

(2019) 08 RAJ CK 0029

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 254 Of 2017

Har Narayan

APPELLANT

Vs

Kanchan Panwar And Ors

RESPONDENT

Date of Decision : 09-08-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2

Citation : (2019) 08 RAJ CK 0029

Hon'ble Judges : Sanjeev Prakash Sharma, J

Bench : Single Bench

Advocate : H.R. Soni, O.P. Mehta

Final Decision : Allowed

Judgement

1. This appeal was heard finally with the consent of counsel for the parties.
2. The appellant has challenged order passed by learned Additional District Judge No.1, Jodhpur Metropolitan on an application under Order 39 Rule 1 & 2 CPC dated 06.10.2016 whereby he has passed interim injunction directing that the property situated at Plot No.162-B, Bhagat Ki Kothi, Jodhpur shall neither be alienated nor transferred nor any construction be made thereto.
3. Learned counsel appearing for the appellant submits that he has no objection with regard to the injunction relating to restraining from alienation of property or transferring it to any third party. He submits that so far as restraining the appellant from making construction in the property is concerned, was wholly uncalled for. Learned counsel has submitted that the property is in possession of the appellant-defendant. Admittedly the plaintiff is residing in another plot situated at B-385, Saraswati Nagar, Jodhpur. Learned counsel submits that neither prima facie case was in favour of the plaintiff nor balance of convenience can be said to be in her favour. No irreparable injury was being caused if construction was made on the property, as the appellant would be constructing the house at his own risk and cost and if at all ultimately the suit would have

been decreed in favour of the plaintiff, the constructed portion could have been handed-over to the plaintiff.

4. Per contra, learned counsel appearing for the respondent has vehemently opposed the submissions and submits that the respondent-plaintiff was a widow of brother of the appellant in whose favour father of the appellant had promised to give half portion of the said property in-question. In this regard he had written a letter to JDA Authorities for dividing the house property in two portions and, thus, as per the promise, the property would have come in respondent's favour as her husband expired. Learned counsel while supporting the order submits that it has correctly reached to the conclusion that the property of Plot No.162 was required to be divided as per wish of father as Plot No.161-A and 162-B and one of the plot was required to be given to Govind Ram, late husband of the plaintiff-respondent and, therefore, submits that injunction order ought not be interfered and has relied upon the following judgments :- 2014(2)WLC (SC) Civil 407 Babu Lal & Ors. Vs. M/s. Vijay Solvex Ltd. & Ors.; 2012 AIR SCW 3007 Marcel Martins Vs. M. Printer & Ors; 2008(2) Western Law Cases (SC) Civil 528 Shaikh Ali Hossain & Ors. Vs. Sk. Showkat Ali & Anr., 2004(8) SCC 488 Maharwal Khewaji Trust (Regd.) Faridkot Vs. Baldev Dass; AIR 1958 SCC 79 Martin Burn Ltd. Vs. R.N. Banerjee; AIR (39) 1952 SC 12 The State of Orissa Vs. Madan Gopal Rungta; 2014 AIR CC 378 (Raj.) Bhagwati Singh Vs. Raja Laxman Singh; AIR 1964 (Raj.) 279 Narayan Dutt & Anr. Vs. Smt. Mohani Devi; RLR 1988(1) 850 M/s. Toyal Bros. Vs. Gram Panchayat Chichowari; 2013(4) DNJ (Raj.) 1501 Jai Singh Vs. Kuldeep Sharma & Anr.; 2008(2) DNJ (Raj.) 955 Janki Devm (Smt.) Vs. Santosh Kumar; 2008(1) DNJ (Raj.) 368 Safi Khan Vs. Ibrahim Khan & Ors.; DNJ (Raj.) 1995 page 699 Bhabhoota Ram Vs. G.D. Saxena & Anr.; AIR 1978 Allahabad 157 Ram Chander Dubey & Anr. Vs. Deputy Director of Consolidation; 2013(3) DNJ (Raj.) 1094 Rajeshwer Shankar Choudhary @ Rajesh Choudhary & Anr. Vs. Shiv Shankar Choudhary & Ors.; 1996(4) CCC page 394 (Raj.) Exotique Apparels, Smt. Indira Bali Vs. Tonk Tanneries Pvt. Ltd. & Ors.; AIR 2009 (NOC) page 2462 (Gau.) Lankeshwar Malakar & Ors. Vs. Harendra Nath Deka (Dead) & Ors and AIR 2014 Madras page 6 R. Jayapaul Vs. Pappayee Ammal.

5. I have considered the submissions and have gone through the record, which was summoned from the trial court.

6. The plaintiff-respondent has preferred a suit for declaration, possession and cancellation of gift-deed executed in favour of the defendant-appellant. Plot No.162 was allotted in the name of Tulsi Ram (father of the appellant and father-in-law of the respondent no.1 and wife of late Shri Govind Ram). The gift-deed is a registered gift-deed in favour of the appellant, which is sought to be cancelled.

7. Several grounds have been raised by the plaintiff-respondent for cancellation of gift-deed. She has admitted in her plaint that she does not have possession of the property in-question and submits that the appellant is making construction on half portion of the house property after demolishing the existing constructions in that portion. She is also praying for a declaration that half portion of Plot 162

should be declared in her name as 162-B. Alongwith the suit seeking declaration, possession and cancellation of gift-deed, an application under Order 39 Rule 1 & 2 CPC has also been moved wherein a prayer was made to restrain the appellant from making any construction on the plot in-question. While hearing the application under Order 39 Rule 1 & 2 CPC, the trial court has examined the case on three aspects viz., prima facie case, balance of convenience and irreparable loss.

8. However, in the opinion of this Court, the trial court has failed to notice various essential aspects required to be examined for the purpose of assessing whether a prima facie case is made out or not ?

Admittedly, there exists as on today a registered gift-deed, which has been executed by father Tulsi Ram in favour of the appellant. The appellant is also having possession over the plot but without examining the aforesaid, the trial court has proceeded to hold prima facie case in favour of the respondent solely on the basis of a promise reflected from a letter written by father of the appellant to give half portion of the property to her husband Govind Ram to JDA. The said promise never materialized and the plot was allotted only in the name of father i.e. Tulsi Ram as her husband expired. Thus, this court finds that the learned trial court has passed an order hinging to perversity on the aspect of prima facie case.

9. As regards balance of convenience, it is noticed that the appellant has already demolished the existing construction i.e. half portion of the property where he intends to make new construction. There is no title existing in favour of the plaintiff. Now the unfinished house is lying in the same status, thus, this Court fails to understand as to how the balance of convenience can be said to be made out in favour of the respondent plaintiff, who neither lives in the said house nor is having any possession on any portion thereto. No document is executed in her favour which may show prima facie that she has a title. On the other hand, it is to be noticed that the appellant has already spent a huge amount for making construction of the house and has already started demolishing for re-constructing the house, thus, keeping the house in a dilapidated stage would go against the convenience of the appellant, who is admittedly residing in the said property, thus, the balance of convenience is also in favour of the appellant.

10. The question regarding irreparable loss is also not made out so far as the permission to allow construction is concerned. There is no such averment that if construction is made on the part of portion, her rights will be taken away for all the times to come. Of course, if any third party rights are created, irreparable loss can be said to be caused to the plaintiff.

11. Thus, keeping in view the above, while holding balance of convenience and prima facie case in favour of the appellant, this Court finds that the order passed by the learned court below restraining the appellant from making construction on the property in-question deserves to be set aside.

12. Keeping in view the aforesaid, I have carefully gone through the judgments cited by learned counsel for the respondent and find that each case of injunction has been decided in terms of the facts which are on record therein and this Court respectfully agrees with the ratio of judgments passed. As noted above i.e. for the purpose of grant of injunction three basic salient features must be examined keeping in view facts which have come on record.

13. In view of the above findings, the order passed by the learned court below dated 06.10.2016 is set aside with a direction to the parties not to create any third party rights in the property in-question and not to alienate the property during pendency of the suit. However, it is made clear that if any construction is made by the appellant on the property, which is in his possession as on today, the same would not create indefeasible right in his favour and would always be subject to final adjudication of the suit.

14. Accordingly, this appeal is allowed as above. All the applications stands disposed of accordingly. The Registry is directed to send the record back to the concerned court.