

(2000) 09 DEL CK 0027

In the Delhi High Court

Case No : IA No. 8424/94 in Suit 2828/93

Misha Vadera and Another

APPELLANT

Vs

Ravi Kumar and Others

RESPONDENT

Date of Decision : 18-09-2000

Acts Referred:

Citation : (2000) 7 AD 1032

Hon'ble Judges : Surinder Kumar Aggarwal, J

Bench : Single Bench

Advocate : Mr. H.L. Tikku, for the Appellant; Ms. Geeta Mittal, for the Respondent

Judgement

S.K. Agarwal, J.—In this application under Order 39 Rule 4, read with Section 151 of the CPC the first defendant Ravi Kumar has prayed for setting aside/modification of the exparte ad interim order dated 4.5.94, whereby he was restrained from alienating or parting with possession or creating any third party interest in commercial space/show room, measuring 1106 sq. feet, on the first floor of the building known as "Hansalaya" situated at 15, Barakhamba Road, New Delhi (hereinafter the suit property).

2. Brief facts are: plaintiffs filed a suit against first defendant, owner of the suit property, second defendant property dealer and third defendant (partnership concern of the plaintiff no. 1/Builder) for specific performance of agreement to sell in relation to the suit property on terms contained in the receipt dated October 28, 1993 executed by the first defendant which reads as under:-

R E C E I P T

Received the sum of Rs. 1,00,000/- (Rupees One lac Only) in CASH from Mr. Misha Vadhera, Hansalaya, 15, Barakhamba Road, New Delhi 110001 as an advance and part payment towards the sale proceeds of Flat No ___ measuring 1106 sq.ft. on the FIRST FLOOR, HANSALAYA, 15, Barakhamba Road, New Delhi-110001. The total sale consideration has been settled for Rs. 90,00,000/-

(Rupees Ninety Lacs only). Further advance of Rs. 8,00,000/- (Rupees Eight Lacs only) will be paid within seven days from the signing of this Receipt.

THAT the SELLER shall apply for the clearance from COMPETENT AUTHORITY within 10 days from the DATE of the signing of the RECEIPT. After getting the clearance, the Seller shall inform the Purchaser by REGISTERED POST, to get the said flat transferred in his favor or in the name of his nominee within 60 days from the date of receiving the information after paying the balance consideration of Rs.81,00,000/- (Rupees Eighty One Lacs only).

The SELLER undertakes to clear all dues of House Tax up to date of transfer of the said property.

This BARGAIN has been finalised by SATISH PANDIT & ASSOCIATES. They will be paid 2% of the total sale consideration by the SELLER and PURCHASER respectively as their COMMISSION.

DATE : October 28, 1993 (RAVI KUMAR)" Witnesses:-

Satish Pandit s/o. Late Mohan Lal Arunachal, 19, B. K. Road, New Delhi.

3. plaintiffs also filed an application under Order 39 Rule 1 and 2 read with 151 CPC, for grant of ex parte ad interim injunction. On 20.12.93, the plaint was registered and summons were issued to defendants by ordinary process and by registered AD post for 1.2.94. No ex parte injunction was granted. Notice on the application was issued for the same date. plaintiffs feeling aggrieved against the order refusing to grant ex parte ad interim injunction, filed an appeal FAO (OS) 4/94, and offered to deposit the balance of the sale consideration mentioned in the Receipt. The appellate court permitted plaintiffs to deposit Rs. 89 lacs. It was ordered that on deposit of Rs. 89 lacs the first defendant will stand restrained from alienating or parting with possession or entering into an agreement etc., in respect of the suit property. The amount was not deposited. The order was modified on 25.1.94 and instead of depositing cash, plaintiffs were permitted to furnish bank guarantee in the sum of Rs. 89 lacs. The appeal was disposed of holding that the ex parte injunction granted by the appellate court, be deemed to have been passed by the Single Judge, granting liberty to the first defendant to apply for modification/ vacation of the said order, if he so chooses. The relevant portion of the orders read as under:

"The orders passed by the Division Bench of this Court will be treated as orders passed in the interlocutory application before the learned single Judge and it will be open to the first respondent if he so chooses, to apply for any modification or vacation of the said orders, if he thinks fit. In that event it will be for the learned Single Judge to deal with the order in accordance with law."

4. After the file was received back fresh summons were ordered to be issued to the first defendant for 5th October, 1994. In the meantime plaintiffs moved an application (IA. 7909/94) praying that they be appointed as receiver. Accordingly, on 8.9.1994 plaintiff was appointed as a receiver of the suit property. Notices

were ordered to be issued to the first defendant for 5.10.94 the date already fixed. Mr. J.P. Verma, Advocate was appointed as local Commissioner to assist plaintiffs in taking over possession of the property. He was permitted to take police assistance, if necessary.

5. Thus the first defendant was not served either in the suit for the date of 4th May, 1994 when the ex parte ad interim injunction was granted or for the date of 8th September, 1994 when the plaintiff was appointed as the Receiver. It appears that the first defendant came to know about the suit only after the first plaintiff had taken the possession of the suit property as a receiver.

6. The first defendant thereafter filed an appeal (FAO 236/94), against the order dated 8.9.94 whereby the plaintiff was appointed as the Receiver. Learned appellate court accepted the appeal and the impugned order was set aside and the possession of the suit property was restored to the first defendant on 16.11.94. Although the possession was restored to the first defendant, he continued to suffer the injunction order dated 25.1.94 where by he was restrained from dealing with the suit property or creating any third party interest.

7. The first defendant filed written statement pleading therein that he is the owner of the commercial property; he has not received any sale consideration; that the time was essence of the contract and plaintiff no.1 having failed to pay the consideration within time stipulated in the Receipt the agreement stood vitiated. It is also pleaded that the plaintiffs had deliberately given the wrong address of the first defendant in the suit to avoid service on his. This fact is denied by plaintiffs in the rejoinder. It may be mentioned here that the written statement filed by the first defendant was allowed to be amended vide orders dated 9th November, 1995. Against this order the plaintiffs filed an appeal FAO(OS) 40/96, which was dismissed on 29th February, 1996. The first defendant had also moved the present application under Order 39 Rule 4, CPC praying for setting aside/modification of exparte and interim injunction order dated 4.5.94. The plaintiffs have filed the reply opposing the application.

8. I have heard the learned counsel for the parties and have been taken through the record. Learned counsel for the defendant has argued that vide orders dated 25.1.94 he was specifically permitted to apply the vacation of the ex parte injunction if he so chooses; that the first defendant is owner of the suit property and the plaintiffs obtained the ex parte order by concealing material facts that the plaintiffs have no right title or interest in the property, Therefore, the order of injunction should be revoked. Reliance was placed on two decisions of this court in M/s. Agarwal Hotels (P) Ltd. Vs. Focus Properties (P) Ltd 1996 II AD (Del) 625 and Yogesh Kumar Gupta & Anr Vs. Sh. Vs. Sathya palan & Ors. 1996 II AD (Del) 628. Learned counsel for the plaintiffs while opposing the application has argued that the plaintiff have a good prima facie case; that plaintiffs have furnished a bank guarantee for full sale consideration and that if the first defendant is permitted to deal with the suit property the suit itself may become infructuous. However, learned counsel for the plaintiffs fairly and rightly conceded that the

first defendant may be permitted to rent out the suit property, for fixed period to suitable tenant provided the tenant is bound down with the outcome of the suit. Lastly it is argued that the proceedings in the suit be expedited.

9. Law with regard to grant of interlocutory injunction is well settled. While considering the question of balance of convenience and irreparable loss and injury if any, to the plaintiff the court has to weigh whether there is any possibility of injury resulting from defendants having been prevented from exercising their own legal right for which he could not be adequately compensated. The court has to weigh one need against the another and determine where the balance of convenience lies.

10. Admittedly, the first defendant is residing abroad, (NRI); the suit property is a commercial flat which was lying vacant for almost last six years and he is suffering from loss in terms of the rent. In view of the fact that no sale consideration was paid to the first defendant, and that even initial deposit of Rs.1 lac was allegedly returned by the first defendant to the plaintiff interest of justice would be met if the injunction order dated 25th January, 1994 is modified to the limited extent and the first defendant be allowed to deal with the property by letting it out to any suitable tenant subject to the conditions (i) that the lease shall be for a fixed period, subject to the maximum of 6 years; (ii) the lease would be duly got registered with the office of the sub Registrar ;(iii) that the lease shall contain a specific clause to the effect that the tenant shall be bound by the outcome of the suit and any order that may be passed in suit by this Court and that the tenant shall not claim equity; (iv) the first defendant shall place a copy of lease deed on record within 30 days from execution of the lease.

11. For the foregoing reasons application is allowed. Order dated 4th May, 1994, restraining the first defendant from alienating or parting with possession of entering into any agreement in respect of the suit property is modified. The first defendant is allowed to let out the suit premises to any tenant subject to the conditions noted above. Any observation made in the order shall not be deemed to be an expression of opinion on the merits of the case.

12. Application stands disposed of.