
(1994) 11 DEL CK 0043
In the Delhi High Court
Case No : First Appeal No. 236 of 1994

Ravi Kumar

APPELLANT

Vs

Misha Vadhera and Others

RESPONDENT

Date of Decision : 16-11-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : (1994) 4 AD 962 : AIR 1995 Delhi 175 : (1994) 31 DRJ 427 : (1995) 2 ILR Delhi 157

Hon'ble Judges : M. Jagannadha Rao, C.J.;Devinder Gupta, J

Bench : Division Bench

Advocate : Swantantar Kumar, Geeta Mittal, H.L.Tikku and B.L.Wali, for the Appellant;

Judgement

M. Jagannadha Rao, C.J.

(1) ADMITTED.

(2) This is an appeal by the 1st defendant against the order of the learned Single Judge dated 8.9.94 in is No. 7909 of 1994 in Suit No. 2828/93 appointing a Receiver in an application filed by the plaintiff-1st respondent without service of the notice in the is on the appellant.

(3) The appellant - 1st defendant Mr. Ravi Kumar is admittedly the owner of a flat with commercial space measuring 1106 sq. ft. on the first floor of a multi-storied building, namely, "Hansalaya", 15, Barakhamba Road, New Delhi. The appellant states that he is a non-resident Indian (NRI) and ha had earlier purchased this property by paying sale consideration in foreign exchange after taking the required permission from the Reserve Bank of India. The plaintiff-1st respondent Misha Vadhera is said to be a builder of the multi- storied building "Hansalaya" and according to the appellant, the plaintiff is carrying on business in real-estate through respondent 3, a real-estate agent (M/s Satish Pandit & Associates). It is said that the appellant is carrying on business in names of

respondent 2 (Hotel Hans Pvt. Ltd.) and respondent 4 (M/s Hansalaya Properties). Appellant admits that he entered into an agreement of sale with respondents 1,2 for a consideration of Rs.90 lacs in respect of the above property, and the terms are that Rs. 1 lakh be paid on 28.10.1993, Rs. 8 lakhs within 7 days of signing the agreement and balance of Rs. 81 lakhs in 60 days of obtaining of the permission by the appellant from the competent authority under Chapter XX-C of the Income Tax Act. The appellant was to apply for the clearance from the I.T. authorities within 10 days after the signing of the agreement i.e. after receipt of Rs. 8 lakhs. It is also admitted that appellant received Rs. 1 lakh on 28.10.93. But, it is the case of the appellant that the plaintiff failed to pay Rs. 8 lakhs within 7 days of the signing of the agreement on 28.10.93 and Therefore the plaintiff committed breach of contract. The appellant says he, Therefore, revoked the contract by a Fax message on 6.11.1993 sent to the plaintiff (FAX No. 3314830) and he also sent a registered letter in that behalf on 7.11.1993. He also says that he returned the amount of Rs. 1 lakh by a registered letter dated 16.12.93 in the form of a Bank Demand Draft No. 110013014 on 16.12.1993 drawn on Bank of India. These letters are filed as Annexures I and II. Appellant says he also took out a public notice and sent a legal notice dated 31.1.1994 to the respondents by regd. post as per Annexures Iii and IV. According to him, no reply was received.

(4) The Suit No. 2828/93 was filed for specific performance by the 1st respondent and is No. 10881/93 was filed under Order 39 Rules 1 & 2 Cpc to restrain the appellant from alienating the property to others, etc. A learned Single Judge ordered notice on 20.12.93 for 1.2.94. The plaintiff filed Fao (OS) 4/94-against the order "notice" issued by the learned Judge. In that appeal, a Division Bench of this Court passed an order on 6.1.94 permitting the appellant-there in (i.e. plaintiff) to deposit Rs. 89 lakhs and said that if the amount is deposited, there shall be temporary injunction as prayed against the 1st defendant(appellant in the present appeal). Later the said order was modified on 25.1.94 into an order to furnish bank-guarantee and the interim injunction was continued. These orders were passed without the present appellant who was respondent in FAO(OS) 4/94 being served in the appeal. The said appeal Fao (OS) 4/94 came up before a Division Bench later, on 4.5.94 and even by that time the 1st. defendant (1st respondent therein) was not served in that appeal or suit. Inasmuch as earlier an order was passed by the Bench on 6.1.94 granting injunction without the 1st defendant (1st respondent therein) being served, the Bench, when the matter came before it on 4.5.94, was not in a position to either consider continuance/vacation of the order of injunction passed earlier on 6.1.94 and with a view to give the necessary opportunity to the 1st defendant, the Bench passed an order permitting the 1st defendant(vendor), to file an application before the learned Single Judge, treating the order of the Bench dated 6.1.94 as an ad interim order passed by the trial Court. The 1st defendant-vendor filed is 8424/90 before the learned Single Judge under Order 39 Rule 4 for vacating the injunction and the same was posted to 23.9.94.

(5) But, in the meantime, the plaintiff (respondent in the appeal) filed is No. 7909/94 on 31.8.94 seeking the appointment of a Receiver to take possession of the said property.

(6) In the above Ia, the plaintiff stated that the 1st defendant was avoiding to receive notice deliberately, that he had received Rs. 1 lakh, and was also holding a cheque for Rs. 8 lakhs, that the plaintiff had given bank guarantee for Rs. 89 lakhs, that the plaintiff is incurring serious financial loss and stated:

"IT is respectfully submitted that the plaintiffs are entitled to use and occupation of the property and derive benefit there under," and again that "The said defendant has no authority or right to be in possession of the suit property and/or to being put in his use and occupation which would be wholly illegal having regard to the facts and circumstances of the case".

(7) In this is 7909/94 for appointment of a Receiver the learned Single Judge ordered on 8.9.94 "notice" for 5.10.94 and then appointed the plaintiff as Receiver "to take possession of the flat" and "use and enjoy the flat till disposal of the suit or till this order is varied." plaintiff is not to part with possession of the property in any manner whatsoever. An Advocate was appointed as Commissioner to take over possession of the property, if need be, with police aid.

(8) In other words, pending the suit for specific performance of contract dated 28.10.93 to sell the flat for Rs. 90 lakhs, upon the plaintiff paying Rs. 1 lakh to the vendor (which was sent back by the vendor with a letter of revocation of contract) and upon furnishing bank guarantee for Rs. lakhs, and when the 1st defendant was already restrained by injunction under Order 39 Rule I from transferring the property or possession, and when 1st defendant was not served nor was declared ex parte, the plaintiff filed the Receiver application and while ordering notice in the Receiver application, the learned Single Judge appointed the plaintiff as Receiver to take possession of the flat and appointed a Commissioner to give possession to the plaintiff by police aid. We may also refer to the order of the learned Single Judge, which according to the appellant's counsel, does not contain any reasons as to why a Receiver is appointed. It reads:

"IN the facts and circumstances of the present case, it appears just and convenient to appoint plaintiff as a Receiver to take possession of the flat as claimed in this present application at this stage He will use and enjoy the flat till disposal of the suit or till this order is varied. He will not part with possession of the property in any manner whatsoever till further orders. Notice be also issued to the defendants for 5th October, 1994. Mr. 1.P. Verma, Advocate, who is present in Court is appointed as a Commissioner who will assist the plaintiff in taking over the possession of the property. He will also be titled to take notice, if necessary. His fee tentatively is fixed at Rs. 5,000.00 to be borne by the plaintiff. He will submit his report within two weeks. dusty."

It is submitted for the appellants that this order of appointment of Receiver is

without reason and was passed at the stage when notice in the suit or in the is for appointment of receiver was not yet served and when there was already an injunction against the 1st defendant from alienating or parting with possession, and must be set aside. There is no reason as to why pending the suit for specific performance, the defendant-vendor is to be summarily dispossessed.

(9) On the other hand, learned counsel for the respondent-plaintiff referred to certain documents to say that 1st defendant deliberately avoided notice in the suit and in the is for temporary injunction and was watching the course of the proceedings. Learned counsel also wanted to rely on some other documents in this behalf but appellant's counsel said that we have to consider the correctness of the order on the basis of the documents which were before the learned Single Judge when the plaintiff was appointed as Receiver.

(10) The point for consideration is: Whether the learned Single Judge was right in directing dispossession of the vendor (1st defendant-appellant) before 1st defendant was set ex parte and at a stage when there was already a temporary injunction against the vendor in an earlier I.A ?

(11) We may make it clear that we are not here deciding whether the plaintiff-respondent is entitled to an order of appointment of the plaintiff as Receiver after both sides are heard. We are only deciding the limited question whether the plaintiff could have been allowed to summarily dispossess the vendor-1st defendant(appellant) even before service of notice or even before the Court could think of setting him ex parte.

(12) We have already pointed out that the learned Judge did not choose to give any reasons except to say that that was "just and convenient" and in the circumstances of the case. What the circumstances were, have not been set out. As already stated, the respondent- plaintiff filed the suit for specific performance on 6.12.93 and sought for temporary injunction in is 10881/93 restraining the 1st defendant from alienating or transferring possession to others. Notice was ordered on 20.12.93 and against that order respondent filed Fao (OS) 4/94 and a Division Bench granted temporary injunction on 6.1.94 without notice to appellant, subject to the plaintiff depositing Rs. 89 lakhs and later modified it on 15.1.94 into one for furnishing Bank guarantee. Later, when the appeal came before the Bench on 4.5.94 it found that in view of the injunction already granted without notice, it could direct the same to be treated as an interim order by the Single Judge and the defendant be permitted to move for vacating it. Thereafter the 1st defendant in fact filed is 8424/94 on 23.9.94 but even before that, the plaintiff filed the present is 7909/94 on 31.8.94 for appointing a Receiver and the Court appointed the plaintiff as Receiver on 8.9.94 and ordered notice to the defendant.

(13) In our view, the case was not a fit one to dispossess the 1st defendant, even before he was served with notice or was set ex parte and that too without any reasons. Except to say that, in the circumstances, it was just and

convenient" to appoint a Receiver at that stage, no reasons whatsoever are given in the impugned order.

(14) It is well-settled that the possession of the defendants cannot be lightly disturbed by the Court and that too at a preliminary stage even before notice of suit or notice in the Receiver application is served. Lord Cranworth L.C. stated in *Leney & Sons Ltd. v. Callingham & Thompson* 1908 (1) K.B. 79 as follows:

" THE receiver ,if appointed in this case, must be appointed on the principle which the court of Chancery acts, of preserving property pending litigation which is to decide the right of the parties. In such cases the court must, of necessity, exercise a discretion as to whether it will or will not take possession of the property by its officer where, indeed, the property is as it was, in media ,in the enjoyment of no one, the Court should prevent a scramble. But where the object of the plaintiff is to assert a right to property, of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong for the defendant, in some cases, an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may, by its interim interference, have cause mischief to the defendant, for which the subsequent restoration of the property may afford no adequate compensation."

(15) It is clear, Therefore, possession of the defendant is not to be lightly interfered with and at any rate even before notice is served on the defendant or he is set ex parte. Even thereafter, normally a plaintiff must make out a prima facie case and also a further case that if the defendant is not disturbed from possession and the Court is not to take over possession, the property is likely to be damaged or wasted the principles laid down by the English Courts of equity have been followed by our courts consistently. The word just or convenient used in Section 25 of the Judicature Act, 1873 (now Section 45 of the Judicature Act, 1925) were interpreted to mean "just and convenient". The same view is followed in India. The discretion to appoint a receiver is not arbitrary or unregulated but is to be exercised cautiously, judicially and according to legal principles (*Benoy Krishna v. Satish Chandra* Air 1928 P.C. 49 after consideration of the whole of the circumstances of the case. A receiver cannot be appointed merely because it is expedient or convenient to one of the parties to do so or because it will do no harm to do so. A bona fide possessor of property should not be dispossessed pending suit unless there is some substantial reason, such as, well-founded fear that the property in question being dissipated or that some other irreparable mischief may occur unless the court gives its protection. The application for appointment of receiver should not be disposed of summarily. The matter should be considered judicially in all its aspects. The plaintiff must show prima facie that he has a strong case i.e. either a good title to the property or a special equity in his favor requiring immediate dispossession of the defendant or that the property in the hands of the defendant is in danger of being wasted.

(16) If these are the general and well settled principles applicable for

appointment of a receiver even after the defendant is served and after hearing him, we fail to see how the respondent can take ever possession as a Receiver, pending disposal of the Receiver application and before notice there in is served. In this case the 1st defendant had returned even the Rs. 1 lakh received by him alleging that plaintiff had committed breach of contract. It is true that the plaintiff has a case that the appellant was evading notice in the suit and was watching the progress of the case. But even, on this aspect, there is no finding of evasion or that the appellant was in know of things and was watching and was giving different addresses. Nor was the appellant set ex parte. After all, there is already ad interim injunction in favor of the plaintiff restraining the appellant from alienating or parting with possession. Counsel for the appellant contends that it is the case of the appellant that he is an Nri and was living outside India, that this fact is known to the plaintiff and that the plaintiff, was deliberately sending notices to wrong addresses. It is also argued that the appellant filed an is for vacating the temporary injunction but before that date the plaintiff took over as receiver even before notice in the receiver application was served.

(17) We may state that ordinarily, even if the plaintiff stated in his plaint that he was ready and willing to complete the contract and even if he had deposited the consideration into court, he cannot normally be put in possession straightaway except where, on the principles stated above, the Court thinks of taking over possession through a receiver because of the serious likelihood of waste or damage to property or the existence of other situations mentioned above.

(18) In the result, we set aside the order of the learned Single Judge dated 8.9.94 and direct the plaintiff to put back the appellant in possession forthwith. The Commissioner appointed by the court earlier is hereby directed to put back the appellant in possession, if need be, with police aid. The Commissioner will be paid Rs. 5000.00 for the same by the appellant. The Commissioner will also take photographs of the property handing over possession to the appellant and submit a report in the is so that the condition of the property at the time of handing over possession to the appellant will be a matter of record. Unless the appellant is put in physical possession, the is for appointment of receiver should not be taken up for fur- ther orders or hearing.

(19) The appeal is allowed and the is 7909/94 is remitted to the learned trial Judge, for disposal according to law. We may make it clear again that we are not to be understood as having said anything on the merits of the IA. All that we have done is to set down the general principles and also to say that the learned Single Judge was wrong in appointing the plaintiff as Receiver even before notice in suit or the is was served and without any reasons. After healing both sides now, the learned Single Judge can deal with the application in accordance with law.