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(2013) 02 RAJ CK 0123

In the Rajasthan High Court

Case No : Civil Misc. Appeal No. 927/2005

Jagbir Singh — APPELLANT

Vs

Shri K.H. Singh (Deswar) and Others — RESPONDENT

Date of Decision : 13-02-2013

Acts Referred:

Citation : (2013) 02 RAJ CK 0123

Hon'ble Judges : Nisha Gupta, J

Bench : Single Bench

Judgement

Nisha Gupta, J.—This Misc. Appeal under Order 43 Rule 1 of CPC has been filed against the order dated 25.1.2005 passed by Addl. District Judge, No. 5, Jaipur City, Jaipur in Civil Misc. Application No. 82/2004, whereby the application filed by the appellant under Order 39 Rules 1 & 2 read with section 151 of CPC has been dismissed. The short facts of the case are that the appellant filed a civil suit for specific performance of contract, declaration and injunction against the defendants-respondents on the contention that the defendant No. 1 and 2 are the owner of the plot No. 6 Hari Marg, Civil Lines. Both the parties are neighbours. The defendant No. 1 had taken huge amount of loan which has been accumulated to Rs. 13,87,472.95/-. In order to pay the dues, defendant No. 1 and 2 agreed to sell the plot No. 6 for an amount of Rs. 25,00,000/- to the appellant. First agreement was executed between the parties on 12.11.1996, thereafter by confirming the same agreement, other agreement to sell was executed on 9.3.2001 and possession of the property was also handed over to appellant. Appellant spent Rs. 5,00,000/- on repair of the house. On 19.2.2004, a notice was published in the newspaper that the property would be put to auction on 27.9.2004 by the Recovery Officer in pursuance of recovery certificate issued in case No. RC 115/96, PNB vs. M/s. Sierra Micro Electronics Ltd. issued by Debt Recovery Tribunal. The appellant raised objection before the Recovery Officer, Debt Recovery Tribunal which was rejected and later on the property was auctioned to defendant No. 5 Shri Vijay Kumar Modi. Hence, the appellant filed the present suit along with an application for temporary injunction that

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defendants be restrained from dispossessing the appellant from suit property which was dismissed by the court below. Hence this appeal.

2. The contention of the present appellant is that the court below has committed an error in holding that the agreements dated 12.11.1996 and 9.3.2001 do not fall within the definition of agreement to sell. Both these documents clearly confirm the basic requirements of the agreement; the defendants No. 1 and 2 had agreed to sell the property to the present appellant on a particular cost and the intention of the parties was to execute an agreement to sell which has been ignored by the court below. There was deficit of stamp duty which was cured by the present appellant during the proceedings and requisite stamp has been deposited. The property was not mortgaged with the bank and no charges have been created on the property. The court below has erred in holding that alternate remedy is available to the appellant as the to suits for specific performance of the agreement, no alternative remedy was available to the appellant before the Debt Recovery Tribunal. The appellant is not party to the proceedings before the Debt Recovery Tribunal and is not bound by the decree of the Tribunal. The present appellant is the bonafide purchaser and proceedings for sell of property are null and void against him. He is having possession over the property, hence, his possession should be protected. During the proceedings before the court below, has ordered to maintain status quo of the property and also before this court from the initiation of the proceedings, status quo order has been passed in favour of the appellant and was also confirmed. Furthermore, his contention is that he was tenant in the property prior to execution of agreement to sell and hence as a tenant, he could not be evicted and reference has been made regarding Order 21 Rule 36 of CPC and Rule 40 of the Income Tax Act Rules and his further contention is that under Recovery of Debts Due to Banks and Financial institutions Act, 1993, there is no provision to dispossess the person who is in possession of the property, his possession should be protected and learned court below has not considered the fact in right perspective.

3. Per contra, the contention of the respondent No. 5 who is auction purchaser of the suit property has stated that a loan was advanced to defendants No. 1 and 2 on 17.6.1988 and that debt recovery tribunal has passed the decree on 29.8.1996. Thereafter, just to circumvent the decree in collusion with the appellant, these two agreements have been executed which cannot be termed as agreement to sell. There was no intention to sell the property has been shown in 12.11.1996 agreement only an intention to transfer the property has been made as there was huge dues towards respondents No. 1 and 2 and furthermore in another agreement dated 9.3.2001, the main intention of the respondent No. 1 is to pay back entire amount and if necessity arises, it could be paid out of the sale proceeds of the disputed house. Furthermore, his contention is that auction proceedings have been started before the Debt Recovery Tribunal and property has been auctioned to present respondents on 27.9.2004 and just to frustrate that proceedings, this suit has been filed collusively. The present appellant and respondent No. 2 are real brother and sister and present appellant is not the

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tenant in the suit premises, no averment has been pleaded about the tenancy in the main suit, the basis of the suit is alleged agreement to sell dated 29.11.1996 and 9.3.2001, the agreement dated 12.11.1996 is an unilateral declaration which is not a bio party agreement between the parties, no consideration has been agreed. These proceedings are only abuse of process. On 22.6.2001, the respondent No. 1 has filed objections before the Debt Recovery Tribunal and stated that she is owner of the land and possession is also with her. She has not stated that she has entered into an agreement to sell with the present appellant. Appellant had not come with clean hands and just to frustrate recovery of proceedings, this suit has been filed. The respondent No. 5 had purchased the suit property by way of auction for the sum of Rs. 41.36 lacs, hence the balance of convenience is in favour of the respondent No. 5 and the court below has rightly rejected the temporary injunction application. There is no reason to interfere in the impugned order.

4. The contention of respondent No. 3-Punjab National Bank is that the appellant had not come with clean hands and there is no infirmity in the impugned order.

5. Heard learned counsel for the parties and perused the impugned order as well as the documents supplied by the counsel for the parties.

6. It is not in dispute that the present appellant has filed the suit on the basis of specific performance of the contract. His contention is that he is tenant in the property and he cannot be dispossessed and reliance has been placed on Samir Sobhan Sanyal Vs. Tracks Trade Pvt. Ltd. and others, where it has been held that tenant cannot be dispossessed without due process of law. There cannot be any dispute about the above but here in the present case, the present appellant has specifically stated in his plaint in para 7 that from 9.3.2001, he is in possession of the suit property as landlord, hence his contention that he is the tenant and looking to the provisions of Order 21 Rule 36 of CPC and Rule 40 of Income Tax Act he could not be evicted are not acceptable as the suit for specific performance of contract is on the basis of averment of ownership.

7. Furthermore, the contention of the appellant that he is not party in debt tribunal proceeding and property was auctioned as it was hence he could not be dispossessed in the execution proceedings and his further contention is that there is no provision of dispossession in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and also in the Debts Recovery Tribunal (Procedure) Rules, 1993. It is true that the court below has rightly considered the fact that when the matter is pending before the Debt Recovery Tribunal, the civil court cannot entertain any suit to restrict recovery proceedings u/s 18 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 which reads as under:

Bar of jurisdiction - On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers of authority (except the Supreme Court, and a High Court exercising jurisdiction under Article

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226 and 227 of the Constitution) in relation to the matters specified in section 17.

8. Bare reading of above clearly suggests that it creates a total bar of jurisdiction for the civil court and any other authority. Hence the court below was right in holding that the proceedings before the debt recovery tribunal cannot be questioned in civil suit.

9. It has been contended by the appellant that he is in possession of the suit property and he could not be dispossessed and reliance has been placed on Rame Gowda (D) by Lrs. Vs. M. Varadappa Naidu (D) by Lrs. and Another, and DNJ (Raj.) 421, Representative Aam Janta, Village Berdo Ka Bas & Anr. Vs. Gramin Vikas Vigyan Samiti, Jelu Ganadi & Ors. and Hanif Azami Eliyas Azami Vs. Shabana Mohsin Ghazi @ Shaikh and Another, . It is true that once a person in peaceful possession cannot be dispossessed forcibly but the contention of respondents is that present appellant is not in possession of the property and alleged agreement to sell dated 12.11.1996 and 9.3.2001 does not narrate anything about handing over the possession to the appellant. Nothing has been put on record to show the possession of the appellant.

10. Per contra, respondent No. 2 Smt. Shakuntala Singh has specifically stated on oath by an affidavit on 22.6.2001 that she is the owner of the land and still has the possession over the land hence story of handing over the possession to the present appellant over the land has not been prima facie established before the court below. The court below has rightly considered the matter, the alleged agreement dated 12.11.1996 could not be termed as agreement as it is only a declaration by Smt. Shakuntala Singh that she will transfer the house to appellant and shall not sale the house to anybody else and intention to transfer the house has been disclosed and admittedly transfer cannot be equated with that of sale as there are other modes of transfer of immovable property are also available under the law. Agreement dated 9.3.2001 speaks that entire amount due to appellant would be paid at the earliest and if appellant would be interested in purchase of the house then the outstanding would be adjusted towards the market value of the house there is no acceptance on the part of the appellant to purchase the house and looking to the nature of these two documents coupled with the fact that recovery certificate was issued against the respondent no. 1 and 2 on 29.8.1996 prior to the execution of these two documents, the court below has rightly held that these two documents cannot be termed as agreements to sell and rightly considered the fact that these two agreements have been executed just to frustrate the execution proceedings in compliance of the recovery certificate, the respondent has relied upon Seema Arshad Zaheer and Others Vs. Municipal Corpn. of Greater Mumbai and Others, , wherein the principal relief of grant of temporary injunction has been explained which reads as follows:

The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff: (i) existence of a prima facie case as pleaded, necessitating protection of plaintiff''s rights by issue of a

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temporary injunction; (ii) when the need for protection of plaintiff''s rights is compared with or weighed against the need for protection of defendant''s rights or likely infringement of defendant''s rights, the balance of convenience tilting in favour of plaintiff; and (iii) clear possibility of irreparable injury being caused to plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff''s conduct is free from blame and he approaches the court with clean hands.

Here in the present case, the appellant''s conduct cannot be termed free from blame and it seems that he approached the court malafidely and there is no perversity or infirmity in the order. The appeal is liable to be rejected and is accordingly rejected.

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