
(2010) 05 MP CK 0020
In the Madhya Pradesh High Court
Case No : M.A. No. 1989 of 2010

Girish Shrivastava and Others

APPELLANT

Vs

N.K. Pateria and Others

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Registration Act, 1908 — Section 17
Specific Relief Act, 1963 — Section 12
Stamp Act, 1899 — Section 35
Transfer of Property Act, 1882 — Section 44

Citation : (2010) ILR (MP) 2165

Hon'ble Judges : R.K. Gupta, J

Bench : Single Bench

Advocate : R.S. Tiwari, for the Appellant; R.S. Sanghi, for the Respondent

Final Decision : Allowed

Judgement

R.K. Gupta, J.—This is an appeal preferred by the Defendants against the order passed on 13/04/2010 by Second Additional District Judge, Jabalpur in Civil Suit No. 38-A/ 2005, whereby the Court below has granted temporary injunction.

2. At the time of hearing Counsel appearing on behalf of the Respondent No. 1/ Plaintiff Shri R.K. Sanghi took notice and the matter was heard finally. LA. No. 5242/2010 is application for dispensing with the services of notice on the Respondent No. 2, since the original Plaintiff appears who is contesting the suit, therefore I. A. is allowed and notice to other Respondent is dispensed with.

3. The facts leading to the present case are that the present Appellants being Defendants have purchased the suit land from the Respondent No. 2, 3, 4 and 5. The Plaintiff filed a suit for specific performance. An agreement dated 02/04/2002 wherein the deceased Luis Dissuja executed an agreement to sell the land to the Respondent No. 1 Plaintiff. The alleged agreement is not registered it is only a notarized agreement. In the said agreement it was agreed to sale the land @ Rs. 100/- sq ft and as an advance 5,00,000/- were paid by the

Respondent No. 1/Plaintiff and it was agreed that the sale deed shall be executed within two years. The possession of the said land was also handed over to the Plaintiff.

4. After execution of the agreement the Mr. Dissuja expired on 28/05/2002. The Plaintiff also made an allegation in the plaint that he was not aware of the other co-owners. It is contended that the agreement since was not performed by the Respondents therefore, notice was given and inspite of the notice there had been no performance of the contract, therefore, a civil suit was filed before the trial Court. An application for temporary injunction was also moved. The purchasers/Appellants were impleaded as Defendants. It is also alleged that they have purchased the suit land from the Respondents No. 2,3,4 and 5 who are the co-owners of the joint property.

5. It was contended by the Defendants that Mr. Dissoja was not the exclusive owner of the property and the agreement was executed by him without their knowledge, therefore, it was the case that the said agreement is not binding on them. It was also stated that since the agreement is notarized and the possession of the land has already been taken over by the Plaintiff, therefore it becomes a conveyance within the meaning of Stamps Act. The question with regard to the limitation was also raised because the civil suit was filed on 06/04/2005, though the agreement was executed on 28/05/2002. The trial Court considered the application for interim injunction and while considering the same the Court has taken into account the prima facie case, balance of convenience, and the irreparable loss. The Court has ultimately directed that the land in question was not be sold to any person and against the said order the present M.A. is filed.

6. On behalf of the Appellant it is contended that inspite of the fact that there was no prima facie case in favour of the Plaintiff, the Court below should not have granted injunction.

7. Apart from the aforesaid, it is also contended that the alleged agreement was not registered inspite of the fact that it required to be registered but is only notarized. It is reflected from agreement that the possession was handed over to the Plaintiff, yet the Court below has committed serious illegality in granting injunction. It is also to be seen that it was a joint property and a sale deed by Respondents No. 2,3,4 and 5 is executed in favour of the Appellant and therefore in view of Section 44 of the Transfer of Property Act the share of the executor of the agreement to sale as an owner remains uncertain and therefore in the absence of any suit for partition no injunction should have been granted.

8. It is also contended on behalf of the Respondent that in the instant case there was an agreement to sale and therefore the Respondent No. 2 and 3 are bound under the law to execute the said agreement as they are the successors of the deceased being the family members of the deceased therefore, agreement of sale is binding on them.

9. For the purposes of ascertaining the prima facie case it is to be seen that the document i.e. the agreement of sale is only a notarized document, the same has not been registered even though the possession of the land in question is taken by the Plaintiff as per agreement.

10. In view of the aforesaid, once the possession is handed over then agreement to sale becomes a "conveyance" within the meaning of Stamps Act and in the instant case Schedule 1-A Entry No. 5 E of the Indian Stamps Act, 1899 applied.

11. The Division Bench of this Court in Shiv Kumar Saxena and Others Vs. Manishchand Sinha and Another, has also taken similar view that by virtue of an agreement of sale if the possession is handed over then it becomes conveyance and it requires to be registered.

12. The enforcement of such agreement for specific performance is filed as it has been noticed that it is only notarized and has not been registered.

13. In view of the aforesaid, at this stage it is very difficult to conceive that the said agreement is enforceable and can be acted upon for the purposes of Section 35 of the Stamps Act, 1899. The said document being a conveyance was required to be registered u/s 17 of the Registration Act, 1908. The matter as such has been considered by this Court in a judgment which is reported in 2009 (1) MPLJ 176 (Narbada Prasad Agrawal v. Tarun Bhawasar).

14. The next question arises with regard to the right to sale of the whole property by Joseph Fransis. As per the plaint allegations there is no dispute that Respondent No. 2, 3, 4 and 5 are also co-owners and the suit for specific performance is filed against them. In the said agreement there is nothing that the other co-owners have also consented to sale the suit land. The question with regard to the same of a joint property by one owner has been considered by the Apex Court in Hardeo Rai Vs. Sakuntala Devi and Others, and paragraphs 22 to 26 of the said judgment reads as under:

22. For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a coparcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property as "joint tenants" but as "tenants-in-common". The decision of this Court in SBI1, therefore, is not applicable to the present case.

23. Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property.

24. We have noticed the representation made by the Appellant. If the representation to the Respondents' father was incorrect, the Appellant should have examined his brothers. He should have shown that such a representation

was made under a mistaken belief. He did nothing of that sort.

25. In *M.V.S. Manikayala Rao v. M. Narasimhaswami* this Court stated the law thus: (AIR p. 478, para 5)

5. ...it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased.

26. Thus, even a coparcenary interest can be transferred subject to the condition that the purchaser without the consent of his other coparceners cannot get possession. He acquires a right to sue for partition.

15. Further the Apex Court in *Shanmughasundaram and Others Vs. Diravia Nadar (Dead) by Lrs. and Another*, paragraph 30 of the same reproduced as under:

30. Section 12 of the Specific Relief Act, in our considered opinion, would be of no assistance in the situation obtaining here. In the absence of sisters being parties to the agreement, the vendee can at best obtain undivided interest of two brothers in the property. Section 12 of the Specific Relief Act cannot be invoked by the vendee to obtain sale of undivided share of the two brothers with a right to force partition on the sisters who were not parties to the agreement of sale. Such a relief u/s 12 cannot be obtained by a vendee, on purchase of an undivided share of the property of some of the co-owners, against other co-owners who were not parties to the sale agreement.

16. Thus, on the basis of the aforesaid judgments it is still doubtful that the Plaintiff will have even a prima facie case in his favour for enforcing such an agreement.

17. On the basis of the same, it is crystal clear that in the absence of any consent of co-owners there is no right to transfer the land to the Plaintiff by the deceased by way of agreement though the purchaser can enforce the same with regard to the share who has agreed to sale the land by way of a suit for partition. But in the present case the share remains uncertain as to which share in partition would have gone to the seller. The Apex Court held that it will appropriate to bring a partition suit.

18. The question in the present case is the irreparable loss also. The agreement was executed on 02/04/2002. The original executor expired on 28/05/2002 and suit itself was filed on 06/04/2005. Thus, the right of purchaser can not be restricted in any manner for an indefinite period.

19. Section 44 of the Transfer of Property Act reads as under:

44. Transfer by one co-owner Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a

partition of the same" but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this Section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

20. In view of the aforesaid, I do not find any justification in granting injunction. Accordingly the order passed by the trial Court of injunction on 13/04/2010 passed in civil suit No. 38-A/05 stands set aside.

Appeal stands allowed.