

(2010) 10 PAT CK 0111
In the Patna High Court
Case No : MA No. 401 of 2009

Krishna Kumar and Others

APPELLANT

Vs

Durga Prasad and Others

RESPONDENT

Date of Decision : 28-10-2010

Acts Referred:

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

Citation : (2011) 2 PLJR 777

Hon'ble Judges : Gopal Prasad, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Gopal Prasad, J.—Heard the counsel for the parties.

2. This Miscellaneous Appeal is directed against the order, dated 7.7.2009, passed by the Civil Judge, V, Chapra, in Title Suit No. 603 of 2008, by which the injunction petition of the Plaintiff has been allowed confirming the interim order of injunction, dated 18.2.2009.

3. The Plaintiff filed a suit against the Respondent second set, i.e., the Railway, seeking a declaration that they are entitled to continue the contract for conducting and arranging the pay and use lavatory at Chapra Junction beyond the period from 25.11.2001 to 24.11.2006 as have paid excess amount till the adjustment of the excess amount already paid.

4. The case of the Plaintiff that being the successful bidder was allotted the contract for a period from 25.11.2001 to 24.11.2006 for conducting and managing the pay and use lavatory at Chapra Junction on annual deposit of Rs. 2,61,151/-. The further, case is that the Railway did not deliver possession of the entire area for which contract was made, and though the possession was delivered only for half of the area agreed, but, he has deposited the entire amount for the period from 25.11.2001 to 24.11.2006 and so has deposited Rs. 10,82,000/- and odd in excess. Hence, sought declaration that till the excess

amount is adjusted he should be permitted to continue to manage the lavatory.

5. The Railway appeared in the suit and denied the extra payment and the contention that possession of lesser amount than agreed was given to the Plaintiff by the Railway.

6. The Plaintiff filed a petition for interim injunction making the Defendants Railway from disposing of management of pay and use lavatory making out a ground that since Plaintiff has deposited excess amount of Rs. 10,82,000/- and odd and till the same amount is adjusted he can not be turned out from the management of pay and use lavatory.

7. However, the Defendant Appellant appeared and contested the petition of interim injunction has asserted that earlier the Plaintiff was a successful bidder for the contract for a period between 25.11.2001 to 24.11.2006 and after the expiry of the said period a fresh bid was conducted for the period from 2008 to 2013 and the Appellant and Plaintiffs Respondents both participated and Appellant being the successful bidder for a contract for the period from 2008 to 2013 for the annual deposit of Rs. 6,31,000/-.

8. In the meantime, the suit was filed by the Plaintiff and the Respondent Railway appeared on 18.12.2008 and prayed for filing show cause in the injunction matter. However, the time was granted for filing show cause by the trial Court, but, on 18.12.2008, itself, an order of status quo till the filing of the show cause was passed. However, on 12.1.2009 the show cause filed, but, the order of status quo as granted on 18.12.2008 was extended. In the meantime, on 16.2.2009 the Appellant and the successful bidder for the period 2008 to 2013 filed an intervener petition asserting that being a successful bidder he is the necessary party directly involved in this case and by order, dated 7.5.2009 the intervener petition was allowed and this Appellant was added as party and, thereafter, a petition for vacating the order of the interim injunction was filed and by the impugned order the petition for vacating the interim order was rejected confirming the order of interim injunction granted in favour of the Plaintiff.

9. The learned Counsel for the Appellant, however, contended that the order of status quo was passed initially merely on the ground that the Railway prayed for a time to file show cause on the injunction petition and while granting time the order of status quo passed till the filing of the show cause without considering the ingredients required to be considered for grant of the ad interim injunction, i.e., without considering a prima facie case a balance of convenience or irreparable loss in favour of Plaintiff and, further, when the petition to recall the interim order was filed even by the impugned order the trial Court rejected the petition confirming the order of status quo or making the order of status quo absolute without going into the question whether the Plaintiff has got the prima facie case, balance of convenience and irreparable loss and, hence, the impugned order passed on conjecture and surmises. The trial Court passed the impugned order, which is quoted below:

If the order of maintenance of status quo will recall it cause prejudice to the Plaintiff because at present it is not possible to adjudicate that which party is on the legs on stand and at present this matter will not be adjudicated and it will take time for disposing off the same and the matter will be decided in trial.

10. It has, further, been contended that Plaintiff was a successful bidder for the period 2001 to 2006, but, has no right to continue beyond 2006 in preference to the Appellant when Appellant is successful bidder for the period 2008 to 2013 and if any amount is paid in excess he is entitled to recover, but that does not give him a right to continue.

11. The learned Counsel for the Respondents, however, appeared and contended that the Plaintiff was the successful bidder for the period from 2001 to 2006, was granted the contract and even after the period they have been asked to continue till further order and have alleged that they have paid excess amount and 1 for which suit filed and, hence, since they have filed the suit and so a prima facie case has also been interpreted to a substantial question to be gone into a suit, hence, it can not be said that the Plaintiff has got no prima facie case and has placed relied upon a decision reported in 1971 B.L.J.R. 486 (Chhathu Ram Bhadani and Ors. v. The State of Bihar) . It has, further, been contended that the Plaintiff was in possession, hence, disturbing the possession is irreparable loss and, further, relied upon Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., that any dispossession from the possession is a substantial loss as well as balance of convenience also there in favour of Plaintiff Respondent.

12. However, the suit is for declaration that the Plaintiff is entitled to continue in possession of the pay and use lavatory on the basis of being a successful bidder in contract beyond the period of the contract from 25.11.2001 to 24.11.2006 on the ground that they have paid in excess of the amount. However, it is admitted that Plaintiff is the successful bidder for the contract to pay Rs. 2,00,000/- (rupees two lacs) and odd for managing pay and use lavatory at Chapra Junction on annual deposit of Rs. 2,61,151/- for period from 2001 to 2006 and claims that though he has deposited the entire amount, but, he was only given the fifty per cent of the area agreed upon and even paid for entire period though he was not in possession to six months during the period, hence, have paid extra amount as during the period he was only in possession of part of area agreed to and for the month had vacated the area for repairing.

13. However, it is pertinent to take notice of the fact that after the termination of the period of the contract a fresh bidding was conducted for the contract to manage the pay and use lavatory for the period from 2008 to 2013 in which the Plaintiff and the Appellant both participated and the Appellant was a successful bidder for an annual deposits of Rs. 6,31,000/-for the period. However, in the meantime, Plaintiff Respondent filed the suit and got an order of status quo.

14. However, while passing the order of status quo the lower Court did not consider the prima facie case, the balance of convenience and irreparable loss

and impugned order passed granting the injunction only on the ground that Railway come with a time petition for filing a show cause the order of status quo was passed. However, subsequently the show cause has been filed by the Railways, but, the order of status quo continue and even extended by order, dated 18.12.2008, and, in the meantime, the intervention petition was filed by the present Appellant before the trial Court and the trial Court allowed the petition. Thereafter, the Appellant being a successful bidder for 2008 to 2013 filed petition to recall the order of status quo on which the interim order was passed.

15. However, in the impugned order the trial Court did not consider the prima facie case, the balance of convenience or the irreparable loss, but, held that if order of status quo is recalled it causes prejudice to the Plaintiff because at present it is not possible to adjudicate that which of the party has leg to stand and the real conclusion can only be decided in trial that who is the genuine person in obtaining tender. However, this finding was recorded without going into the question of prima facie case or irreparable loss and balance of convenience. However, taking into consideration the fact that Plaintiff was put in possession being the successful bidder for the period from 25.11.2001 to 24.11.2006 and, the Plaintiff was only entitled for possession for a period from 25.11.2001 to 24.11.2006 and, hence, has no right or interest over the suit premises beyond 24.11.2006 after termination of the period on 24.11.2006 though this is matter of the necessity that the lavatory is to function in public interest as lavatory was at Railway Junction and so Plaintiff was ordered to continue till further orders or till a fresh bid organized and successful bidder at the bid rate pay. The fresh bid was conducted for the period from 2008 to 2013 and the Plaintiff also participated in the fresh bid and the Appellant became the successful bidder but the Plaintiff being unsuccessful filed the suit making a claim that he has paid excess amount and prayed for injunction to disallow the claim of Appellant as the successful bidder for period from 2008 to 2013.

16. Hence, the question for consideration is whether the claim of Plaintiff that since he has paid excess amount gives him a right to continue in possession of the pay and use lavatory withholding successful bidder and on this ground he is entitled to get a injunction restraining the Railway and successful bidder to continue the possession of Plaintiff.

17. The contract to bid was for a period 2001 to 2006. The Plaintiff claim that he paid excess amount if he paid excess amount it amounts to a right to claim the excess and it is like a money suit to recover the amount, but, question arose that he is entitled to continue in possession even beyond the period 2008 to 2013. However, the Plaintiff took the bid for the period 2001 to 2006 at the annual rental of rupees two lacs and odd per year whereas the fresh bid is at the rate of rupees six lacs and odd per year. Hence, having regard to circumstances the Plaintiff claims to be in possession and asserts to continue in possession even on termination of period of contract and Appellant being a successful bidder at an

annual payment of rupees six lacs and odd whereas Plaintiff is paying only rupees two lacs and odd and, hence, the prima facie case, balance of convenience, irreparable loss does not lie in favour of Plaintiff and Plaintiff can well be compensated in terms for money as there is neither irreparable loss nor balance of convenience is in his favour. The claim of the Plaintiff for excess payment is a money suit and no injunction can be granted in money suit as there is neither irreparable loss nor balance of convenience.

18. However, in the facts and circumstances reported in 1971 B.L.J.R., 486 (Chhattu Ram Bhadani and Ors. v. The State of Bihar) the Court held that there was substantial question of law and fact have to be decided in the suit taking into consideration the pleading of the parties and so the case of the Plaintiff is that the Plaintiffs is not liable to pay and Defendant permanently restrained from taking any step for auction sale or taking any step in certificate case. However, under the present facts and circumstances of this case, the case of the Plaintiff is that he has taken the contract for a period being a successful bidder for a period. 2001 to 2006 and since the contract was for the period he can not be said to have any right to continue beyond the period on the ground that he has paid excess amount and for the payment of the excess amount he may claim the amount and the damage, but, can not contend to have a prima facie case for having a right over the contract/property or to continue till the adjustment of excess amount paid by him, hence, there is no prima facie case entitling him to continue in the possession or to continue the contract particularly in such a situation when he did participate in the bidding for the year 2008, however, participation as unsuccessful bidder may not have disentitled from filing the suit, but, he can not counter the possession of the Appellant of the premises on the basis of said bidding conducted by the Railway and, hence, taking into consideration the facts and circumstances though the Plaintiff has no prima facie case regarding his right to continue in possession as an unsuccessful bidder on the ground to entitle him to continue in possession on the ground that he has paid excess amount. However, even assuming that he has a case the question for consideration is whether balance of convenience or irreparable loss.

19. However, the learned Counsel for the Appellant has contended that he was in possession and has placed reliance on decision reported in AIR 1927 Lah 169 (Fateh Khan v. Daim and Ors.) . However, in the facts and circumstances of the case in a suit for pre-emption which was decreed the vendee-Defendant filed first appeal and the Appellant applied stay petition that during pending disposal of the appeal the execution of the decree be stayed. In the facts and circumstances of that case, it was considered that in a suit for pre-emption the Defendant vendee is in possession of the property under a perfect valid title obtained for consideration from the original owner and held that such a possession should not be disturbed till the Plaintiff have finally held to have lost his title and the vendee has exhausted all his remedies for retaining his possession and in the facts of that case it was considered that the vendee alleged that his crops are standing on the land and in that facts and circumstances it was ordered that it was a fit

case in which order for stay of execution should be made and, hence, the ratio decided in the facts and circumstances of those cases does not apply to the facts and circumstances of the present case.

20. However, in the facts and circumstances of the case, reported in AIR 1927 Lah 169 (supra) the Appellant was in possession of the property in exercise of his right being a purchaser from the original owner, here the Plaintiff has no right to continue in possession after the expiry of the period of contract for being a successful bidder from 2001 to 2006 and even for excess amount paid he has no right to continue in possession.

21. The learned Counsel for the Appellant, further, relied on the decision reported in Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., and here in the facts and circumstances the premises were owned by the Appellant and hold a tenancy by the Respondents on monthly rental of Rs. 371/-. The tenancy commenced in the year 1944 and since then the rent remained static and in 1992, the Appellant initiated a proceeding for vacation of premises on the ground that the Respondents have illegally sub-let the premises and sub-tenant was going it to sell. The Additional Rent Controller held that the ground of eviction made out. An appeal was preferred the Rent Controller directed that the eviction of the Respondents remained stayed subject to condition to deposit Rs. 15,000/- per month in addition to contractual amount. The High Court ordered that during the pendency of the appeal the Respondents shall continue to remain in occupation of the premises subject to payment of amount equivalent to the contractual amount. However, the Supreme Court in the facts and circumstances set aside the order of the High Court and held that the Tribunal was right in putting the tenant on terms of payment of Rs. 15,000/- per month as charge for use and occupation during pendency of appeal. However, under the facts and circumstances of this case, the Appellant was in possession of the premises on the basis of a right to be a tenant and till his right is extinguished he can not be said to have holding" the premises without any right.

22. Hence, the ratio decided in decision relied by the Appellant is not applicable to the facts and circumstances of the case, merely because the Plaintiff is in possession being a successful bidder for 2001 to 2006 can not be allowed to continue beyond 2006 on the basis of contract for the period allowed to continue in the premises till the disposal of the suit, and if he is allowed it will be to the prejudice to both, the Railway and the Appellant, who is a successful bidder for the period from 2008-2013. Here if the injunction is refused the Plaintiff is not a loser, at all, rather a gainer by illegal means to continue in possession by mere paying rupees two lacs and odd when Appellant is a successful bidder for rupees six lacs and odd and, further, the Railway be apparently a loser that in stead of rupees six lacs and odd and he will be getting rupees two lacs and odd only from the Plaintiff-Respondent. If such a practice is continued then a person coming in possession being a successful bidder will remain to continue in possession by filing such suit against public interest and anomalous position will arise that once

the person coming in possession being a successful bidder will adopt mode and means to defeat the successful bidder at the loss of the Railway and, hence, under such facts and circumstances neither the prima facie case nor balance of convenience nor irreparable loss can well be inferred in favour of the Plaintiff Respondents rather the prima facie case, balance of convenience and irreparable loss lies in favour of the Appellant. However, it is, further, pertinent to mention that during the pendency of the appeal and interim order passed staying the operation of the impugned order by order, dated 25.8.2009.

23. The learned Counsel for the Respondents, however, relied upon decision reported in 1976 P.L.J.R., 401 (Bihar State Electricity Board and Anr. v. Jawahar Lal and Ors.) - However, in the said case the suit was by the consumers for declaration that the new rate imposed by the Electricity Board are arbitrarily excess and illegal and pray that the Board should be enjoined from realizing the new rate till the decision of the suit. The trial Court rejected the prayer holding that the balance of convenience is not in favour of the consumers and if the Plaintiff succeeds in suit they could recover or ask the Defendant-Petitioner to set out the excess payment as against their future payments. The appellate Court reversed the decision of the trial Court with regard to the balance of convenience and granted injunction and when the matter come up before the Hon"ble Court, the Hon"ble Court held that enhanced tariff is miserably in terms of money and there would be no difficulty in getting the amount so realized from the consumers and adjusted against their future dues if the opposite party succeeds in the suit and held that that it is well established principle of law that the Court could not grant injunction under Order XXXIX Rule 1 of the CPC in case where the damages or loss can arise in terms of the money.

24. Hence, having regard to the facts and circumstances, since, the Plaintiff claims to have paid excess amount in the pretext that he was given a lesser area and for six months he had to leave premises than contracted for pay and use lavatory for the period of contract from 2001 to 2006 and, hence, even if he has paid extra amount he is entitled to recover the same with interest which is a money claim for which there is no irreparable injury or loss and even the balance of convenience is not in his favour and, hence, could not make out a case for injunction. However, the trial Court passed the order of status quo, which is impugned order, without going into the question whether the Plaintiff make out a case of prima facie case, balance of convenience and irreparable loss, hence, impugned order is not sustainable. However, going into the facts and circumstances of the case, since, Plaintiff claimed to have paid excess money and that can be compensated in terms of money and, hence, neither has irreparable loss nor balance of convenience in his favour and, hence, not entitled for an order of injunction and status quo in his favour and, hence, under the facts and circumstances, the impugned order is set aside.

25. The Miscellaneous Appeal is allowed.