

(2002) 01 GUJ CK 0064
In the Gujarat High Court
Case No : Appeal From Order No. 403 of 1999

Gopal Laxmandas Lakhani	Vs	APPELLANT
Krishnaben Girdharilal Lalvani		RESPONDENT

Date of Decision : 22-01-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 104 , 115

Citation : AIR 2002 Guj 398 : (2002) 22 GLH 427

Hon'ble Judges : H.H. Mehta, J

Bench : Single Bench

Advocate : Nilesh A. Pandya, for the Appellant; P.R. Thakkar, for the Respondent

Final Decision : Dismissed

Judgement

H.H. Mehta, J.—This is an appeal u/s 104 of the CPC read with Order 43, Rule 1(r) of the CPC directed against order dated 2nd August, 1999 passed below Exh. 5 in Special Civil Suit No. 161 of 1999 by the learned IIIrd Joint Civil Judge (S.D.), Vadodara.

2. The present appellant is the plaintiff, while respondent is the defendant in aforesaid suit.

3. Facts leading to the present appeal in a nutshell are as follows :

3.1 Formerly, plaintiff filed Regular Civil Suit No. 1044 of 1998 for a decree of declaration to the effect that defendant has no right, title or interest to transfer the suit property described in Para 11 of the plaint to any other person, without consent of plaintiff. Consequently, plaintiff also prayed for a perpetual prohibitory injunction restraining defendant from transferring the said property to any other person. Subsequently plaintiff amended the plaint and prayed for a decree for specific performance of an agreement to sell dated 21st July, 1998 executed by defendant in favour of plaintiff, as a result of such amendment, the aforesaid Regular Civil Suit No. 1044 of 1998 was converted and it was numbered as Special Civil suit No. 161 of 1999.

3.2 On 12-8-1998, plaintiff has submitted an application Ex. 5 for an interim injunction restraining defendant from transferring the suit property to any other person till final disposal of the suit. Consequent upon amendment in the plaint for relief of decree for specific performance of agreement to sell, relief at Para 8-A was added by which plaintiff prayed for an interim mandatory injunction directing defendant to hand over the physical possession of suit property to plaintiff.

3.3 Admittedly, the suit property is of ownership of defendant. The defendant executed an agreement to sell on 16-4-1998 for suit property in favour of plaintiff for consideration of Rs. 5,50,000/-. It is the case of the plaintiff that plaintiff has paid in all Rs. 3,67,885/- by different items to the defendant till the date of said agreement to sell. That agreement to sell was got registered in the Office of the Sub-Registrar. Baroda on 21st April, 1998.

3.4 It is the case of the plaintiff that as per said agreement to sell, final sale deed was to be executed within six months from the date of that agreement to sell. It was also agreed upon by and between both the parties the plaintiff would pay remaining amount of Rs. 1,82,115/- to defendant at the time of execution of final sale deed. Thereafter on 22-4-1998, one agreement was executed in between plaintiff and defendant. It is the case of the plaintiff that by execution of the second agreement on 22-4-1998, defendant had handed over the possession of suit property except the first floor, to plaintiff.

3.5 It is the case of the plaintiff that on or about 19-7-1998, defendant got one criminal complaint lodged against plaintiff through her husband and in connection with that complaint, police arrested and took plaintiff into police custody on 20-7-1998. On that very day i.e. 20-7-1998, the defendant filed Regular Civil Suit No. 942 of 1998 against plaintiff in the Civil Court, Vadodara and sought an ex pte interim injunction restraining plaintiff from entering into suit property. Thereafter, present plaintiff was released on bail in case lodged against him by the husband of the defendant. He came to know that defendant had taken over the possession of suit property in his absence when plaintiff was in police custody. Thereafter, plaintiff filed aforesaid suit and filed application Ex. 5 for reliefs stated earlier.

3.6 On the date of filing of the application Exh. 5 i.e. 12-8-1998, the learned Judge of the trial Court granted ad interim injunction in terms of Para 5-A of the application Ex. 5 for a limited period up to 28-8-1998 and subsequently that order was extended from time to time till 1-8-1999.

3.7 In the said proceeding of application Ex. 5, defendant appeared and filed his written statement at Ex. 42. After hearing the learned Advocates for both the parties and after examining the documents and affidavits produced by both the parties, the learned Judge of the trial Court came to a conclusion that on the date of filing of the suit, the plaintiff was not in possession of the suit property, and therefore, the plaintiff has no prima facie case. Ultimately, the application

Ex. 5 came to be dismissed with costs on 2-8-1999, and ad interim injunction granted on 13-8-1998 came to be vacated, As against that order, that appeal has been preferred by the original plaintiff.

4-5. When this appeal was taken up for hearing, neither respondent nor his advocate Shri P. R. Thakkar has remained present, and therefore, in their absence, this appeal has been heard.

6. Heard Shri N. A. Pandya, the learned Advocate for the appellant in detail. Shri Pandya has produced copy of plaint, copy of agreement to sell and copy of agreement dated 22-4-1998 for perusal of this Court.

7. I have heard Shri N. A. Pandya, the learned advocate for the appellant in detail at length. I have perused the impugned order which is challenged in this appeal.

8. It is settled legal position that granting or refusing temporary injunction rests on the sound exercise of discretion of the Courts, and such exercise of discretion cannot be lightly interfered with by the appellate Court unless it is shown that such exercise of discretion is unreasonable or capricious. The area of interference of discretionary orders passed by the Courts below in exercise of the discretion vested in them by the appellate Court in appeal against such orders is, although, not so much restricted as in the case of a revision u/s 115, C.P.C., still it is not as wide as the normal and ordinary appellate powers of an appellate Court in dealing the appeals, the power is indeed very much restricted in its scope. The area of interference of such discretionary orders by the appellate Court is circumscribed by the limitations and such interference would be legally permissible only where the order under review is passed by the Courts below acting unreasonably or capriciously or ignoring relevant facts and adopting an unjudicial approach. Certainly, in exercising the appellate powers, the appellate Court cannot substitute its own exercise of discretion for that of the trial Judge.:

9. As per case of the plaintiff, defendant executed an agreement to sell for suit property on 16-4-1998. I have perused copy of the documents. By that agreement to sell, plaintiff agreed to purchase the suit property for consideration of Rs. 5,50,000/-. It also appears that as against that consideration of Rs. 5,50,000/-, defendant had received in all Rs. 3,67,885/- by different items from plaintiff till date of that agreement to sell. One of the contentions was to the effect that defendant had to execute final sale deed within six months, but for that, plaintiff had undertaken to fulfil his obligation to pay rest of the consideration i.e. Rs. 1,82,115/-. Nowhere, it is stated that possession of suit property was given by the defendant to plaintiff. As per case of the plaintiff, this agreement to sell was got registered in the Office of Sub-Registrar, Baroda on 21-4-1998.

10. It is further the case of the plaintiff that on 22-4-1998, plaintiff and defendant both entered into one single agreement and both the parties had signed before the Notary. It is the case of the plaintiff that by this agreement dt.

22-4-1998, defendant handed over actual physical possession of the suit property except first floor to plaintiff. On reading this second agreement dated 22-4-1998, it appears that defendant informed plaintiff to cancel the agreement to sell, executed on the previous day. Therefore, plaintiff demanded Rs. 3,67,885/- which he had already paid to defendant. On such demand being made, defendant informed plaintiff that immediately he was not able to return that amount paid by the plaintiff. By this second agreement, defendant agreed to return Rs. 3,67,885/- to plaintiff within six months. It was also agreed upon by both the parties that in case within six months, if third party is prepared to pay some higher price, then defendant will sell the suit property to that third party offering higher price and at that time, plaintiff will not object and plaintiff will sign as confirming party in the said final sale deed which may be executed by defendant in favour of that third party offering higher price. It appears from the second agreement that possession of suit property was given by defendant to plaintiff only in security of Rs. 3,67,885/-. Anyhow, an agreement to sell dated 21-4-1998 was executed in favour of plaintiff and possession of the suit property was given on the next day,

11. Now, plaintiff has made out a specific case in his plaint stating following facts:

(i) On or about 19-7-1998, defendant got one criminal complaint filed against plaintiff through her husband and in the proceeding of that complaint, plaintiff was taken up in police lock-up on that very day.

(ii) He was produced before the Magistrate in criminal case on 20-7-1998.

(iii) On 20-7-1998, defendant filed Regular Civil Suit No. 9412 of 1998 against plaintiff of this suit and obtained an ex parte interim injunction restraining plaintiff of this suit from disturbing possession of the defendant of this suit.

(iv) As plaintiff was in police lock-up on 19-7-1998, by taking advantage of his absence in the suit property, defendant ousted plaintiff from the suit property.

(v) From impugned order which is challenged in this appeal, police took plaintiff in police custody on 19-7-1998 during night hours and he was produced before the learned Magistrate at 14-00 hrs. on 20-7-1998. It also appears that plaintiff was released on bail on 20-7-1998.

12. By stating aforesaid facts, plaintiff has advanced his case that he has been dispossessed from the suit property illegally, and therefore, mandatory injunction be granted to plaintiff directing defendant to hand over the physical possession of the suit property to plaintiff.

13. Originally, the plaintiff had filed Regular Civil Suit No. 1044 of 1998 for a decree of declaration to the effect that the defendant has no right whatever to transfer the suit property in any manner without the consent of the plaintiff and consequently, decree of perpetual prohibitory injunction has been sought for, restraining the defendant from transferring the suit property to any person by any mode. Thereafter on or about 4-2-1999, plaintiff got the plaint of Regular

Civil Suit No. 1044 of 1998 amended by which a prayer for decree of specific performance has been sought for. As the suit property is of value exceeding Rs. 50,000/-, the suit was converted from Regular Civil Suit No. 1044 of 1998 to Special Civil Suit No. 161 of 1999. As a result of such amendment, the plaintiff also amended application Ex. 5 by which he also prayed for a relief for an interim mandatory direction directing defendant to hand over possession of suit property to plaintiff. So from pleadings of the plaintiff after amendment application was allowed in Regular Civil Suit No. 44 of 1998. It appears that plaintiff was not in possession of suit property, and therefore, by submitting application Ex. 5 with subsequent amendment, plaintiff has prayed for an interim mandatory injunction.

14. From the above facts, one thing is certain that plaintiff is not an owner of the suit property. On the date of filing of the suit, he was not in possession of suit property. When the Court granted permission to amend plaint on 4-2-1999, for the first time, he prayed for an interim relief of mandatory nature, and therefore, even on the date of the suit and even on 4-2-1999, plaintiff was not in possession of the suit property. The plaintiff has based his claim on the basis of an agreement to sell in which there is no reference to the effect that possession of the suit property was given to plaintiff. As per the case of the plaintiff, on the second day when defendant informed plaintiff that he was cancelling the Banakhat, possession was given to plaintiff only for the purpose of security of money, and therefore, no right, title or interest was created in the property in favour of plaintiff. Agreement to sell is one type of contract, saying that one party will purchase the property from opposite party for consideration and that opposite party will sell it to plaintiff. When possession of property was not given at the time of execution of agreement to sell, question with regard to part performance u/s 53A of the Transfer of Property Act will not arise. In case of Keshavlal Laxmandas Patel Vs. Narsinhbhai Kalidas Patel and Another, it is held that agreement to sell does not create any interest or any such right in the property.

15. So far as the fact with regard to possession of suit property which was taken away by defendant on 20-7-1998, in absence of plaintiff, when he was in police custody is concerned, the case pleaded by plaintiff rests on certain facts and these facts are required to be proved by tendering evidence in the trial Court. At this stage, this Court cannot accept the case of the plaintiff with regard to circumstances leading to alleged dispossession of plaintiff from the suit property. When the question with regard to dispossession of suit property is pleaded, it requires to be examined by evidence which may be adduced by both the parties in the trial Court. Under the circumstances, admittedly when on the date of suit and even on the date of amendment of the plaint, the plaintiff was not in possession of the suit property, and therefore, the learned Judge Of the trial Court has rightly held that the plaintiff has no prima facie case. When the defendant is in possession of the suit property and when the plaintiff is prevented from entering into the suit property by Court's order passed in Regular Civil Suit No. 942 of 1998, that order of the Court cannot be set at

naught by granting mandatory injunction in this suit, and therefore, I am of the opinion that the learned Judge of the trial Court has rightly refused the prayer of Interim mandatory injunction.

16. Shri N. A. Pandya, the learned Advocate for the appellants has placed reliance on following authorities:

(1) Ramesh Devchand Pala v. Jayant-kumar Gordhandas Madani, reported in 1998(1) GLR 610.

(2) State of Maharashtra Vs. Pravin Jethalal Kamdar (Dead) by Lrs., .

Aforesaid two authorities are pertaining to litigation initiation u/s 6 of the Specific Reliefs Act, 1963. The plaintiff has not filed the suit u/s 6 of the Specific Reliefs Act, 1963. The plaintiff has filed the suit u/s 10 of the Specific Reliefs Act, 1963, and therefore, these two authorities are not helpful to the appellant.

17. Shri Nilesh Pandya has also placed reliance on case of M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, . In this case, the Hon"ble Supreme Court has held as under :

Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the Jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These consideration will arise not only in respect of the person who seeks an order of injunction under Order 39, Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings.

18. Shri Pandya has argued that conduct of defendant is required to be considered because the defendant got one complaint lodged through her husband, as a result of which, in connection with that complaint, he was taken into police custody and by taking advantage of his absence, while he was in police custody, defendant filed Regular Civil Suit No. 942 of 1998 and he was prevented from entering into the suit property. This conduct is consisting of certain facts and those facts are required to be scrutinized and that can be done only by leading evidence by both the parties in the trial Court. At this juncture, the case relating to that conduct cannot be assessed or accepted as gospel truth. In view of this, this authority is not helpful to the plaintiff, because the case of that authority has been decided on peculiar facts and circumstances of that case.

19. Ashwinkumar K. Patel Vs. Upendra J. Patel and Others, , it has been held that

where agreement for sale of land found to be invalid but plaintiff proved possessory right and permissive possession which accepted by owners, plaintiff was entitled to temporary injunction in his favour. Here in this case, permissive possession is not proved because on the date of the suit, plaintiff was not in possession of suit property, and therefore, this authority is not helpful to the plaintiff.

20. The plaintiff has prayed for interim mandatory injunction. In case of *Dorab Cawasji Warden Vs. Coomi Sorab Warden and others*, , the Hon''ble Supreme Court has given certain guidelines as to when interim mandatory injunction can be granted. It has been held in Paras 14 and 15 as follows :

Para 14:

"The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, Courts have evolved certain guidelines. Generally stated these guidelines are :

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious Injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

Para 15:

Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive or complete or absolute rules, and there may be exceptional circumstances needing action, applying them as pre-requisite for the grant or refusal of such injunction would be a sound exercise of a judicial discretion."

21. Looking to the facts and circumstances of the case, plaintiff is unable to satisfy the aforesaid guidelines, and therefore, plaintiff is not entitled to mandatory injunction as prayed for.

22. The plaintiff has based his case on title flowing from agreement to sell. The

Hon"ble Supreme Court in case of Dalpat Kumar and another Vs. Prahlad Singh and others, held as under :

"Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession."

23. As discussed earlier, the learned Judge of the trial Court has rightly held that plaintiff has failed to satisfy the Court that he has got a prima facie case. Under the circumstances, the case advanced on the basis of agreement to sell without possession of the suit property having been given to plaintiff, cannot be said to be a prima facie case, and therefore, the learned Judge of the trial Judge has rightly dismissed the application Ex. 5, and therefore, this appeal deserves to be dismissed.

24. Before concluding argument, Shri N. A. Pandya, the learned advocate for the appellant submitted that in case, if this Court comes to a conclusion that the appeal is required to be dismissed, that in that case, it is necessary for the defendant to be directed to maintain status quo with regard to suit property so that the suit property cannot further pass into the hands of a third party by way of further transfer. This prayer seems to be reasonable and that prayer is required to be considered.

25. In view of what is stated hereinabove, this appeal is dismissed. No order as to costs. Still however, considering the peculiar facts and circumstances of the case, as a measure of equitable relief, the respondent/defendant is directed to maintain status quo as of this day with regard to suit property described in Para 11 of the plaint, till final disposal of the suit.