

(2013) 01 GUJ CK 0091
In the Gujarat High Court

Case No : Appeal From Order No. 326 of 2011 with Civil Application No. 11726 of 2011

Ishwarbhai Lallubhai and 5

APPELLANT

Vs

Maganbhai Nanjibhai Patel

RESPONDENT

Date of Decision : 24-01-2013

Acts Referred:

Citation : (2013) 01 GUJ CK 0091

Hon'ble Judges : Rajesh H Shukla, J

Bench : Single Bench

Advocate : P.P. Majmudar,s No. 1 - 6 and Mr. S.P. Majmudar,s No. 1 - 6, for the Appellant; B.M. Mangukiya, Advocate for the Respondent(s) No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh H. Shukla, J.—The present Appeal from Order has been filed by the appellants-original defendants being aggrieved with the impugned order passed below Exh. 5 in Special Civil Suit No. 280/2009 by the 8th Addl. Sr. Civil Judge, Surat, dated 7.7.2011 granting injunction on the grounds stated in the memo of the Appeal from Order. Heard learned advocate Shri S.P. Majmudar for the appellants and learned advocate Shri Mangukiya for the respondent.

2. Learned advocate Shri Majmudar has submitted that the court below has failed to appreciate the fact that the suit for specific performance of an agreement of 15.12.1989 has been filed in the year 2009 and therefore would be barred by limitation. He strenuously submitted that the execution of such agreement to sell or receipt of the consideration or part payment has been denied, disputed and the said agreement to sell is not even signed by the appellants-original defendants. He, therefore, submitted that the court below has failed to consider these aspects. He further referred to the impugned order and submitted that though the claim is made with regard to part payment of the consideration over a period of time, there is no evidence produced on record. He

submitted that when the consideration is said to be paid by cash, there has to be some evidence or material and unless it is established by some evidence, it cannot be accepted as a truth.

3. In support of his submission, learned advocate Shri Majmudar has referred to and relied upon the judgment of this High Court in the case of Harshadkumar Kantilal Bhalodwala and Another Vs. Ishwarbhai Chandubhai Patel and Others, , and submitted that as observed in this judgment, unless payment of consideration has been proved by other material or cogent evidence, it cannot be readily accepted as a gospel truth. Learned advocate Shri Majmudar submitted that, in fact, the document which has been referred to by the other side is with regard to the revenue record for payment of taxes or dues which is in the name of the appellants. He also submitted that admittedly the possession of the property is with the respondent and therefore the impugned order has been passed without considering the basic relevant criteria for grant of injunction. He submitted that the plaintiff has to prove a prima facie case, then only the question of balance of convenience etc. would arise. He submitted that if the plaintiff has failed to establish even a prima facie case, then the balance of convenience etc. would not be considered as it may not be relevant.

4. In support of his submission, he has referred to and relied upon the judgment of the Hon''ble Apex Court in the case of K.S. Vidyanadam and Others Vs. Vairavan, , to emphasise his submission with regard to the limitation. He submitted that as observed in this judgment, the delay with the rise in prices would raise doubt about the genuineness of the claim made. He therefore submitted that equitable relief is not required to be granted to the respondent-plaintiff who has slept over his right for all these years and therefore the impugned order granting injunction requires modification and the present Appeal from Order may be allowed.

5. Per contra, learned counsel Shri Mangukiya for the respondent-original plaintiff referred to the papers and submitted that the documents which have been placed with the paper-book may be considered. He pointedly referred to the agreement to sell produced on record and submitted that in fact there is an acknowledgment about the receipt of the part payment by the appellants. He has shown this endorsement from his copy, though the agreement to sell produced with the list does not have such endorsement on the back-side. Further, learned counsel Shri Mangukiya submitted that the payment has been made over a period of time and the last payment has been made in the year 2007 for which there is an entry in the diary with the acknowledgment or the hand-writing of the appellants-defendants herein. Learned counsel Shri Mangukiya has also referred to such entry in the diary and submitted that the said aspect has been considered in the impugned order in para 11. He also referred to the receipt for acceptance of the part payment.

6. He therefore submitted that the matter requires consideration and the injunction is only to the extent that the land in question may not be sold or

transferred in any way so as to create the right of any third party. He therefore submitted that the impugned order is just and proper. He has also referred to the written statement filed by the defendants. Learned counsel Shri Mangukiya submitted that if the suit is not maintainable and is barred by the law of limitation, the appellants original defendants could have filed an application under O.7 R.11. He has therefore submitted that the present Appeal from Order may not be entertained.

7. In view of rival submissions, it is required to be considered whether the present Appeal from Order calls for any interference or not.

8. The first aspect which is required to be considered and which has been much emphasised by learned counsel Shri Majmudar about the delay is required to be considered. It has been contended that in respect of the agreement to sell dated 15.12.1989 the suit for specific performance is filed in 2009 is hopelessly barred by the law of limitation is required to be considered. Though at the first blush this argument may sound appealing, but in light of the contentions and prima facie material which has been referred to hereinabove it requires a closer scrutiny on the basis of appreciation of evidence.

9. There is a specific contention about receipt/acknowledgment of part payment in the agreement to sell dated 15.12.1989 though the very execution thereof is disputed. Further, part payment has been received till 2007 for which an entry in the diary is also produced. There are witnesses also. Therefore, whether it would be barred by limitation or not is a mixed question of law and facts which could be considered on the basis of material and evidence at the trial.

10. Again, as it has been observed by the court below referring to this aspect in para 11, it would suggest that as per the terms of the agreement to sell, there were mutual obligations including obligations on the appellants-defendants to get the IT. clearance certificate and also the encumbrance on the property in question. Further, much emphasis given by learned advocate Shri Majmudar that the payment has been made in cash and unless some other evidence or the material is produced, the same cannot be accepted and the burden lies on the respondent-plaintiff is also required to be considered.

11. In the facts of the present case, as discussed hereinabove, there is an acknowledgment prima facie with regard to part payment and it is not necessary that there has to be a withdrawal from the bank showing that the amount has been withdrawn from the bank for payment of the consideration. Therefore, the totality of the facts and circumstances has to be seen and when there is an agreement to sell with the endorsement for the part payment, prima facie, the impugned order passed by the court below cannot be said to be erroneous which would call for any interference.

12. The Hon''ble Apex Court has laid down broad guidelines with regard to the approach in such appeal from order for the purpose of interference with the discretionary order passed by the trial court. The Hon''ble Apex Court in a

judgment in the case of Julien Educational Trust Vs. Sourendra Kumar Roy and Others, has specifically observed that if the discretionary order passed by the trial court is not perverse or is not misdirected in the sense that it has not considered the relevant material, then, merely because a different view is possible by itself is not a ground to interfere with the discretionary order. Further, in such cases, where the issues are required to be considered on the basis of material and evidence at the trial, it is not possible to jump to any conclusion either way.

13. Similarly, a useful reference can also be made to the observations made by this High Court in a judgment reported in 2009 (4) GLR 3213 in the case of Jasoda Indralal Vadhva v. Hemendrabhai Kakulal Vyas & ors., where, again, the Division Bench of this Court has considered about reversal of the discretionary order in such an appellate jurisdiction.

14. The Hon''ble Apex Court in a judgment in [the case of Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass, has also considered this aspect of avoiding multiplicity of proceedings by creation of rights of third parties in such a situation. It has been observed,

... unless and until a case of irreparable loss or damages is made out by a party to the suit, the Court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings...

15. Therefore, the normal approach of the court would be to maintain the disputed property as it is and the status-quo would be granted to avoid any further complication by creation of rights of the third parties. It is in this background, when the court below has passed an order granting injunction against transferring the property in any manner to preserve it as it is and to avoid any complication by creation of rights of third parties, it cannot be said that the order is erroneous or perverse.

16. Therefore, having considered broadly the aforesaid relevant aspects, the present Appeal from Order cannot be entertained and deserves to be dismissed and accordingly stands dismissed. In view of dismissal of the Appeal from Order, the civil application does not survive and the same is accordingly disposed of.