

(2000) 03 DEL CK 0085
In the Delhi High Court
Case No : FAO (OS) 248 of 1999

Ajay Narain

APPELLANT

Vs

Aarti Singh and Others

RESPONDENT

Date of Decision : 31-03-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4

Citation : (2000) 4 ARBLR 879 : (2000) 85 DLT 536 : (2000) 54 DRJ 93 :
(2000) 3 RCR(Civil) 562

Hon'ble Judges : Devinder Gupta, Acting C.J.; Surinder Kumar Aggarwal, J

Bench : Division Bench

Advocate : Mr. V.K. Makhija and Ms. Vandana Khurana, for the Appellant; Mr. P.N. Lekhi and Mr. Aman Lekhi, for the Respondent

Judgement

S.K. Agarwal, J.—Admit.

2. This appeal is directed against the order dated 26th July, 1999 passed by the learned single Judge of this court vacating the ex-parte ad-interim injunction dated 13th July, 1998 passed against respondents (defendants) under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908 (for short the Code) whereby, they were restrained from transferring, alienating or parting with the possession of the first floor and the second floor of 110, Jor Bagh, New Delhi (for short suit the premises) thus allowing respondents' application under Order 39, Rule 4 of the Code (IA No. 417/99). Since the point involved in the appeal is very short and record has already been called, by this order we propose to dispose of the appeal itself.

3. Facts giving rise to this appeal briefly are: The appellant filed the suit against respondents for a decree of declaration that General Power of Attorneys (for short GPA) dated 6.12.1996, 7.10.1997 and 30.3.1998 in favor of Aarti Singh respondent No.1: GPA dated 6.12.1996, and four special power of attorneys all dated 30.3.1997 in favor of Kanwar Raj respondent No.2: GPA dated 7.10.97 in favor of respondents 2 and 3: agreements to sell dated 6.12.1996, 7.10.1997

and 30.3.98 in favor of respondents 1 and 2 and other related documents (hereinafter the sale documents) executed by him, in favor of respondents, in respect of the suit premises, would not come into operation till 31.12.1999 and for declaration that the blank signed papers given by him to the respondents be treated as null and void ab-initio and for a decree of injunction against the respondents not to act upon or use the said documents.

4. The appellant alleged in the suit that he is the owner of the property No. 110, Jor Bagh, New Delhi and has been residing on its ground floor. In 1986 respondent No.1 who was then working as an air hostess with the British Airways, took on rent second floor (barsati floor) of the said premises. She, after some time, started doing business and with the passage of time, family of appellant came closer to respondent No.1; first floor was also rented out to her. Respondent no.1 got married to respondent No.2 in December 1991. Respondent No.3 is the sister of respondent No.1. It was alleged that in the latter half of 1996 the appellant started business of manufacture and export of jewellery and garments and required investment to the tune of Rs. 50-60 lakhs. Respondents 1 and 2 readily offered to provide loan to the appellant with interest at the rate of 16% per annum but they insisted upon some kind of security since the amount involved was very large, and came up with the suggestion that the appellant should give them the suit premises as security for repayment of the loan. The appellant informed the respondents that the suit property was encumbered with the bank, as a collateral security, at the time he had obtained loan of packing credit limit from them. Respondents 1 and 2 then stated that it would not make any difference to them because once the appellant clears the loan amount the sale documents to be executed by him, in their favor would be returned back to him. As per this understanding between December 1996 and 30th March, 1998 the appellant received a total sum of Rs. 60 lacs from respondents 1 and 2 on different dates, and executed said sale documents showing sale of the suit premises in their favour. On 24th April, 1998 the some NDMC official visited the premises from whom the appellant came to know that the respondents 1 and 2 had submitted plans for reconstruction of the suit premises; thereafter on 30th April, 1998 the accompanied with one Manmohan Kapoor and vikram Seth, contacted respondents 1 and 2 and returned to them amount of Rs. 45 lacs (Rupees Forty Five Lacs only) in case. It was further claimed respondents, 1 and 2 handed over to the appellant, two letters one signed by respondents 1 and the other by respondent no.2 when this amount was returned acknowledging that the appellant had in fact taken a loan of Rs. 60 lacs from them with interest 16% per annum; that at their request, the appellant had executed sale documents in respect of the suit premises and also some other blank papers clarifying that the said documents were got executed because the property was already mortgaged with the bank, and assuring that in the event of the appellant paying the balance of the loan amount of the sale documents would be returned to him and further asserting that in case the appellant fails to pay the entire money before 31.12.99, they would have the right to sell the property or part thereof to

recover the balance dues and also confirming and acknowledging receipt of Rs.45 lacs in cash from the appellant (hereinafter referred to as disputed letters). On 13th July, 1998 an ex-parte ad-interim injunction was granted in favor of the appellant against the respondents restraining them from transferring, alienating or parting with the possession of the suit premises.

5. Respondents 1 and 2 in their written statement pleaded that the appellant had sold the suit property to them had received the entire sale consideration that the appellant had executed the said documents and some of the documents were duly registered with the sub-Registrar. Other material allegations in the plaint were also denied. It was pleaded that the transaction was not of loan and documents were not intended to be the security. It was denied that a sum of Rs. 45 lacs was ever returned by the appellant to respondents No. 1 and 2 on 30th April, 1998. They specifically denied their signatures on the aforesaid two disputed letters.

6. In view of the pleadings, the disputed signatures of Respondents 1 and 2 on the disputed letters as well as their admitted signatures on other documents were sent to a hand writing expert of the Central Forensic Sciences Laboratory (CFSL) on 26th October, 1998 for comparison and opinion. As per the orders, signatures on the disputed documents were examined by the Government hand writing ex pert and vide report dated 7th January, 1999 he opined that signatures of respondents No. 1 and 2 on the disputed letters marked Q-1 and Q-2 were forged.

7. The respondents thereafter moved an application under Order 39 Rule 4 of the Code (IA 417/99) seeking vacation of the ex-parte interim injunction operating against them. The appellant filed a reply opposing this application. Learned Single Judge after hearing argument vide impugned judgment order dated 26th July, 1999 vacated the said ex-parte injunction order dated 13th July, 1998. This order is under challenge.

8. We have heard learned counsel for the parties and have been taken through the record.

9. Learned counsel for the appellant while assailing the impugned judgment and order argued that an opinion of a hand-writing expert is the weakest form of evidence and it could not be relied upon; that earlier opinions of Mr. Nehra, the hand writing expert. CFSL who had given the present report were adversely commented upon by several courts. In support of this argument reliance was placed on a Supreme Court decision in S. Gopal Reddy Vs. State of Andhra Pradesh, wherein it was held:-

"Thus, the evidence of PW 3 is not definite and cannot be said to be of a clinching nature to connect the appellant with the disputed letters. The evidence of an expert is a rather weak type of evidence and the courts do not generally consider it as offering "conclusive" proof and Therefore safe to rely upon the same without seeking independent and reliable corroboration." (Emphasis

supplied)

10. There cannot be any dispute that an opinion of a handwriting expert is a weak type of evidence. Having regard to the imperfect nature of the science of identification of handwriting, the approach should be one of caution and the reasons for opinion, must be weighed properly. All the relevant circumstances must be considered.

11. At this stage, it may be useful to refer to the laws with regard to the grant of interlocutory injunctions during the pendency of proceedings, which is well-settled, by several authoritative pronouncements of the Apex Court as well as of this court. In *Gujarat Bottling Co. Ltd. & Ors Vs. Coca Cola Co. & Ors.* (1995) 5 SCC it was held:-

"The grant of an interlocutory injunction during the pendency of legal proceedings is a matter enquiring the exercise of discretion of the court while exercising the discretion the court applies the following tests - i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favor of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to that plaintiff during the period before the uncertainty could be resolved. The object of the interlocutory injection is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated."

12. In the light of the above principles an application under Order 39, Rules 1 and 2 of the code has to be decided. At the risk of repetition it may be recalled that in this case admittedly between December, 1996 to March, 1998 the appellant had received a sum of Rs. 60 lacs (Rupees Sixty Lacs) through cheques from respondents No.1 and 2 and had executed the sale documents in their favour. The appellant, further, claimed that on 30th April, 1998 he had paid a sum of Rs. 45 lacs in cash to respondents No. 1 and 2, and obtained two letters from the respondents No.1 and 2 purported to be signed by them on that day. Signatures of respondents 1 and 2 on these two disputed letters marked Q1 and Q2 were opined to be non-genuine by a Government handwriting expert.

13. In this case attending circumstances also do not seem to support appellant's

claim. Admittedly, the entire amount of Rs. 60 lacs was received by the appellant through cheques. Why should he return the amount of Rs. 45 lacs in cash? There is no Explanation. Where from he withdrew got this amount? There is no Explanation. If he had withdrawn this amount from the bank he could easily pay the same by way of banker's cheque or he could place some documentary evidence to support the withdrawal of this amount. The two receipts executed by the appellant in his own handwriting on his own letter head which also do not support the stand set up by him that the sale documents were executed as security. The receipts read as under :-

Ajay Narain

110, Jor Bagh

New Delhi - 110 003

Phones: 4620663, 4620664

Received with thanks a sum of Rs. 8,00,000/- (Rupees Eight Lacs only) vide cheque No. 279582/243065/279562 dated 9th December, 1996 drawn on Central Bank of India, Jor Bagh, New Delhi from Ms. Aarti Singh, wife of Sh. Kanwar Raj Singh, R/o, 110, Jor Bagh (first floor), New Delhi, earnest money with regard to sale of the first floor of the property bearing No.110, Jor Bagh (First Floor), New Delhi, comprising of two bedrooms, two attached bathrooms, kitchen, two stores, lobby, verandah and one balcony.

The total sale consideration is Rs.40 lacs (Rupees forty lacs only) out of which Rs. 8,00,000/- (Rupees eight lacs only) has been paid for the above mentioned sale. The balance sale consideration shall be payable by 31st December, 1997.

Signed

11.12.1996

Ajay Narain

110, Jor Bagh

New Delhi - 110 003

Phones - 4620663

4620664

Received with thanks a sum of Rs. 5,00,000/- (Rupees five Lacs only) vide pay order No. NIE 038899 dt. 9th December, Connaught Place, New Delhi from Sh. Kanwar Raj Singh, son of Late Sh. Madanjit Singh r/o.110, Jor Bagh(2nd Floor), New Delhi earnest money with regard to the sale of second floor of property no.110, Jor Bagh, New Delhi comprising of one room, bath room, kitchen, one servant quarter, terrace rights and passage from common staircase.

The total sale consideration is Rs. 20 lacs (Rupees twenty lacs only) out of which Rs. 5,00,000/- (Rupees five lacs only) has been paid for the above mentioned sale. The balance sale consideration shall be payable by 31st December, 1997.

Signed

11.12.1996

14. Further the case set up the appellant, in a subsequent suit for permanent and mandatory injunction, filed by the appellant against the respondents in the court of the Senior Sub Judge, Delhi (Suit No. 957/99) also prima facie appears to be in contradiction with the stand taken by him in suit before this Court. Thus opinion of the handwriting expert coupled with the attending circumstances noted above, certainly put a big question mark on the whole case pleaded by the appellant.

15. It was next argued that in the absence of a registered sale deed a person cannot claim title in an immovable property as an owner. On the basis of agreement to sell and power of attorney etc. no title to the suit property is acquired. Section 54 of the Transfer of Property Act, 1882 defines the sale of the immovable property and reads as under:-

54. "Sale" defined. - "Sale" is a transfer of ownership in ex-change for a price paid or promised or part-paid and part-promised.

Sale how made

.....

Contract for sale

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property" .

16. It is clear that a contract for sale of immovable property does not, by itself, create any interest in or charge on such property. However, in view of the fact that respondents No. 1 and 2 were tenants and in occupation of the suit premises, execution of agreements to sell, receipts of Rs. 60 lacs, execution of registered power of the attorneys, special power of attorneys and execution of registered will, by the appellant in favor of the respondents, would go a long way to show that the respondents have a right to obtain relief of specific performance against the appellants for execution of sale deed and its registration in accordance with law. The contract for sale, does create a right in personum but not a right in the estate. True no privity can be deduced from these documents which can bind the estate, but a right in personum would bind the vendor.

17. Learned counsel for the appellant in support of this argument placed reliance on a decision of this court in Imtiaz Ali Vs. Nasim Ahmed, . On facts the observations made in that case are not applicable to the present case: that was a

case under the Delhi Rent Control Act. The judgment and the order dismissing the suit by the Tribunal instituted by the purchaser of the shop, on the basis of agreement to sell and power of attorney etc. was challenged. This Court after making the observations that u/s 54 of the Transfer of Property Act, no interest is created in the estate held the petition for eviction to be maintainable on behalf of the person holding him to be the landlord of the premises.

18. It is needless to point out that the onus of proof lies on the appellant to prove his case that it was a loan and the documents were executed by way of security. If these two disputed letters are excluded from consideration, there would hardly be any material to support the case of the appellant that it was a loan transaction or that he had returned Rs. 45 lacs in cash to the respondents. Therefore, a prima facie, finding regarding balance of convenience or irreparable injury could not be recorded in his favour.

19. Supreme Court, while laying down the law, regarding power of the appellate court to interfere with the discretion of the Court in the first instance in *Wander Ltd. and Another Vs. Antox India P. Ltd.*, held :-

"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 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 appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

20. In exercise of the appellate jurisdiction the Court cannot substitute its own discretion except where the discretion is shown to have been exercised arbitrarily or capriciously or perversely by the learned single Judge or where the Court has ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against an order of exercise of discretion is maintainable only on principle. Even other-wise, the fact that the appellate court would have taken a different view may not justify interference with the trial court's discretion. In our considered view the discretion exercised by the learned Single Judge while vacating the ex parte ad interim injunction cannot be said to be perverse or arbitrary or in violation of any principle of law. The impugned order is perfectly valid and legal. We do not find any infirmity in it so as to warrant any interference.

21. We may also notice here that in the plaint appellant-plaintiff had made a prayer that the documents executed by him be not given effect to till 31.12.99.

This period has already expired. Nothing has been placed on record by the appellant to show as to what happened thereafter.

22. For the foregoing reasons the appeal is dismissed with costs quantified at Rs.10,000/-.