

(2012) 01 GUJ CK 0013
In the Gujarat High Court

Case No : Misc. Civil Application-for Direction No. 2425 of 2011 in Appeal from Order No. 170 of 2009

Padmavati Paradise, Proprietary Concern of Parashar Arvind and Another APPELLANT

Vs

Kirtiben Dhanesh kumar Shah RESPONDENT

Date of Decision : 20-01-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4
Penal Code, 1860 (IPC) — Section 114, 465, 468, 471

Citation : (2012) 2 GLH 61

Hon'ble Judges : M. R. Shah, J

Bench : Single Bench

Advocate : B.B. Naik and Mr. Rajesh R. Dewal Applicants 1 - 2, for the Appellant; A.L. Shah, Ld. and Mr. Tirthraj Pandya Opponents 1, 1.2.1, 1.2.2, for the Respondent

Judgement

Mr. M.R. Shah, J.—Present Miscellaneous Civil Application has been preferred by the applicants herein original respondents -defendants to vacate the interim relief granted earlier by this Court passed in Appeal from Order No. 170 of 2009 with Civil Application No. 5369 of 2009 while exercising powers under Order 39 Rule 4 of the CPC in view of change circumstance which has taken place subsequent to the granting of the interim order passed by this Court passed in aforesaid Appeal from Order No. 170 of 2009. The facts leading to the present Miscellaneous Civil Application in nutshell are as under:-

1.1. That the respondents herein-original plaintiffs have instituted Special Civil Suit No. 426 of 2008 in the Court of learned Principal Civil Judge (S.D.), Ahmedabad (Rural) against the applicants herein-original defendants for specific performance of the agreement/Banachithhi dated 24th April, 2008 in respect of the immovable property situated at mouje Kalana, Tal. Sanand, District: Ahmedabad bearing Khata Nos. 99 and 100, Survey No. 236 paiki, admeasuring about 24, 180 sq. mts. That the original plaintiffs have also sought a permanent

injunction restraining the defendants from transferring or assigning the property in favour of the third party or from obstructing or interfering in the plaintiffs possession of the property. That it was alleged by the plaintiffs that the suit property is agreed to be sold by defendants- original land owners for a sale consideration of Rs. 42,00,300/-. It was case on behalf of the plaintiffs that despite the part sale consideration was paid by clearing debt of Rs. 10 Lacs and thereafter some balance amount was paid by cash and the possession was handed over to the plaintiffs, the defendants were not executed the sale-deed in their favour and they were trying to sell/dispose of the properties in question. That in the said suit, the plaintiffs submitted application Exh. 5 for interim injunction restraining the defendants from transferring and/or alienating the suit property in question in any manner whatsoever and restraining the defendants from obstructing the possession of the plaintiffs.

1.2. That the said application Exh. 5 was opposed by applicants herein -original defendants by submitting that Banachithi is forged and concocted one for which criminal complaint has been filed. It was also further submitted that as such, there was no agreement between the plaintiffs and defendants and the amount of Rs. 9 Lacs was not paid by the plaintiffs but by one Shri Shashi Bhushan and therefore, the plaintiffs are not entitled to file the suit and/or pray for specific performance. That it was also submitted that as such the possession is with the defendants. Therefore, it was requested to dismiss the application Exh. 5.

1.3. That the learned trial Court by order dated 18.4.2009 dismissed the application Exh. 5 with respect to the transfer and the possession also. So far as the possession is concerned, learned trial Court relied upon the Commissioner's Report by which the possession of the defendants (applicants herein) was proved and the appellants/original plaintiffs were not found to be in possession of the suit lands

1.4. That being aggrieved and dissatisfied with the order passed by the learned trial Court passed below Exh. 5 in dismissing the same, the respondents herein-original plaintiffs preferred Appeal from Order No. 170 of 2009 before this Court and this Court by judgment and order dated 13.7.2009 allowed the said Appeal from Order in part and granted interim injunction restraining the applicants herein-original defendants from transferring and/or alienating the suit property in question in any manner whatsoever during the pendency of the suit. The applicants herein -original defendants are also restrained from parting with the possession of the land in question. While allowing the aforesaid Appeal from Order and granting the aforesaid interim injunction this Court considered the statement on behalf of the appellants that Banachithi and agreement to sell is forged and concocted one, however this Court observed that whether Banachithi and agreement to sell is forged and concocted one is question, which is required to be considered at the time of trial in Civil Suit and/or Criminal Case and no opinion can be expressed at this stage, otherwise the proceedings before the Criminal Court and proceedings in the suit will be prejudice.

1.5. At this stage, it is required to be noted that at the relevant time the applicants had already filed one Criminal Complaint against the defendants alleging inter alia that Banachithi/agreement on which the suit has been filed is forged and/or concocted however at the relevant time the investigation was pending. It is also required to be noted at this stage that at the relevant time there were two different opinions of the private Handwriting Expert. That thereafter, the criminal complaint filed by the applicants herein came to be investigated by the concerned Investigating Officer and initially the Investigating Officer submitted "B" Summary Report. However, subsequently the applicant No. 1 submitted the protest application against the report submitted by the Investigating Officer and thereafter the documents/Banachithi/agreement was sent to the FSL for Handwriting Expert Opinion and FSL had submitted the report that signature on the Banachithi/ agreement is forged one and it has been found that the signature on the Banachithi/agreement of the applicant is forged and concocted one. That thereafter, the learned Magistrate has taken cognizance of the offences against the respondents herein-original plaintiffs and by order dated 24.1.2011, the learned Metropolitan Magistrate Court No. 25, Ahmedabad has rejected the "B" Summary Report submitted by the Investigating Officer and has directed to issue process against the respondents herein-plaintiffs for the offences under Sections 465, 468, 471 and 114 of the Indian Penal Code.

1.6. That thereafter, in view of the aforesaid changed circumstance, the applicants herein-original defendants have preferred present application to vacate interim injunction granted by this Court in Appeal from Order No. 170 of 2009 in exercise of powers under Order 39 Rule 4 of the Code of Civil Procedure.

2. Shri B.B. Naik, learned Senior Advocate for the applicants has submitted that at the relevant time when this Court granted the interim injunction against the applicants, the investigation against the respondents herein-original plaintiffs with respect to the agreement to sell/Banachithi was pending and therefore, at the relevant time this Court granted interim injunction restraining the appellants from transferring and/or alienating the suit property in question by observing that whether agreement to sell/ Banachithi is forged and or concocted or not is a question which is required to be considered either in the civil suit or in the criminal case. It is submitted that however, subsequently the documents/ Banachithi/agreement to sell on the basis of which the suit has been filed by the plaintiffs was sent to the FSL for Handwriting Expert opinion and the FSL has submitted report that the signature on the agreement to sell/ Banachithi is forged one and is not that of the defendants -original land owners. It is submitted that even thereafter the learned Magistrate has taken cognizance of the offences against the plaintiffs and the learned Magistrate has issued process against the respondents herein-original plaintiffs for the offences under Sections 465, 468, 471 and 114 of the Indian Penal Code.

2.1. Shri B.B. Naik, learned Senior Advocate for the applicants- herein original defendants has submitted that as held by the Hon''ble Supreme Court in the case

of Chandra Shashi Vs. Anil Kumar Verma, to produce forged and fabricated document in the Court with oblique motive of deceiving or defrauding the Court, it amounts to interference in administration of justice and amounts to contempt of Court. It is submitted that therefore, when now it has been prima facie found that the Banachithhi of which the plaintiffs have sought the specific performance is found to be forged and concocted one and for which even the process has been issued by the learned Magistrate against plaintiffs for the offences under Sections 465, 468, 471 and 114 of the Indian Penal Code, it is submitted that now prima facie case would be in favour of defendants and against the plaintiffs and therefore, in view of the aforesaid changed circumstances and changed in the prima facie case, it is requested to exercise the powers under Order 39 Rule 4 of the CPC and to vacate interim injunction granted earlier while disposing of the Appeal from Order No. 170 of 2009.

2.2. Shri B.B. Naik, learned Senior Advocate for the applicants-herein original defendants has also relied upon the decision of the Calcutta High Court in the case of Dever Park Builders Pvt. Ltd. and Others Vs. Smt. Madhuri Jalan and Others, by submitting that as held by the Calcutta High Court while considering application under Order 39 Rule 4 of the Code of Civil Procedure, the Court may consider the subsequent events.

2.4. By making above submissions and relying upon the above decisions, it is requested to allow the present application and to vacate interim injunction granted by this Court granted while disposing of the Appeal from Order No. 170 of 2009 with Civil Application No. 5369 of 2009.

3. Present application is opposed by Shri A.L. Shah, learned Advocate for the respondents-original plaintiffs. Shri A.L. Shah, learned Advocate for the respondents-original plaintiffs has submitted that merely because the process has been issued by the learned Magistrate against the original plaintiffs for the offences under Sections 465, 468, 471 and 114 of the Indian Penal Code, it cannot be said that the charge for forging the Banachithi by the original plaintiffs is proved. It is submitted that unless and until the original plaintiffs are convicted in the trial for forging Banachithi, it cannot be said that there are changed circumstance, which warrants exercise of powers under Order 39 Rule 4 of the Code of Civil Procedure.

3.1. Shri A. L. Shah, learned Advocate for the respondents-original plaintiffs has further submitted that Handwriting Expert opinion given by the FSL can be said to be a prima facie opinion which is required to be tested and/or considered at the time of trial. It is submitted that at the relevant time when this Court granted the injunction while disposing of the aforesaid Appeal from Order, this Court has specifically observed that whether the Banachithi/ agreement is forged or concocted one is a question which is required to be considered at the time of trial either in the civil suit and/or criminal case and no opinion can be expressed at this stage. Therefore, it is submitted that the aforesaid observations of this Court would still be there and therefore, it is requested not to vacate interim injunction

granted earlier while disposing of Appeal from Order and that too in exercise of powers under Order 39 Rule 4 of the Code of Civil Procedure. By making above submissions, it is requested to dismiss the present application.

4. Heard the learned Advocates for the respective parties at length. At the outset, it is required to be noted that respondents herein-original plaintiffs have instituted suit for specific performance of agreement/Banachithi which according to the applicants herein-original defendants is forged and concocted one. It is required to be noted that at the relevant time when this Court disposed of the aforesaid Appeal from Order and granted the injunction against the applicants-original defendants restraining them from transferring and/or alienating the suit property in question in any manner whatsoever, at that stage the Investigating Officer submitted "B" Summary Report and protest application against the said "B" Summary was challenged by the applicants-herein original plaintiffs and further investigation was requested by the applicants -original plaintiffs. Considering the aforesaid position at the relevant time, this Court partly allowed the aforesaid Appeal from "Order and granted the interim injunction against the applicants herein-original defendants and in favour of plaintiffs restraining the applicants herein-original defendants from transferring and/or alienating the suit property in question in any manner whatsoever during the pendency to the suit. That thereafter, on the protest application submitted by the applicants herein-original defendants, the learned Magistrate passed an order dated 19.3.2010 directing to send the disputed Banachithi to the FSL for Handwriting Expert opinion. That thereafter, FSL has submitted its report submitting that signature on the Banachithi/agreement to sell dated 24.4.2008 alleged to be of the applicants-original owner is forged one and is not that of the original owner. That thereafter, the learned Magistrate has passed an order on 24.1.2011 rejecting "B" Summary Report submitted by the Investigating Officer and has directed to issue process against the respondents herein -original plaintiffs for the offence under Sections 465, 468, 471 and 114 of the Indian Penal Code. Therefore, now Banachithi/agreement to sell of which the plaintiffs have sought specific performance is prima facie found to be forged and concocted one. In view of the aforesaid changed circumstances, this Court is required to consider whether a case is made out for variation of the interim injunction granted by this Court in exercise of powers under Order 39 Rule 4 of the CPC ?

4.1. As per Order 39 Rule 4 of the Code of Civil Procedure, any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order. Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstance, or unless the Court is satisfied that the order has caused undue hardship to that party. Under the circumstance, considering Order 39 Rule 4 of the CPC an injunction which has been passed after giving to a party an opportunity of being heard, the order shall

not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstance. Therefore, if a party against whom the injunction has been granted satisfies on submitting application that there are change in the circumstances the Court may in exercise of powers under Order 39 Rule 4 of the CPC vary or set aside or discharge the injunction granted earlier. Therefore, this Court is required to consider whether subsequent Handwriting Expert report submitted by the FSL and rejecting "B" Summary submitted by the Investigating Officer with respect to the FIR filed against the respondents herein-original plaintiffs with respect to the Banachithi/agreement to sell of which specific performance is sought and taking cognizance of the offence by the learned Magistrate against the respondents herein-original plaintiffs and issuing the process against the respondents herein-original plaintiffs for the offences under Sections 465, 468, 471 and 114 of the Indian Penal Code whether the same can be said to be change in the circumstances warranting exercise of powers under Order 39 Rule 4 of the CPC ?

4.2. As per the settled proposition of law and even considering the provision of Order 39 Rule 1 while considering the grant of injunction under Order 39 Rule 1 of the Code of Civil Procedure, the Court is required to consider the prima facie case, balance of convenience and irreparable loss. While considering grant of injunction under Order 39 Rule 2 of the CPC prima facie case plays an important role. If the Court finds that there is no prima facie case in favour of the plaintiffs, the Court may not even grant the injunction. At the relevant time the Court might have granted injunction considering the facts and circumstances prevailing at the relevant time and considering the prima facie case, balance of convenience and/or irreparable loss at the relevant time. However due to change in circumstance and in view of subsequent development, in a given case a prima facie case and/or balance of convenience and/or irreparable loss might change and if it is found that due to subsequent development prima facie case and balance of convenience is likely to be changed, the same can be said to be change in circumstances warranting exercise of powers under Order 39 Rule 4 of the CPC and the Court may in exercise of powers under Order 39 Rule 4 of the CPC may discharge or vary or set aside the injunction granted earlier. Therefore, any change in circumstance subsequent to grant of injunction due to the subsequent development by which prima facie case and/or balance of convenience is likely to be changed, the Court can exercise the powers under Order 39 Rule 4 of the CPC and can discharge, vary or set aside the injunction granted earlier. However, while exercising such powers the Court is required to take great care and unless a strong case is made out of change in the circumstance, by which the relevant consideration for grant of injunction are likely to be changed, the Court may not exercise such powers, as earlier injunction has been passed after giving an opportunity to both the parties.

4.3. Considering the above, the facts of the case on hand are required to be considered. As stated above, at the, relevant time when the injunction was

granted by this Court in favour of respondents herein-original plaintiffs against applicants-original defendants the FIR filed by the applicants against the respondents herein-original plaintiffs alleging inter alia that Banachithi/agreement to sell is forged and concocted was pending and therefore, considering aforesaid facts and circumstances this Court observed that whether the Banachithi/agreement to sell is forged or concocted is question which is required to be considered at the time of civil suit and/or criminal case. However, subsequently on further investigation a prima facie case has been found against the respondents herein-original plaintiffs and there is Handwriting Expert opinion given by the FSL Government Laboratory by which it is prima facie established that the Banachithi/agreement to sell of which the specific performance is sought is forged and concocted one and considering the same when the learned Magistrate has taken cognizance of offence against the respondents herein-original plaintiffs and has issued the process against the original plaintiffs for the offences under Sections 465, 468, 471 and 114 of the Indian Penal Code with respect to the agreement to sell/Banachithi of which the specific performance is sought it can be said that there would not be any prima facie case against the original plaintiffs for grant of such an injunction against the applicants herein original defendants. If Handwriting Expert opinion of FSL Government Laboratory would have been there at the time when this Court decided the Appeal from Order and granted injunction and/or if the learned Magistrate would have taken the cognizance of the offences against the original plaintiffs and would have issued the process against the original plaintiffs for the offences under Sections 465, 468, 471 and 114 of the Indian Penal Code with respect to the agreement to sell/Banachithi then in that case this Court would have certainly held in favour of the defendants and this Court would have certainly considered that in view of the above there is no prima facie case in favour of the plaintiffs warranting injunction and thereafter this Court would not have granted the interim injunction. Under the circumstance, there would be change in considering prima facie case. Any subsequent development, by which, if it would have been there at the time of considering the application for injunction is likely to have change in the result, it can be said to be change in the circumstances warranting exercise of powers under Order 39 Rule 4 of the Code of Civil Procedure. As stated above by the subsequent development narrated hereinabove, there is change in the prima facie case and if such position would have been there earlier, this Court might/would not have granted injunction in favour of plaintiffs and therefore, there are change in the circumstances and therefore, the powers under Order 39 Rule 4 of the CPC can be exercised. It is true that as on today, the learned Magistrate has taken cognizance of offences against the plaintiffs and the learned Magistrate has directed to issue process against the original plaintiffs for the offences under Sections 465, 468, 471 and 114 of the Indian Penal Code, however the aforesaid would be sufficient at this stage for considering the prima facie case while considering injunction application under Order 39 Rule 1 of the Code of Civil Procedure. It is required to be noted at this stage that after considering FSL report and having found prima facie case the learned Magistrate

has directed to issue process against original plaintiffs for the offences under Sections 465, 468, 471 and 114 of the Indian Penal Code, which can be said to be change in circumstance.

5. In view of the above and for the reasons stated above, the application succeeds and interim injunction granted by this Court while disposing of the Appeal from Order No. 170 of 2009 with Civil Application No. 5369 of 2009 restraining the applicants herein -original defendants from transferring and/or alienating the suit property in any manner whatsoever and further injunction restraining the applicants herein-original defendants from parting with the possession of the suit in question during the pendency of the Special Civil Suit No. 426 of 2008 is hereby discharged/recalled/vacated in exercise of powers under Order 39 Rule 4 of the Code of Civil Procedure. However, it is observed that the observations made in the present application shall be construed for deciding the application for interim injunction only and Civil Suit and/or pending criminal case be considered by the concerned Court in accordance with law and on merits. Rule is made absolute to the aforesaid extent. At this stage, Shri A. L. Shah, learned Senior Advocate for the respondents - plaintiffs has requested to stay the implementation and operation of the present order and/or to continue the interim injunction granted by this Court while disposing of the aforesaid Appeal from Order so as to enable the respondents herein-original plaintiffs to approach the Higher Forum. Considering the facts and circumstance of the case, interim injunction dated 13.7.2009 granted by this Court while disposing of the Appeal from Order, which is now discharged and/or vacated is hereby ordered to be extended upto 15.3.2012 so as to enable the respondents-original plaintiffs to approach the Higher Forum against the present order.