

(2011) 07 DEL CK 0342

In the Delhi High Court

Case No : IA No. 13036 of 2010 in CS (OS) No. 1356 of 2009

Gurmeet Singh

APPELLANT

Vs

Hardev Singh and Others

RESPONDENT

Date of Decision : 18-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, 151

Citation : (2011) 183 DLT 191

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : J.M. Kalia, for the Appellant; Prasson Kumar, D-1 and 2, V. Shekhar Puneet Bhatnagar for D-3, for the Respondent

Final Decision : Disposed Off

Judgement

Manmohan Singh, J.—By this order I shall dispose of the present application filed by the Defendant No. 3 in the present suit under Order 39 Rule 4 read with Section 151 CPC seeking variation/ modification/ vacation of the orders dated 29.07.2009 and 10.11.2009 passed in the present case.

2. The brief facts leading up to the filing of the present application are that the Plaintiff is a retired government employee whose wife and younger son are dependent upon him. As per the Plaintiff, the Defendant Nos. 1 and 2, who are his son and daughter-in-law, in conspiracy with each other and without informing the Plaintiff, got the sale deed of the property bearing No. 92, 3rd Floor, Sector-9, Pocket-1, Dwarka, New Delhi, executed in favour of the Defendant No. 1, despite the fact that the entire consideration of the said property was paid by the Plaintiff out of his retirement benefits and subsequently sold the said property to the Defendant No. 3.

3. It is stated by the Plaintiff, that the he came to know of this fraudulent conduct of the Defendant Nos. 1 & 2 only in the first week of July 2007 when they asked him, his wife and younger son to vacate the suit property and

disclosed that they have entered into an agreement to sell with the Defendant No. 3 and therefore, the vacant possession of the suit property has to be handed over to him on the registration of the sale deed.

4. Further, it is stated that the Defendant Nos. 1 & 2 after dishonestly selling the suit property for a consideration of Rs. 30,00,000/- to the Defendant No. 3 have purchased another flat on 30.07.2007 at a consideration of Rs. 16,00,000/- bearing No. 375, 3rd Floor, Pocket-B, Sector-13, Dwarka, New Delhi where both of them are presently residing. After moving to their new flat, the Defendant Nos. 1 & 2 along with Defendant No. 3 tried to forcibly dispossess the Plaintiff and his family from the suit property, but, could only take possession of two rooms where they have put their locks.

5. Therefore, the Plaintiff filed the present suit for cancellation of the sale deed dated 30.07.2007 and mandatory injunction.

6. On 29.07.2009, when the matter was listed for the first time, this Court passed an ex-parte order in I.A. No. 9466 filed by the Plaintiff Order 39 Rules I and 2 read with Section 151 CPC. The relevant extract of the said order reads as follows:

Accordingly, it is directed that till the next date of hearing the Defendants are restrained from selling, transferring, alienating, disposing of or creating third party rights in any manner whatsoever in the property bearing No. 92, 3rd Floor, Sector-9, Pocket-1, Dwarka, New Delhi and Flat No. 375 (3rd Floor) Pocket-B, Sector-13, Dwarka, New Delhi. Status quo shall also be maintained by the parties. This is subject to Plaintiff complying with Order XXXIX Rule 3 within a period of one week from today.

7. When the matter was listed before Court on 10.11.2009, the counsel for the Defendant No. 3 stated that he has no objection to order dated 29.07.2007 being made absolute if it is clarified that the said order will not come in way of his suit before the ADJ, Tis Hazari Courts, Delhi. On 10.11.2009 the court passed the order making the order dated 29.07.2007 absolute. The relevant extract of the order dated 10.11.2009 reads as follows.

I have heard the learned Counsel for the parties. It is clarified that the District Court may proceed with the Defendant No. 3's suit in its own way; however, if a final order is passed in the application under Order 12 Rule 6 of the CPC, it shall not be given effect, during the subsistence of the interim order passed in the present suit. Accordingly, order dated 29.07.2009 is made absolute. However, liberty is given both parties to move the court for variation, if found necessary, in the event a final order is passed by the District Court in the application under Order 12 Rule 6 of the CPC filed in Defendant No. 3's Suit No. 46/2008.

8. Now the Defendant No. 3 filed an application under Order 39 Rule 4 CPC for vacation of stay as the applicant/Defendant No. 3's earlier suit for possession bearing No. 46 of 2008 with respect to the suit property was pending before ADJ,

Tis Hazari Courts, Delhi, has been decreed vide order dated 05.02.2010 by allowing the application of the applicant/Defendant No. 3 under Order 12 Rule 6 CPC. A decree for possession directing the Plaintiff herein to hand over and deliver actual/physical, vacant peaceful possession of the suit premises to the applicant/Defendant No. 3 herein. It was stated in the order that the execution of the decree shall be subject to the order/ judgment of this Court in the present suit.

9. The case of the Defendant No. 3 is that since the decree for possession has been passed in his favour by District Judge on 05.02.2010 and while confirming the interim order on 10.11.2009, the liberty was given to the parties to move the Court for variation, if found necessary, in the event the final order is passed by the District Court in the application under Order 12 Rule 6 CPC filed by the Defendant No. 3 in Suit No. 46/2008. Therefore, the present application is maintainable and Defendant No. 3 is entitled for the relief, as prayed for.

10. The Plaintiff in his reply to the application has not denied the fact that the application of the Defendant No. 3 under Order 12 Rule 6 CPC was allowed and the suit was decreed by the order/judgment dated 05.02.2010. The contention of the Plaintiff is that an appeal bearing RFA No. 422/2010 had been filed before this Court and the same is pending for disposal. Thus, the interim order passed on 29.07.2009 be not modified. It is stated that earlier a similar application, being IA No. 14384/209, was not pressed by the Defendant No. 3, therefore no valid ground has been made out by the Defendant No. 3 to vary the interim order and at least till decision in RFA No. 422/2010, which is pending for disposal.

11. The learned Counsel appearing on behalf of the Defendant No. 3 has not denied the fact that the appeal against the judgment dated 05.02.2010 had been filed by the Plaintiff. The learned Counsel for the Defendant No. 3 states that the operation of the order/judgment passed has not been stayed by the Court. Rather, the stay application was dismissed as withdrawn. He has admitted before Court that a fresh application has been filed by the Plaintiff for stay of the operation of the judgment passed in Suit No. 46/2008 which is pending for disposal.

12. Provision of Order 39 Rule 4 CPC reads as under:

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 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 interests 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.]

13. From the plain reading of proviso of the Order 39 Rule 4 CPC, it is clear that an order of injunction can be discharged, varied or set aside by a change of circumstances after satisfaction of the Court that the interim order passed earlier had caused undue hardship to the party.

14. Let me now discuss the rival submissions of the parties in the facts and circumstances of the present case.

15. It is the admitted position that the Plaintiff is the father of the Defendant No. 1 and father-in-law of the Defendant No. 2. The learned Counsel appearing on behalf of the Defendants 1 and 2 admitted before the Court that the suit property had been sold to the Defendant No. 3 for a consideration of Rs. 30,00,000/-. It is also informed that against the said amount received by the Defendants 1 and 2, they have purchased another property bearing No. 375, 3rd Floor, Pocket-B, Sector-13, Dwarka, New Delhi, for a consideration of Rs. 16,00,000/- where both the Defendants are residing. The counsel for the Defendants 1 and 2 has also made a statement that they have no objection if the Plaintiff resides with them. The counsel for Defendant Nos. 1 and 2 has also made a statement that the said property has rightly been sold by Defendant No. 1, being the owner of the said property. It is also stated that the Plaintiff was one of the witnesses in the sale-deed executed in favour of the Defendant No. 3.

16. The fact remains that the Defendant No. 3 has purchased the property from the owner of the property and has admittedly paid a sum of Rs. 30 lac. In case the Plaintiff has any dispute about the ownership of the property with the Defendant No. 1, the same may continue. As far as the Defendant No. 3 is concerned, the suit filed by the Defendant No. 3 for possession has already been decreed and in appeal, no stay against the judgment and decree dated 05.02.2010 has been passed. Therefore, there is no impediment to pass the order sought by the Defendant No. 3. As far as the other objection of the Plaintiff about the maintainability of the present application is concerned, the earlier application under Order 39 Rule 4 CPC filed by the Defendant No. 3 was withdrawn at the stage, when his suit for possession was still pending. The interim order was continued with the consent of Defendant No. 3. The liberty was granted to him if his application under Order 12 Rule 6 CPC is allowed, he could move the court for variation. Thus, in view of the change of circumstances and hardship shown by the Defendant No. 3, the relief sought by the Defendant No. 3 can be granted as the Defendant No. 3 is able to show his hardship. According to him, he has paid the consideration after taking the loan and he is paying Rs. 30,000/- per month as loan installment. At the same time he is not enjoying the possession of the suit property despite the fact that decree is passed in his favour.

17. I agree with the learned Counsel for the Defendant No. 3 that the present case is a fit case where if the prayer sought by the Defendant No. 3 is not granted, undue hardship would be caused to the Defendant No. 3. The present application is accordingly allowed. Accordingly, the Defendant No. 3 is allowed to file and proceed with the execution of the judgment/order dated 05.02.2010 passed by Sh. Jitender Mishra, ADJ, Tis Hazari Courts, Delhi, in Suit No. 46/2008 titled as "M/s Mithi Interiors Pvt. Ltd. v. Hardev Singh and Ors." The application, being IA No. 13036/2010, stands disposed of.