Metro Marins & Anr. Vs. Bonus Watch Co. Pvt. Ltd.* as also AAIR 2002 Delhi 501 *J. Daulat Singh Vs. Delhi Golf Club Ltd.* to support his submission that where an interim injunction of the nature as has been granted by the impugned order is passed, it would amount to the decreeing of the suit itself; such an injunction being in the mandatory form would in fact encompass the prayer which has been made in the plaint and such a relief is not permissible.

6 Arguments have been countered. Learned counsel for the respondent points out that in no manner does the impugned order suffer from any infirmity. He has drawn attention of this court to the

photographs of the terrace floor; it is pointed out that it is an admitted position that the geyser and water tank of the parties are fitted on this terrace floor and the trial court has interpreted Clause 18 of the sale deed of the petitioner in its correct perspective; the top terrace floor is distinct from the terrace floor and even presuming that the right of construction is available to the petitioner at the terrace floor, in such a situation it would still be incumbent upon the petitioner to remove the amenities which were being enjoyed by the respondent at his own cost and shift them to the top terrace floor. The impugned order has drawn the fine distinction between the terrace floor and top terrace floor in its correct perspective. Impugned order calls for no interference. Reliance has been placed upon (2006) 8 SCC 367 *M. Gurudas and Ors. Vs. Rasarnjan and Ors.* to substantiate a submission that a prima facie view is a finding of fact and where the triple test of an injunction has been satisfied as it was so in this case, no interference is called for.

7 Arguments have been heard. Record has been perused. This appears to be a contentious litigation between two parties who are admittedly purchasers of the first floor and second floor of the same property. They have little choice between themselves but to live as harmoniously as possible in the background of their respective grievances.

8 The plaint shows that the petitioner was under an apprehension that the respondents would be installing a water heater on the terrace floor which is a portion where admittedly the geysers and water tanks

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of the parties are already installed. The sale deed by virtue of which the petitioner has purchased the second floor and its terrace right is a registered deed dated 03.8.2006. Clause 18 of this sale deed which is the bone of contention and which has been interpreted differently by the two courts below is relevant for the controversy in hand. It reads as under:

"That the entire terrace rights over and above the Second Floor shall remain the exclusive property of the VENDEES, who shall have full right of further construction on it, as and when permitted by M.C.D. in future and in such event, the VENDEES shall shift the lift room, overhead water tanks and other common facilities and amenities so provided to the other owners/occupants of the said building (of the same size and same location) on the newly built top terrace at their own cost and expenses and shall ensure that during the course of construction no damage is caused to the existing structure of the building and the normal water supply is maintained".

9 By virtue of this clause the entire terrace rights over and above the second floor are owned by the petitioner with additional right of further construction as and when permitted by the MCD. In such an eventuality the petitioner would shift the lift room, overhead water tanks and other facilities and amenities which the parties were enjoying till then to the top terrace floor and this would at the cost and expense to be borne by the petitioner. This clause also specifies the size and location of the said amenities (which have been described as the lift room and overhead water tank) will remain the same. Normal water supply also had to be ensured by the petitioner to the respondents.

10 Relevant would it be to state that Clause 19 of the sale deed (dated 02.8.2006) of the respondents also spells out this same right

which has been given to the petitioner. Relevant would it be to extract Clause 19 of the sale deed as well; it reads herein as under:

"19. That the VENDEE(S) shall have no ownership/usage rights of the terrace above the second floor of the said property, and the owner of that portion shall have full right to raise further construction on it, as and when permitted by Municipal Corporation of Delhi in future and in such event, the party doing the construction shall shift the lift room, overhead water tanks and other common facilities and amenities so provided to the other owners/occupants of the said building (of the same size and same location) on the newly built top terrace at his/her own cost and expenses and shall ensure that during the course of construction no damage is caused to the existing structure of the building and the normal water supply is maintained to the occupants of the said building."

11 This document states that the respondents would have no ownership or user right of the terrace above the second floor and it will be the sole right of the petitioner to raise a construction upon it as and when permitted by the local bye-laws. Rider attached is that as and when this construction is carried out the lift room and overhead water tanks as also the other facilities being occupied by the other occupants of the same building (including the respondents) would be shifted to the top terrace floor at the expense of the petitioner. Normal water supply was to be maintained by the petitioner. Emphasis is laid on the same size and same location of the shifting of the said amenities to the top terrace floor.

12 Intent of the vendor and vendee can be well gathered from the aforenoted documents. The prima facie finding returned by the Civil Judge in this context appears to be the correct finding. The sale deed of both the parties confer ownership of entire terrace right over and above

the second floor to the petitioner and the respondents only have a limited access to clean the overhead tanks, repair them and to install their TV antenna and water tanks etc. This find mention in Clause 13 of the sale deed of the petitioner. The over emphasis on the word "etc." is misplaced as 'etc." is appearing after the installation of the TV antenna and has to be read *ejusdem generis* to the preceding words; it cannot be given a wider meaning which the learned counsel for the respondent insists i.e. his right to place 2.5 metre solar heater in this property of the petitioner. Distinction between the 'top terrace' and 'terrace' is also not prima facie made out to enable the respondents to exercise any further rights than those which had already been granted to them in terms of their sale deed.

13 Impugned order has committed a patent illegality; it has interpreted Clause 18 of the sale deed of the petitioner in a perverse manner. It has given an interpretation to the clause which is neither permissible nor contained in the language of the various clauses of the respective sale deeds of the two parties all of which have to be read together. A specific query has also been put to the learned counsel for the respondents which is to the effect that a solar heater would normally be required only in the winter months, the present being the summer season; a suggestion was given that the trial can be directed to be expedited in order that the trial can well be over before the winter months approach. Learned counsel for the respondents is however not agreeable to this proposal.

14 Even otherwise the relief as granted by the impugned order being in the mandatory form amounts to decreeing a part of the suit itself which is prayer (a) of the plaint. Such a course would not be permissible as a prima facie reading of the two sale deeds of the two parties does not make out such a prima facie case in favour of the respondents entitling them to an injunction in the mandatory form, balance of convenience is also not in favour of the respondent. An irreparable loss in such an eventuality would be suffered by the petitioner.

15 It is only after evidence is led can this issue is decided as rightly noted by the trial judge. Impugned order is accordingly set aside.

16 Petitions are allowed in the aforesaid terms. Applications also stand disposed of accordingly. Parties are left to bear their own costs.

INDERMEET KAUR, J.

APRIL 30, 2013
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