

**(1998) 02 PAT CK 0075**

**In the Patna High Court**

**Case No :** Appeal from Original Order No. 8 of 1998 (R)

Anil Singh

APPELLANT

Vs

Nimai Ghosh and Others

RESPONDENT

**Date of Decision :** 27-02-1998

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 151  
Specific Relief Act, 1963 — Section 22

**Citation :** (1998) 2 BLJR 1233 : (1998) 2 PLJR 372

**Hon'ble Judges :** M.Y. Eqbal, J

**Bench :** Single Bench

**Final Decision :** Allowed

## Judgement

M.Y. Eqbal, J.—This Misc. appeal, at the instance of the plaintiff-appellant is directed against the order dated 19.1.1998 passed by Subordinate Judge IV, Jamshedpur, in the District of Singhbhum (East) in Title Suit No. 35 of 1996 vacating the order of injunction dated 17.10.1996 in purported exercise of jurisdiction under Order XXXIX, Rule 4 of the CPC (for short "the Code") at the instance of defendant No. 1(a).

2. The facts of the case lie in a narrow compass. The plaintiff-appellant filed the aforesaid suit for specific performance of contract for sale against the Principal defendant namely, Nimai Ghose. The plaintiff's case is that defendant No. 1 sold an area of 216 Sq. ft. with a Kutcha structure thereon at TISCO'S Holding No. 158, Sakchi New Planning Area, in the town of Jamshedpur to the plaintiff by a registered sale deed dated 25.4.1995 and put him in possession of the same. After purchase the plaintiff demolished the old structure and constructed pucca building over it and came in possession of the same. Subsequently defendant No. 1 being in urgent need of money further offered to sell the plaintiff an additional area of 1800 sq. ft. in continuation of the existing building of the plaintiff. The plaintiff accepted the said offer and entered into written agreement on 16.5.1995 for the purchase of the said property on consideration of Rs. 6,00,000/- (Rupees

Six lakhs), out of which a sum of Rs. 2,00,000/- Was paid as an earnest money. It was agreed in the said agreement that the balance consideration would be paid on the registration of the sale-deed. The plaintiff's further case is that on 22.6.1995 defendant No. 1 received a further sum of Rs. 2,00,000/- and a receipt to that effect was executed by the defendant No. 1. On 6.11.1995, defendant No. 1 again received a further sum of Rs. 1,50,000/- and executed third agreement-cum-money receipt. Only balance consideration of Rs, 50,000/- to be paid at the time of registration of the sale-deed which was to be done by the first week of December, 1995, The plaintiff's case is that on 9th December, 1995, a registered notice through advocate was sent to the defendant No. 1 requesting him to execute and register the Sale deed, but on receipt of the notice, defendant No. 1 hurriedly started construction on the suit land without giving any reply. The plaintiff, therefore, filed the aforesaid suit claiming a decree for specific performance of contract and in the alternative a decree for refund of the earnest money together with interest. The plaintiff also sought a decree for a permanent injunction restraining the defendant No. 1 from making any construction. The plaintiff-appellant then filed an application under Order XXXIX, Rules 1 and 2 of the Code for grant of temporary injunction restraining the defendant from making any construction. In the said application it was alleged that defendant No. 1 along with his brother Nimai Ghose and sister Namita Ghose had assigned the suit land in favour of one Kundan Verma and decided to make construction over the suit land. The said prayer of the plaintiff-appellant was opposed by defendant No. 1 by filing a rejoinder. The learned Subordinate Judge, Jamshedpur after hearing the parties on the petition for grant of temporary injunction passed final order on 17.10.1996, whereby the petition for temporary injunction was allowed and defendant No. 1 was restrained from making any further construction on the suit land, either personally or through contractor or any agent till the disposal of the suit. Defendant No. 1 challenged the aforesaid order dated 17.10.1996 by filing an appeal before this Court being M.A. No. 2 of 1997 (R). The said appeal was eventually dismissed by this Court in terms of the judgment and order dated 10.7.1997. It appears that thereafter said Kundan Verma was impleaded as proforma defendant No. 1(a) in the suit who filed his written statement. However, on 4.9.1997 the said defendant No. 1(a) Kundan Verma filed a petition under Order XXXIX, Rule 4 read with Section 151 of the Code before the Court below seeking a prayer for cancellation/variation of the injunction order dated 17.10.1996. The said petition was opposed by the plaintiff-appellant by filing a rejoinder. The Court below after hearing the parties by the impugned order allowed the petition filed by Kundan Verma and vacated the order of temporary injunction granted in favour of the plaintiff-appellant and hence this appeal.

3. Mr. Debi Prasad, learned Senior Counsel appearing on behalf of the appellant assailed the impugned order as being illegal and wholly without jurisdiction. Learned Counsel firstly submitted that the Court below gravely erred in vacating the order of injunction under Order XXXIX, Rule 4 of the Code which does not at

all apply in the facts and circumstances of the case. Learned Counsel submitted that the Court below has committed seriously error of law in holding that defendant No. 1(a) become the owner of the property and further that the plaintiff-appellant has claimed for alternative relief for refund of money in the suit. Therefore, the order of injunction is liable to be vacated. Learned Counsel submitted that the learned Court below completely misconstrued and misappreciated the facts and law involved in the case.

On the other hand, Mr. M.M. Banerjee, learned Counsel appearing on behalf of the defendant-respondent submitted that the plaintiff-appellant by misrepresentation of the fact obtained the order of temporary injunction, inasmuch as the plaintiff was aware of the fact that defendant No. 1(a), namely, Kundan Verma was making construction of the building, but he was not made party in the suit. Learned Counsel further submitted that the construction of building fully completed and portion of the building have been allotted to different allottees who have come in possession of the same. Question of further construction of building does not arise. Learned Counsel lastly submitted that defendant No. 1(a) is not going to make any further construction and, therefore, the order of injunction was. rightly vacated by the Court below when it came to the notice that was Kundan Verma who was making construction of the building.

4. Before appreciating the case of the parties, it would be appropriate first to look into the provision of Order XXXIX, Rule 4 of the Code which reads hereunder:

4. Order for injunction may be discharged, varied or set aside.-Any order for an injunction may be discharged, or varied or set aside by the Court, on an application made thereto by any party dissatisfied with such order.

Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interest of justice.

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.

5. From bare perusal of the aforesaid provision it is manifest that two situations have been contemplated in the said provision when Court should exercise its jurisdiction, namely, where there has been a change in the circumstances which necessiated setting aside or modification of the final order of injunction and where the Court is satisfied that the order has caused undue hardship to the

parties who has suffered the injunction.

6. The only question, therefore, falls for consideration is whether the order of injunction has caused or would cause undue hardship to the defendants including defendant No. 1(a) unless the order is discharged, varied or set aside. For answering these question it would be proper to look into the facts of the case. It is the specific case of the plaintiff-appellant that the original defendant entered into an agreement on 16.5.1995 for sale of the suit land on consideration of Rs. Six lacs and out of the said amount, major portion i.e., Rs. 5.5 lacs have been paid by the plaintiff and only a sum of Rs. 50,000/- was to be paid at the time of execution and registration of the sale-deed. The plaintiff's case was that a registered notice dated 9.12.1995 was sent to defendant No. 1 through the advocate requesting him to execute and register the sale deed but on receipt the said notice, defendant No, 1 hurriedly started construction on the suit land with the help of Kundan Kumar Verma. These facts regarding execution of the agreement and payment of the earnest money were not denied or disputed by defendant No. 1 in the show cause filed by him. From perusal of the show cause, a copy of which has been annexed as Annexure-B to the counter affidavit, it appears that the only defence taken by defendant No. 1 was that he along with the brother and sister gave the suit land to one Kundan Kumar Verma on 18.9.1995 for construction of the building on certain terms and conditions and said Kundan Kumar Verma is in possession of the suit land and the construction of the building is about to be completed. The learned Court below finding prima facie case and balance of convenience in favour of the plaintiff granting temporary injunction holding that the plaintiff would suffer irreparable injury. Defendant No. 1 challenged the aforesaid order of injunction by filing Civil Revision No. 2 of 1997. This Court also considered the entire facts and dismissed the Civil Revision application holding that even if defendant No. 1 is not making construction rather defendant No. 1(a) is making construction, if the defendants are allowed to do so, it would cause irreparable injury in the plaintiff. Paragraphs 6 to 10 of the judgment are quoted herein below:

6. From the pleadings of the parties, it is abundantly clear that out of consideration money of Rs. 6 lakhs, the plaintiff-respondent No. 1 had already paid the substantial portion and only Rs. 50,000/- was to be paid to the appellant. In paragraph 7 of the rejoinder (Annexure 1), the appellant-defendant No. 1 has not denied the assertion of the fact that an agreement was entered into between him and the plaintiff and he received the said amount out of total consideration money of Rs. 6 lakhs. However, his case is that he along with his another brother and sister had given away the suit land on 18.9.1995 to one Kundan Verma granting ownership of the two stories of the building on certain terms and conditions. According to him, said Kundan Verma is making construction on the suit land on his own and even though the plaintiff was aware of the fact, did not put any objection to the said construction by Kundan Verma.

7. From the aforesaid stand of the plaintiff, it appears that after executing the

agreement on 16.5.1995 with the defendant No. 1 in respect of the suit land and after receiving considerable amount of consideration, he along with his brother and sister entered into an agreement with said Kundan Verma on 18.9.1995 without even given any reply to the notice sent to him by the plaintiff. The appellant has admitted that he not making any construction over the suit land rather Kundan Verma is making the construction. In this view of the matter, I am of the view that when the Court below has injuncted the appellant-defendant No. 1 to make any further construction, he cannot make any objection inasmuch as. according to is own case, he is not making any construction.

8. In the case of Kalyanpur Lime Works Ltd., (supra), facts were different inasmuch as this Court found that the defendant was in possession and as such by injunction, the defendant could not be dispossessed.

9. On the other hand, in the case of Gangubai Bablya Chaudhary and Others Vs. Sitaram Bhalchandra Sukhtankar and Others, , the Supreme Court was of the view that if a third party is allowed to put up construction for the whole of the land including the land involved in dispute, the situation may become irreversible by the time the dispute is decided and would preclude fair and just decision of the matter.

10. Similarly, in the instant case though the possession of the suit land is not with the plaintiff, admittedly there is an agreement, for which the appellant has already received a substantial portion of the amount. Instead of respecting his agreement with the plaintiff after receiving the said amount, the defendant No. 1, it is alleged, along with his brother and sister entered into an agreement subsequently with Kundan Verma and allowed Kundan Verma to construct over the suit land. In such circumstances if ultimately the plaintiff succeeds in his suit, then he might be compelled to face another litigation with Kundan Verma.

7. From perusal of the petition filed by Defendant No. 1(a) under Order XXXIX, Rule 4 of the Code, it appears that the case of the said defendant is that the defendant No. 1 and proforma defendant Nos. 2 and 3 entered into an agreement with him on 18.9.1995, in terms of which possession of the land was delivered to him and defendant No. 1(a) started constructing a multi storied building after demolishing the old structures standing thereon as a promoter and builder who has undertaken a number of buildings in the town of Jamshedpur, It is not the case of the defendant No. 1(a) that defendant No. 1 transferred the ownership of the suit land in his favour and he has been making construction in his own right having acquired all right, title and interest in the suit land. From all these facts it is clear that on one hand defendant No. 1 entered into an agreement with the plaintiff on 16.5.1995 and received a major amount of consideration i.e., Rs. 5.5 lakhs and execution and registration was to be done only after receipt of a sum of Rs. 50,000/-. On the other hand, defendant No. 1 along with his brother and sister subsequently executed an agreement on 18.9.1995 and allowed defendant No. 1(a) Kundan Verma to developed the land by making multi storied building. Prima facie, therefore, subsequent agreement

dated 18.9.1995 allowing defendant No. 1(a) to go on making construction as promoter is nothing but to defeat the earlier agreement executed with the plaintiff and the action of the defendant No. 1 cannot be said to be bona fide and honest. This Court has, therefore, rightly observed that the view of the Apex Court that if a third party is allowed to put up construction for the whole of the land including the land involved in dispute, the situation may become irreversible by the time of the dispute is decided and would preclude fair and just decision of the matter.

8. I am fully conscious of the law that the agreement to sale of immovable property creates a right in personam and not in the estate and such right created against vendor to obtain specific performance can ultimately bind the subsequent transferee, but here is the case where a Court has to decide whether continuance of injunction order would cause hardship to the party enjoined. I am of the opinion that if the parties with intention to defeat agreement and the fruits of the decree that may be passed on the basis of that agreement entered into a subsequently agreement and starts making construction in order to defeat the very topography of the land then it cannot be said that the order of injunction against them would cause undue hardship.

9. Coming back to the impugned order passed by the learned Court below it appears to me that the Court below has not only committed error of law, but also error of facts. Although it is the specific case of defendant No. 1(a) that by agreement dated 19.9.1995, the defendant No. 1 along with his brother and sister delivered possession of the suit land to him and he started construction as a promoter and developer, but the Court below on the basis of that agreement held that defendant No. 1(a) has been making construction as an owner of the land. It is very elementary thing that the right, title and interest of immovable property can be transferred only by virtue of registered instrument and not by an agreement. The Court below has gravely erred in law by treating the agreement of defendant No. 1(a) as a document of title. The Court below further committed grave error of law insofar as it held that since the plaintiff claimed alternative relief of refund of earnest money in the suit, therefore, the order of injunction is liable to be vacated. Perhaps, the Court below has not looked into the provision of Section 22 of the Specific Relief Act which, says inter alia that the plaintiff in a suit for specific performance of contract for the transfer of immovable property, in addition to a decree for specific performance of contract, may seek other relief including refund of earnest money and if the plaintiff has not claimed any such relief, the same shall not be granted by the Court. It is, therefore, manifest that merely because of alternative relief for refund of earnest money is claimed in the suit, the plaintiff cannot be held not entitled to a decree for specific performance of contract.

10. Having regard to the facts and circumstances of the case, I am of the opinion that merely because the construction of the building is at the end of completion and defendant No. 1(a) even delivered possession of portion of the building to

other persons cannot and shall not be a ground to vacate the order of injunction. From the entire facts stated herein above, it is evident that action of the defendants in developing the land with the help of promoter by virtue of execution of the agreement subsequent to the agreement with the plaintiff is not bono fide with the sole intent to defeat the agreement and the decree that may be passed in the suit. In my opinion, therefore, no case is made out by defendant No. 1(a) under the provision of Order XXXIX, Rule 4 of the Code. Even assuming that the petition of defendant No. 1(a) is maintainable under the aforesaid provision, it is well settled that the procedural laws are no doubt devised and enacted for the purpose of advancing justice and the main purpose and object of enactment of procedural law is to see that justice is done to the parties. It is equally well settled that the Court may in appropriate cases ignore or excuse a mere irregularity in the observance of the procedure laws in the larger interest of justice. The Court below has, therefore, committed grave error of law and facts in passing the impugned order and vacating the order of injunction.

11. In the result, this appeal is allowed and the impugned order passed by the Court below is hereby set aside. However, there shall be no order as to costs.