(2004) 07 BOM CK 0147

In the Bombay High Court

Case No : Appeal From Order No. 539 of 2004

Mrs. Shabana Mohsin Ghazi alias Shaikh APPELLANT

Vs

Mr. Hanif Azmi Eliyas Azami and Mr. Mohsin Mahfooz Ghazi RESPONDENT

Date of Decision : 20-07-2004

Acts Referred:
Penal Code, 1860 (IPC) — Section 498A
Registration Act, 1908 — Section 32, 33

Citation : (2005) 1 ALLMR 156 : (2005) 1 BomCR 238 : (2004) 4 MhLj 356

Hon'ble Judges : V.C. Daga, J

Bench : Single Bench

Advocate : Mahendra Bajpai, instructed by S.J. Chaurasia, for the Appellant; S.K. Pandey, instructed by B.G. and Associates, for the Respondent

Judgement

V.C. Daga, J.—This appeal is directed against the order dated 14th May, 2003 passed in Regular Civil Suit No. 268 of 2004 by the Civil Judge (Senior Division), Thane directing the defendants to maintain status-quo in respect of the suit property being flat No. 102 admeasuring about 912 sq.ft. (carpet area) locate in B-wing, in the building known as ''Sundaram Enclave'' in Sundaram Co-op. Housing Society Ltd., Mira Road, District- Thane ("the suit flat" for short)

Facts:

2. Respondent No. 1 is the original plaintiff. Respondent No. 2 is original defendant No. 1, whereas appellant is original defendant No. 2. Original defendant are husband and wife. Defendant Nos. 1 and 2 purchased suit flat in their joint name in the year 1998 for a consideration of Rs. 2 lakh.

3. The case of Respondent No. 1 - original, plaintiff is that he entered into an agreement to purchase the suit flat on 19th March, 2004 from defendant No. 1 who has executed the said agreement on behalf of himself and his wife, defendant No. 2 on the basis of her authorisation based on unregistered power of attorney alleged to have been executed by her (the appellant) in favour of her

husband i.e. original defendant No. 1.

4. The agreement to sale dated 19th March, 2004 between original plaintiff and defendant No. 1 (husband of appellant) mentions that an amount of Rs. 11,40,000/- was paid to defendant No. 1/respondent No. 2 herein in cash and possession is delivered to the vendee/ purchaser.

5. Plaintiff apprehending threat to his possession filed suit to restrain the appellant and her husband from disturbing his possession being Regular Civil Suit No. 268 of 2004 along with an application (Exh.5) for interim injunction and amongst others prayed for ad-interim relief.

6. Trial Court, initially, vide its order dated 12th May, 2004 refused to grant ad-interim relief. However, it appears defendant No. 1/respondent No. 2 appeared before the trial Court and extended his no-objection for grant of injunction in favour of the plaintiff. Trial Court vide order dated 14th May, 2004 directed defendants to maintain "status-quo" in respect of the suit flat.

7. The appellant is taking exception to the above order of status-quo dated 14th May, 2004 on the ground that under the guise of the aforesaid order of status-quo respondent No. 1 is trying to dispossess her. It was being urged that the order of status-quo on the face appears to an innocuous order but it is a product of collusion between respondent Nos. 1 and 2 so as to dispossess appellant from the suit flat as husband and wife are on waging matrimonial war against each other. Respondent No. 1, on the contrary, claims to be in possession of the suit flat as bonafide purchaser. This appeal was filed during summer vacation styling it as urgent matter.

8. With the aforesaid rival contentions the matter was heard by learned Vacation Judge of this Court for grant of interim relief during summer vacation, who was pleased to stay the order of status-quo by his reasoned order dated 4th June, 2004; prima facie; finding absence of acknowledgements evidencing cash payment of Rs. 11,40,000/-; prima facie; holding that the plaintiff/ respondent No. 1 could not make out any case to establish his possession over the suit flat. Learned Vacation Judge also; prima facie; found that the appellant being in possession of the suit flat it was necessary to stay the impugned order of status-quo. Appeal was ordered to be placed for admission on 10th June, 2004 before regular bench dealing with such matters.

9. That is how this appeal came up for admission before this Court. After hearing the parties for some time this Court found that it would be in the interest of justice to dispose of the appeal finally at the admission stage itself; it being against an order of ''status-quo'' pending substantive application for interim relief in the trial Court. Accordingly, parties were put on notice. In order to enable the parties to bring rival documents on record in appeal, it was adjourned from time to time. Parties were permitted to file their affidavits and counter affidavits and rejoinder. In the aforesaid backdrop appeal was taken up for final hearing at the stage of admission.

10. It is the case of the appellant that appellant and respondent No. 2 are husband and wife married sometime in the month of January, 1996. After February, 1996 appellant claims to have realised that respondent No. 2 was involved in various anti-social activities and that he was running sex racket. She refused to help him in his activities. Appellant contends that respondent No. 2 tried to push her in the flesh trade. She resisted which resulted in discord between husband and wife, appellant and respondent No. 2, which, ultimately, resulted in several complaints to the police authorities at the instance of the appellant-wife.

11. It appears that some time in the month of March, 1998 some elderly persons in the society intervened, and with a view to provide financial and social security; the respondent No. 2/husband was made to purchase one flat for the appellant and her family members. Accordingly, suit flat came to be purchased in the joint name of appellant and respondent No. 2. However, it appears that relations did not improve. On the contrary, it became bad to worst; which led to complaints u/ s 498-A of Indian Penal Code against respondent No. 2 on 14th October, 1999. He was arrested. Since then he is staying separately. The appellant - wife did not allow him to enter in the suit flat. That is how the appellant claimed to be in exclusive occupation and possession of the suit flat along with her mother.

12. Appellant further stated that since November, 1999 respondent No. 2 was threatening and administering serious threats to the life of the appellant. Number of attempts were made to dispossess her from the suit premises, which again resulted in several complaints to the police authorities against respondent No. 2. Some of them were lodged on 6th January, 2003, 23rd April, 2004, 10th May, 2004 and 17th May, 2004. Appellant submitted that she was apprehending her dispossession from the suit flat at the instance of respondent No. 2 and his hirelings. Appellant further submitted on 10th May, 2004 Police Inspector of Mira Road Police Station called her and compelled her to deposit keys of the suit flat with him. On 14th May, 2004, the present respondent No. 1/ original plaintiff obtained order of status-quo from the trial Court and based on this order he approached the police station claiming his right over the keys of the suit flat. The Police Inspector obliged him and handed over keys to him. Appellants submits that after having obtained keys from the Police Inspector, respondent No. 1 is claiming to be in possession of the suit flat.

13. Learned counsel for respondent No. 1 tried to find flaw in the story put up by the appellant-wife. He submits that in pursuance of the complaint dated 10th May, 2004, respondent No. 1 - plaintiff was called to the police station where appellant and respondent No. 2 were present. Based on the events which have taken place in the police station, respondent No. 1 - plaintiff entertained belief that he may be forcibly dispossessed from the suit flat. He, therefore, chose to file present suit for injunction. On 12th May, 2004, no interim relief was granted by the trial Court. However, the matter was adjourned to 14th May, 2004. In the meanwhile, plaintiff/ respondent No. 1 could serve copy of the plaint on

defendant No. 1 through Mira Road Police Station. After getting intimation, respondent No. 2 appeared before the trial Court and furnished his no-objection for grant of ad-interim relief. Number of contradictions in the story put up by the appellant with respect to her possession came to be highlighted. That is how possession of the appellant came to be disputed by respondent No. 1. He denied to have dispossessed the appellant in pursuance of the order of status-quo passed by the trial Court. Respondent No. 2 in spite of service of notice of this appeal chose to remain absent.

Submissions:

14. Learned counsel for the appellant submits that agreement for sale executed by respondent No. 2 in favour of respondent No. 1 is sham and bogus transaction. It was executed acting upon an unregistered power of attorney. Thus the agreement cannot have the effect of transferring her interest in favour of respondent No. 1. The transaction is per se bad and illegal and contrary to the statutory provisions of Section 32 and 33 of the Registration Act, which mandate that for execution of sale deed registered power of attorney is required.

15. Learning counsel for the appellant further submits that consideration for sale said to have been paid is in the sum of Rs. 11,44,000/-, whereas Government value of the property is shown as Rs. 14,35,000. The entire consideration is said to have been paid in cash, which is contrary to the Income Tax Act. He further submits that not a single receipt was produced when the order of status-quo was obtained from the trial Court. This omission to produce receipts has been referred to by the learned single Judge in his order while granting stay in favour of the appellant. He further submits that receipts produced, for the first time before this Court by respondent No. 1, clearly exhibit on its face that all these receipts are written in one sitting. He further pointed out that respondent No. 1 has stated on oath in his affidavit dated 5th July, 2004 that he has not disclosed payment of such hefty sum in his Income Tax returns. In the circumstances, learned counsel for the appellant submits that bear perusal of the agreement for sale is sufficient to lead to an irresistibility conclusion that the said agreement is sham, bogus and moonshine and the same is brought into existence in collusion with respondent No. 2, especially, to deprive present appellant of her right to possess and occupy the suit flat.

16. He further submits that in absence of registered power of attorney, respondent No. 2 could not have transferred the interest of the appellant in favour of respondent No. 1. He further submits, assuming for the sake of argument that agreement for sale is a genuine transaction, even then respondent No. 1 can at the best be said to be a purchaser of the undivided interest of respondent No. 2 i.e. the husband of the appellant in the suit flat. If that be so, he is not entitled to have either joint or exclusive possession of the said flat he being stranger to the family. His remedy would be to file suit for partition in respect of the undivided interest in the suit flat. Learned counsel for the appellant submits that even if respondent No. 1 is treated to be a person

armed with the registered document in his favour even then he has no right to possess the suit flat. Undivided title with respect to suit flat still vests with the appellant and she is entitled to possess the same until she divests of her interest in the flat.

17. In the above backdrop, learned counsel for the appellant submitted that appellant was in possession of the suit flat for all the time. She did not loss possession of her flat at any point of time till the delivery of keys by her to the Police Inspector. He further submits that orders of the Court cannot be used to dispossess a person who is in settled possession of the suit flat. With this submission learned counsel for the appellant submits that the impugned order is liable to be quashed and set aside in the interest of justice and the appellant''s possession over the suit flat is liable to be maintained. He submits that appellant is being kept out of possession of the suit flat taking advantage of the order of the trial Court though legal possession over the suit flat as on date is of the appellant.

18. Per contra, learned counsel appearing for respondent No. 1 asserted that respondent No. 2 was the real owner of the suit premises. All payments were made by him to the builder and not by his wife and, therefore, it was open for him to dispose of the said premises without taking consent of his wife/ the appellant herein who claims to be the joint owner of the suit premises. In the wake of all these submissions, learned counsel for respondent No. 1 submitted that the appeal be dismissed holding it to be without any substance.

Consideration :

19. At the outset, one thing must be made clear that, normally, this Court is reluctant to interfere with the ad-interim order unless it is perverse or it gives unfair advantage to one party over other. Nobody can be allowed to abuse the process of Court. Nobody can be allowed to exploit the order of the Court. Merely because this appeal is against the order of status-quo does not mean that this Court should close its eyes to the abuse of the process of Court and should allow one party to claim unfair advantage over other. Having heard rival parties, one thing is clear that this appeal is against the ad-interim order of status-quo, substantive application for injunction is still pending for adjudication as such without going to the disputed facts and rival pleadings and without touching merits of the matter, this appeal can be disposed of preserving the status of the suit property.

20. The undisputed facts reveal that the suit flat is a joint property of the appellant and her husband/respondent No. 2. The power of attorney alleged to have been executed by the appellant in favour of respondent No. 2 is unregistered. Provisions of Sections 32 and 33 of the Registration Act which mandate that in case of sale registered power of attorney is a must. The agreement for sale has been executed by respondent No. 2 in favour of respondent No. 1 on 19th March, 2004. Entire consideration was paid in cash.

The receipt evidencing acknowledgement of the consideration appended to the said agreement for sale shows that payment in lump sum whereas affidavit filed by respondent No. 1 dated 11th June, 2004 accompanied by 12 receipts issued on different dates show payments over the period ranging from 1st April, 2002 to 19th March, 2004.

21. Apart from the aforesaid undisputed facts, some of the facts and circumstances available on record speak for themselves, such as the payment of cash consideration backed by 12 receipts. All these receipts, need to be examined in its proper perspective. Respondent Nos. 1 and 2 are strangers. Payments of huge consideration were made from time to time without obtaining agreement to sale. Entire consideration is shown to have been paid in cash in two different financial years. The source of the amount has not been disclosed. Income Tax returns are not filed. The payments made are not part of the Income Tax returns. The strained relations between the husband and wife i.e. appellant and respondent are not in disputes. Attempt on the part of respondent No. 2 dispossess her is also not in dispute. In the wake of these speaking circumstances and undisputed facts, it was obligatory on the part of the trial Court not to pass the order of status-quo in a casual and perfunctory manner, especially when two days before it had refused to grant ad-interim order. Trial Court should have been careful, ought to have applied its mind and considered as to how the person against whom serious allegations are made in the complaint is sou-motu appearing in the Court and furnishing his no-objection for grant of ad-interim relief. If the affidavit of respondent No. 1 is believed to be true and correct, then on oath he has stated that respondent No. 2 appeared in the Court on 14th May, 2004 and stated that respondent No. 1 (plaintiff in the suit) was supposed to pay further amount of Rs. 3 lakh. He has further brought the reaction of the trial Court on record to say that the trial Court after hearing the version of respondent No. 2 told him either to agree to maintain status-quo else the Court will pass a speaking order. It appears from the affidavit of the plaintiff/ respondent No. 1 herein that respondent No. 2 was represented by an advocate. If all these circumstances are true, then the trial Court was expected not to react in this fashion and was further expected to read the circumstances and course of events in its proper perspective and ought to have refused to pass ad-interim order of status-quo.

22. Since this appeal is against the order of status-quo and application for injunction is still pending for consideration on its own merits, it would not be proper on the part of this court to express any opinion with respect to the merits of the matter except saying that the order of status quo was unwarranted. However, by way of ad-interim arrangement, with a view to protect and preserve suit property, I appoint the Nazir of the Civil Court, Thane as Court Receiver in respect of the suit property described in para-1 (supra) and direct that he shall take possession of the suit property with immediate effect and appoint the appellant as agent of the Court Receiver without any security or royalty. She shall remain in possession of the suit flat as the agent of Court Receiver without

payment of any royalty. Parties to the suit are directed not to alienate or encumber suit property until application (Exh.5) for injunction is decided on its own merits. All rival contentions are kept open. The order of appointment of Receiver shall be subject to the result of the application for injunction (Exh.5).

23. Trial Court is directed to decide application for injunction pending in the Court after hearing both parties as expeditiously as possible, at any rate, within a period of eight weeks from the date of receipt of writ of this order.

Appeal stands disposed of in terms of this order with no order as to costs.

24. At this stage, learned counsel for respondent No. 1 prayed for stay of this order. Prayer for stay is rejected.?

