

(1997) 11 MP CK 0013
In the Madhya Pradesh High Court
Case No : M.A. No. 1332 of 1996

Ramcharan Atma Ram Sonkar	Vs	APPELLANT
Radheshyam Dukhram Pandey		RESPONDENT

Date of Decision : 19-11-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Criminal Procedure Code, 1973 (CrPC) — Section 457

Citation : (1998) 2 MPLJ 173

Hon'ble Judges : Rajeev Gupta, J

Bench : Single Bench

Advocate : Alok Aradhe, for the Appellant; P. Diwakar, for the Respondent

Judgement

R.P. Gupta, J.

This appeal by plaintiff-appellant has been filed against the order dated 5-11-1996 passed by 4th Addl. District Judge, Durg, in Civil Suit No. 44-A/96. The plaintiff has filed a suit for specific performance of sale of agricultural land against the defendant. The agreement to sale on the disputed land was executed by defendant/respondent in favour of plaintiff on 1-10-1993. The sale price was fixed at Rs. 1,31,000/- and the advance paid was Rs. 20,000/-. In the agreement to sell, there was no mention of delivery of possession. The land involved was Khasra No. 24 mentioning 5.40 acres in village Kapsi. The appellant/plaintiff filed a suit on 30th September, 1996 for specific performance of contract further urging that in May, 1995, he had paid Rs. 30,000/- further without receipt and at that time he had obtained possession of land also and was in cultivation of the land. The plaintiff moved an application for interim injunction also under Order 39, Rules, 1 and 2 of CPC praying that the defendant be restrained from interfering with his possession during the pendency of suit. This was contested by defendant urging that he never transferred possession nor even obtained Rs. 30,000/- orally or without receipt in May, 1995. He, however, admitted the execution of agreement to sale and receipt of advance of Rs. 20,000/-, but urged

that the plaintiff failed to perform his part of contract in paying the rest of the price and so the agreement has become discharged. He claims possession in himself and also asserted in reply to the application for interim injunction that the plaintiff wants to grab possession illegally in the garb of obtaining interim injunction and that he be restrained from doing so while the suit was pending.

By the impugned order, the plaintiff's application for interim injunction was dismissed, and at the same time it was held that prima facie the defendant was in possession of the land and was entitled to retain its possession during the pendency of suit. It was directed that the plaintiff would not interfere in the possession of the defendant during the pendency of suit. So, not only the plaintiff's petition for interim injunction was dismissed, but, the defendant's counter prayer for injunction against plaintiff was granted.

In this appeal, the appellant-plaintiff has challenged both parts of the order. The counsel for appellant asserts that there was sufficient material on record to show that even as far back as in July 1995 the plaintiff-appellant was in possession of the suit land. He had sown, the crop of Soyabin in that season. The defendant lodged a complaint Under Sections 447 and 379, Indian Penal Code against him with Police. The Police investigated and filed a challan. That complaint is on record which is Annexure A-3 before the trial Court. It was dated 14-7-1995. In this, the defendant has asserted that in July '95, the plaintiff had taken temporary possession by ploughing disputed field. He had also asserted theft of crop. In those investigations, the crop was seized by Police and ultimately on application by the present appellant for possession of crop u/s 457, Criminal Procedure Code the Magistrate directed the crop to be handed over on Supardginama to the appellant, finding his possession as prima facie. A revision against that order was filed by the respondent before the Sessions Judge and the same was dismissed. It is urged that during those proceedings of Section 457, Criminal Procedure Code the dealing Magistrate had recorded statement of Patwari for prima facie evidence and the Patwari's statement was produced by him before the trial Court and the copy of the same is Annexure A-8. It is argued that Patwari had narrated that in fact this appellant had sown the crop, although the entry was made by him in favour of respondent in the Khasra entries because no order of change of entry had been obtained by that time from the revenue authorities and that he docs not make a change without orders. The argument of the learned counsel for appellant is that the trial Court in declining his petition for interim injunction against the defendant, relied upon entries of Khasra which were in favour of defendant, but this was a wrongful reliance. No discussion was made about the complaint of the defendant to Police, that plaintiff had taken possession in July 1995 by tilling the land, nor any consideration was given to the order of Supardginama passed by the Magistrate by the plaintiff and the rejection of the Revision filed by the defendant before the Sessions Judge. These documents were not even discussed in the order refusing injunction. Thus, the argument is that the trial Court has failed to consider material documents and has reached an arbitrary conclusion. The entries in the Khasra had been

explained by patwari and so they had no evidentiary value to show possession of the defendant.

The learned counsel has also argued that the trial Court wrongfully passed an order of injunction in favour of defendant. It was not a suit of the defendant and even if the plaintiff's petition for interim injunction was to be dismissed, it does not mean that a counter injunction in favour of defendant was to be issued against the plaintiff. There was no such counter claim made by the defendant in his written statement to the plaint. In doing so, the learned trial Court has ignored the pronouncement of Division Bench of this Court in *Churamani and Anr. v. Ramadhar and Ors.* 1991 MPLJ 311 and has erroneously relied upon *Noormohammad Bhure Khan v. Majid Khan Chand Khan and Ors.* 1992 MPLJ 412.

After perusing the record and hearing the learned counsel for both the sides I am of the clear view that there is no force in this appeal regarding right of plaintiff appellant to get ad-interim injunction against his dispossession against the defendant/respondent. In the agreement to sell entered into on 1-10-1993, there is no recitation that possession had been given to the plaintiff. Ordinarily, such possession would not be given merely because an initial part payment by way of earnest money or advance towards payment has been made. The question is whether Rs. 30,000/- was paid in May 1995 and possession was delivered by defendant to plaintiff at that time without any writing. It would be strange to accept this contention prima facie. Rs. 20,000/- was earnest money so recited in the agreement to sale Annexure A-1. When a writing was thus obtained about Rs. 20,000/- between the parties, it would be rather strange and incongruous that no writing was obtained for payment of a further sum of Rs. 30,000/-. It may be noticed that in the written agreement, it was agreed that the rest of the amount would be paid within 20 days and the sale deed would be got registered. So, the time for payment of sale consideration was to expire on 21-10-1993. In the plaint itself it had been pleaded that the defendant had given a notice of discharge of contract and forfeiture of earnest money and right to sell the property to other persons. This notice had been given on 10th May, 1994. The plaintiff refuted the allegations by his reply through his counsel, dated 30th May, 1994 and demanded that demarcation be made by some Patwari within 15 days as it was for the defendant to get the demarcation done as precondition of the sale deed, and the plaintiff pleads that thereafter in May, 1995, the defendant approached the plaintiff personally for compromise and as a result of compromise Rs. 30,000/- was further paid by plaintiff to defendant and possession of the land was given by the defendant to the plaintiff and then he cultivated the land. The narration of events in these pleadings of plaintiff clearly suggests that the plea regarding compromise and payment of Rs. 30,000/- without receipt cannot be accepted. When this was the sort of the contention between the parties that one was forfeiting the earnest money and the other was claiming subsistence of right to get sale deed executed, there could not have been any payment without receipt. If payment had been made the ordinary conduct of plaintiff would have been to obtain renewal of contract by a specific

writing and to get an acknowledgment that the possession had been given.

These pleas have been refuted by the defendant and the denials stand to reason. So, for prima facie purpose, such an assertion of the plaintiff would have to be rejected that there was a fresh payment and obtaining of possession by the plaintiff from defendant at that time. It may be noticed that no specific data of such payment has been given in the plaint nor in any affidavit in support of such contention. So the contention that possession was given by the defendant to plaintiff, is prima facie, not acceptable. This leaves us with the assertion regarding complaint to Police by defendant about interference in possession, and wrongful ploughing of the land by plaintiff. That complaint is Annexure A-3. It records that the opposite party, without right had in July, 1995, levelled the land with Tractor and thus temporarily possessed it and caused damage to him worth Rs. 50,000/-. On this, a case under Section 447 was registered against plaintiff. The simple and natural interpretation of this complaint is that the plaintiff had with a tractor tilled the land while crop of the defendant had already been sown and existed and there was theft of the crop or its destruction and unlawful trespass on land. Such a trespass, even by tilling with tractor unauthorisedly, cannot be counted as evidence of possession nor can the act of trespass itself be considered as an act of possession.

Any subsequent proceedings arising from such a complainant and its investigation regarding Supardgi of the crop can, by no stretch of imagination, be called as findings of possession. The observation of the Magistrate would be counted only for prima facie purposes of Supardgi Order when he held that the present plaintiff had harvested the crop of Soyabin after sowing it.

Supardgi proceedings u/s 457, Criminal Procedure Code are merely incidental proceedings. The observation regarding possession in such proceedings cannot have any evidentiary value and are not binding nor persuasive for a Civil Court unless there is independent evidence about possession.

The entries in Khasra Panchsala show cultivation of defendant. The argument of the counsel for appellant, that these entries should be ignored as the Patwari did not change them because there was no order for change and because the Patwari stated in Supardgi proceedings that possession was that of the appellant, has no force.

On the material on record it appears clear to this Court that, prima facie, plaintiff was not entitled to injunction to restrain the defendant from interfering in his possession as, prima facie, the plaintiff was not in possession. He never obtained possession from the defendant, prima facie. These observations of Court will not affect the merits of the suit, which may ultimately be established after leaving entire evidence on merits of the suit by the parties. So the relief was rightly declined to the plaintiff.

The next important question is whether a temporary injunction should have been issued in favour of the defendant against the plaintiff, in a suit of the present

type. The trial Court has observed that the jurisdiction to issue such an injunction should be drawn from the principle enunciated in a Division Bench judgment of this Court in Noormohammad Bhura Khan's case (supra). In this case, a writ petition under Article 226/227, Constitution of India had been filed before the High Court against an order of Addl. District Judge, Ujjain, modifying injunction order of the trial Court. Before trial Court, the plaintiff had filed suit for injunction to restrain the defendant from interfering in his possession in respect of particular agricultural land. The applications for temporary injunction were filed by plaintiff and defendant also filed similar applications. The trial Court issued an ad-interim injunction in favour of defendant about the entire land holding that prima facie defendant was in possession. In appeal, the Additional District Judge modified the order saying that it would be operative only in respect of 1/3rd share in the land as prima facie the title of the plaintiff was only to that extent. The defendant had approached the High Court in writ and supervisory jurisdiction against the order of this District Judge. A perusal of the judgment of Division Bench of High Court shows that the question whether in suit filed by plaintiff for injunction, the defendant could seek interim injunction against the dispossession or not, was not at all discussed or argued. The only point argued shows that if the defendant was in possession of any land prima facie, modification of the order of the trial Court was justified.

As against this, the counsel for appellant has relied upon another Division Bench judgment of this Court cited in titled Churamani etc. v. Ramadhar etc. (supra). In this case the Division Bench specifically considered the question whether in a suit for permanent injunction against dispossession by defendant in respect of land, the defendant could seek temporary injunction on allegation that in fact the plaintiff wanted to dispossess them under garb of injunction. The Division Bench considered this point and considered the provisions of order 39, Rule 1(a)(b) and (c). The Division Bench observed that the case fell under Order 39, Rule 1(c) only and injunction of that type could be granted to a plaintiff only and not to defendant. The Division Bench observed that Clause (a) of Rule 1 of Order 39, Civil Procedure Code, does not deal with cases of invasion of possession. It deals with waste, damage or alienation or sale in execution of a property. Clause (b) of that rule deals with the defendant removing or disposing of property to defraud creditors. So this does not cover injunction of the present type, that is against dispossession. Clause (c) of Rule 1, Order 39 is in following terms :-

"that the defendant threatens to dispossess and plaintiff or others to cause injury to the plaintiff in relation to any property in dispute in the suit. In such a case, the Court may by order grant a temporary injunction to restrain dispossession of the plaintiff until the disposal of the suit or until further orders."

The Division Bench observed that a temporary injunction of this type is provided for only in favour of the plaintiff against the defendant and not vice versa under this clause. The Court had also observed that under Rule 2 of Order 39 also when a suit is for restraining the defendant from committing a breach of contract or

other injury of any kind, the plaintiff may after commencement of the suit, apply to the Court for temporary injunction to restrain the defendant from committing breach of contract or injury. The Court observed that this type of temporary injunction could be sought by a plaintiff only.

Thus, it was in this case that a Division Bench of this Court was directly faced with the questions and the question was actually mooted and argued before the Court whether and in what circumstances, the defendant could apply for a temporary injunction against the plaintiff to restrain the plaintiff from dispossessing him from suit property. The Court said that the defendant could not do so. Since this aspect was not raised in the authority cited by counsel for defendant/respondent the only question considered was whether defendant in possession was entitled to be protected.

When a legal point is not specifically argued and discussed in a judgment and is not decided, the judgment cannot be a precedent on that point on the mere assertion that the question could have been raised and was not raised and so must be deemed to have been decided in a particular manner.

Thus, the interpretation given in "1991 MPLJ 311", discussed above, is the binding authority on this point. The contention of the appellant is that injunction should not have been granted in favour of defendant as there was no counter claim by them seeking injunction and the suit was not of nature described in Clause (a) of Rule 1, Order 39 of Civil Procedure Code. So, the petition of the defendant could not be maintained. On the scope of Order 39, Rule 1(a) to (c) the contention is well founded.

In view of my above discussion the appeal fails to the extent of relief for injunction against the respondent, but succeeds to the extent of temporary injunction granted in favour of defendant/respondent against the plaintiff-appellant. That part of the impugned order is therefore set aside but the refusal of temporary injunction in favour of appellant against respondent is confirmed.