
(2011) 07 MP CK 0034

In the Madhya Pradesh High Court

Case No : Writ Petition No 6464 of 2010

Ajay Narang

APPELLANT

Vs

Ram Enterprizes

RESPONDENT

Date of Decision : 15-07-2011

Acts Referred:

Evidence Act, 1872 — Section 114
General Clauses Act, 1897 — Section 27
Specific Relief Act, 1963 — Section 41, 42

Citation : (2011) ILR (MP) 2162

Hon'ble Judges : Rajendra Menon, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajendra Menon, J.—Challenge in this writ petition under Article 227 of the Constitution is made to an order-dated 3.3.2010 - Annexure P/7 passed by the 4th Additional Judge to the Court of District Judge, Bhopal in Misc. Civil Appeal No. 73/2008, whereby an order of injunction passed by the trial court vide Annexure P/6 on 25.4.2008, is interfered with.

2. Facts in a nut-shell, necessary for disposal of this writ petition, indicate that the Petitioner and Respondent firm, which is a partnership firm, had entered into an agreement in the matter of development of certain land and construction of flats/houses. The agreement in question entered into between the parties is available on record as Annexure P/3. The agreement, termed as a Joint Venture agreement, was executed between the parties on 31.5.2005 and the Petitioner herein, who is referred to as the first party in the agreement, being owner of certain land which is divided into 65 plots, agreed to permit the Respondent/firm to make construction of house and flats on the terms and conditions stipulated in the agreement. On the ground that in breach of the agreement, the Petitioner is selling various plots out of the 65 plots covered in the agreement, suit in question was filed by the Respondent/firm before the 4th Civil Judge Class II,

Bhopal. The said suit was registered as Civil Suit No. 314-A/2008 and the Respondent firm sought permanent injunction and declaration. In the suit in question, Respondent/firm sought a declaration to the effect that a decree be passed in favour of the Plaintiff giving exclusive rights to develop, construct and sell the plots mentioned in the agreement. Further prayer made was that a permanent injunction be granted in favour of the Plaintiff against the Defendant restraining the Defendant from alienating the 65 Plots. Annexure P/1 is a copy of the plaint. Alongwith the plaint an application for temporary injunction under Order XXXIX Rule 1 and 2, of the Code of Civil Procedure, was filed and the temporary injunction sought for was to injunct the Petitioner/Defendant from alienating the plots indicated in the agreement. The learned court below after evaluating the facts and circumstances of the case found that no prima facie case is made out. Apart from finding various aspects with regard to non-compliance with the agreement by the Respondent/firm, the court below found that the agreement in question was terminated by the Petitioner/Defendant, a notice of termination was sent and it was held that under law the notice is served on the Respondent/firm. That apart, it was found that the Respondent has only sought for a declaratory decree, they have not sought specific performance of the agreement and after taking note of the provisions of Section 41 and 42 of the Specific Relief Act, 1963, it was found by the trial court that no case for injunction is made out and the application for temporary injunction was rejected. However, on an appeal being filed by the Respondent/firm, injunction was granted by the appellate court vide order-dated 3.3.2010 - Annexure P/7 and, therefore, Petitioner is before this Court assailing the aforesaid grant of injunction.

3. Shri Ravish Agrawal, learned Senior Advocate, assisted by Shri Abhishek Arjaria, Advocate, pointed out two glaring infirmities in the order passed by the learned appellate court. It was pointed out by Shri Ravish Agrawal, learned Senior Advocate, that in the order passed by the trial court on 26.4.2008 - Annexure P/6, apart from evaluating various aspects of the matter on merits in paragraph 9, the trial court has recorded a finding with regard to notice issued by the Petitioner for termination of the agreement and the fact with regard to service of notice on the Defendant. The second contention of Shri Ravish Agrawal, learned Senior Advocate, was to the effect that in paragraph 11, the learned trial court has taken note of the relief claimed by the Plaintiff and finding that no relief for specific performance of the agreement is sought for, application for injunction is rejected. It is argued by learned Senior Advocate that both these vital questions which are legal questions and because of which existence of prima facie case on behalf of the Plaintiff is not made out, the appellate court totally ignored and proceeded on merits without taking note of these two legal questions.

4. Referring to the notice for termination of agreement - Annexure P/5-A, sent by the Petitioner's counsel to the Respondent by registered post acknowledgement due and under postal certificate given by the post-office available at page 48, the

registered notice sent and the receipt of registration and the return of the notice with an endorsement to the effect that the Respondent/firm are not available to collect the notice inspite of information Shri Ravish Agrawal, learned Senior Advocate, argued that in view of the provisions of Section 27 of the General Clauses Act read with Section 144 of the Evidence Act, presumption of service of notice of termination of the agreement has to be drawn. That apart, inviting my attention to a judgment rendered by a Bench of this Court in the case of Jawahar Theatres Private Ltd. Vs. Smt. Kasturi Bai and Another, learned Senior Advocate emphasized that in the absence of relief claimed for specific performance of the agreement, the order passed by the learned appellate court is unsustainable. It was argued by Shri Ravish Agrawal, learned Senior Advocate, that if both these aspects are taken note of, then prima facie case in favour of the Plaintiff was not in existence and in granting injunction inspite of the above, the learned appellate court has committed error which warrants interference now in these proceedings.

5. Shri R.K. Verma, learned Counsel for the Respondent/Plaintiff, took me through the agreement in question, the submissions made by the Respondent/firm in the plaint and the order passed by the learned appellate court, to emphasize that it was a case where the Petitioner in breach of the agreement was trying to alienate the plots and was not permitting the firm to get the permissions etc from the Municipal Corporation by not transferring the land and getting it mutated. Inter alia contending that the appellate court has taken note of various aspects and has recorded a finding in favour of the Plaintiff, which is based on due appreciation of evidence and material available on record, Shri R.K. Verma seeks for dismissal of this writ petition by contending that if the plots are alienated during the pendency of the proceedings, the right of the Plaintiff would be adversely affected and the entire purpose for filing the suit would be frustrated and, therefore, it is argued by him that no interference be made.

6. I have heard learned Counsel for the parties and perused the records.

7. It is seen from the records that when the matter was dealt with by the trial court, in the order passed on 26.4.2008, as is evident from Annexure P/6, the trial court apart from adverting to various factual aspects of the matter in dispute between the parties with regard to compliance or otherwise of the agreement has taken note of the fact about termination of the agreement by the Petitioner. In paragraphs 8 and 9, this aspect of the matter is dealt with and it is found by the trial court that on 15.2.2008, the Petitioner had terminated the agreement and it is only after a month, thereafter on 15.3.2008 that the Plaintiff issued a press communication with regard to agreement being in force. The finding recorded by the court below is that the Plaintiff was aware of the termination of the agreement. Once the finding recorded by the trial court was to the effect that prima facie the agreement is seen to have been terminated then the question would be as to whether a prima facie case exists in favour of the Plaintiff for grant of injunction. The Plaintiff's case was based on the right accruing to him by virtue of the agreement and the material available on record indicates that vide

Annexure P/5-A on 15.2.2008, for various reasons indicated therein, the Petitioner had sent a notice both by UPC and registered post acknowledgement due. The posting certificate is available at page 48 of the paper book and the postal receipt with regard to dispatch of the registered letter acknowledgement due is at page 53, and the acknowledgment card bearing the endorsement to the effect that inspite of information and notice, none is present in the office of the Respondent to accept the notice is indicated. Once the communication is sent by UPC or by registered post acknowledgement due, in the facts and circumstances of the case a presumption with regard to service of notice can be drawn, particularly when the notice is sent both by registered post acknowledgement due and under posting certificate.

8. In this regard, recently Supreme Court had dealt with the matter in the case of Samittri Devi and Another Vs. Sampuran Singh and Another, and in paragraphs 29 and 30, Hon''ble Supreme Court has held that depending upon the facts and circumstances of each case even a presumption with regard to service of notice sent under postal certificate should be drawn. If the principles laid down by the Supreme Court in the aforesaid case is taken note of and the principle laid down in paragraph 27 onwards are taken note of, it would be clear that in this case a presumption can be drawn with regard to service of notice for termination of the agreement on the Respondent, as the notice is sent by postal certificate so also by registered post acknowledgement due and the records indicate that the Respondent inspite of knowledge refused to accept the same.

9. This vital aspect of the matter was totally ignored by the appellate court while granting injunction whereas the trial court had taken note of this fact and alongwith other cumulative facts, recorded a finding that a prima facie case is not made out. This finding of the trial court, particularly in the matter of service of notice for termination of agreement is not at all considered by the appellate court and injunction is granted. To that effect, Shri Ravish Agrawal - learned Senior Advocate, is right in contending that the order of the appellate court is perverse and unsustainable. Similarly, if the prayer made by the Plaintiff in the plaint is seen, the prayer is declaratory in nature and the Plaintiff only wants a declaration to the effect that Petitioner/Defendant should not alienate the plots during the pendency of the proceedings. The question as to whether such a decree could be granted without seeking specific performance of the agreement in the light of the provisions of Section 41 and 42 of the Specific Relief Act, is considered by a Bench of this Court in the case of M/s Jawahar Theatres Private Limited (supra) and after evaluating the principle and taking note of the provisions of Specific Relief Act, 1877 as was then applicable, the law laid down is that a suit for mere negative injunction without claiming specific performance is not maintainable.

10. In the present case also, Plaintiff is not claiming specific performance of the agreement, but is only claiming injunction. If the principle laid down in the case of M/s Jawahar Theatres Private Limited (supra) is applied to the facts and

circumstances of the present case, the suit itself being not maintainable, the question of existence of prima facie case does not arise. This vital aspect of the matter also was totally ignored by the appellate court while granting injunction.

11. In view of the aforesaid, this Court finds much force in the contentions advanced by Shri Ravish Agrawal, learned Senior Advocate, that assessment of prima facie case made by the appellate court is totally perverse and illegal and on the said ground alone, the impugned order is liable to be quashed. Accordingly, for the grounds and reasons indicated hereinabove, this Court is of the considered view that the order passed by the 1st Appellate Court interfering with the trial court's order rejecting the prayer for injunction is wholly unsustainable and the appellate court has granted injunction without appreciating the existence of prima facie case and the facts and circumstances properly.

12. In view of the above, this petition is allowed. The impugned order passed by the 1st Appellate Court dated 3.3.2010 - Annexure P/7 is quashed and the court below is directed to expedite hearing of the suit and complete its proceedings within a period of three months from the date of receipt of certified copy of this order.

13. With the aforesaid the petition stands allowed and disposed of. No order so as to costs.