

(2011) 03 GUJ CK 0074

In the Gujarat High Court

Case No : Appeal from Order No. 26 of 2011 and Civil Application No. 759 of 2011 in Appeal from Order No. 26 of 2011

Sai Developers and Another

APPELLANT

Vs

Nakulan S. Pannikar and Others

RESPONDENT

Date of Decision : 28-03-2011

Acts Referred:

Registration Act, 1908 — Section 17(b)

Citation : (2011) 03 GUJ CK 0074

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : Y.N. Oza and Sandeep R Limbani, for the Appellant; Mihir H. Joshi and Arpit A. Kapadia, for respondent 1, Mihir H. Joshi and Gaurav S. Mathur, for Respondent 2, P.C. Kavina and Alkesh N. Shah, for Respondent 3 and Kashyap K. Pujara, for Respondent 4, for the Respondent

Judgement

Abhilasha Kumari, J.—Admit. Mr. Arpit A. Kapadia, Mr. Gaurav Mathur, Mr. Alkesh N. Shah and Mr. Kashyap K. Pujara, learned advocates, waive notice of admission for Respondents Nos. 1 to 4, respectively. On the facts, and in the circumstances of the case, and with the consent of the learned advocates for the respective parties, the Appeal is being heard and finally decided.

2. The Appellants (original Plaintiffs) have initiated Special Civil Suit No. 186 of 2010 in the Trial Court to declare, that the Agreement dated 02.08.2010 regarding the suit property entered into between the Appellant No. 1 and Respondent No. 1, as well as the Possession Receipt dated 31.07.2010, executed by Appellant No. 1, be declared to be null and void, and to declare that the Possession Receipt is not legal as it is obtained by exercising fraud, and further to declare that they are in possession of the same by virtue of order passed in Civil Suit No. 350 of 2000 and that the Defendants have no right in the same. The Appellants/ Plaintiffs further prayed that the Defendants be restrained from interfering in the suit property or selling, transferring, assigning or creating any rights in the same. The Appellants have filed an application at Exhibit 5, interalia,

praying for grant of temporary injunction during the pendency of the suit, restraining the Respondents from taking the possession of the suit land from the Appellants, except in accordance with law, which has been dismissed by the impugned order, giving rise to the filing of the present Appeal from Order.

3. The case of the Appellants/ Plaintiffs in the plaint, is that the suit property originally belonged to one Thakore Shri Bharatsinh of Haripur Pala, upon whose death, the land was inherited by Shri Harishchandrasinh, as his personal property. On 07.04.1993, the original owner, said Harishchandra, agreed to sell the said property to M/s. Sai Developers, for Rs. 21,92,600/- by an Agreement to sell dated 07.04.1993.

4. The Appellant No. 1 filed Civil Suit No. 350 of 2000 for specific performance of the Agreement of sale dated 07.04.1993. The Trial Court, passed a judgment and decree dated 07.02.2001 in the above Civil Suit, in favour of the Appellant. The said decree was got registered before the Sub-Registrar, Rajkot, on 07.02.2001, by the Plaintiff-Appellant No. 1 through his Power of Attorney Holder Shri Arvind Dwarkadas Jani (Defendant No. 3 - Respondent No. 3). Another suit, being Civil Suit No. 247 of 2001, came to be filed by the sisters of the original owner Harishchandra, challenging the judgment and decree dated 07.02.2001. The original owner Harishchandra also filed Civil Suit No. 53 of 2002, challenging the judgment dated 07.02.2001. In the meanwhile, the original owner Harishchandra expired and the names of his legal heirs were mutated in the revenue records. Suo-motu proceedings were initiated by the Competent Authority regarding title of the suit property. The Appellant issued a public notice for title clearance, pursuant to which objections were raised by one Ebhaji Arjanji and Dahyabhai Jamnadas, who subsequently filed Civil Suit No. 23 of 2008 and Civil Suits No. 82 and 83 of 2007 respectively, for specific performance of the Agreements for sale of the suit property. According to the Appellants, Appellant No. 1 suffered a paralytic stroke and had to undergo extensive medical treatment from March 2010 onwards, due to which his physical and mental condition was weak and unstable. Taking undue advantage of this, the Defendants/ Respondents got executed Agreement for sale dated 29.04.2010, whereby the decree in respect of the suit property was assigned to Respondent No. 1 for a consideration of Rs. 76 crores. As per this Agreement, a sum of Rs. 1 crore was to be paid by Respondent No. 1 to Appellant No. 1 for rendering the Agreement operative, which was paid to the Appellant. The Agreement dated 29.04.2010 records in Clause-7 that an amount of Rs. 9 crores was also paid thereafter, for making settlements with the legal heirs of the original owner and third parties. According to the Appellants, this Agreement was got executed by taking undue advantage of the weak physical and mental condition of Appellant No. 1. According to the Appellants, another Agreement dated 02.08.2010 was executed by Appellant No. 1, through his daughter, Appellant No. 2, whom he had constituted as his Power of Attorney on 02.08.2010. According to the Appellants, this Agreement records that the possession of the suit property is with the Appellants and is to be handed over to the the Respondents only at the time of executing Sale Deeds

with the heirs of the original owner, and the remaining amount of Rs. 66 crores is to be paid to the Appellants, in order to make settlements. It is the case of the Appellants/ Plaintiffs that the Respondents/ Defendants are making efforts to grab the possession of the suit property and trying to show that the possession is with them, with a malafide intention, in contravention of the terms of the Agreement dated 02.08.2010 and they have got fabricated, a Possession Receipt dated 31.07.2010, but it is not legal as it is on insufficient stamp. It is further the case of the Appellants that Respondent No. 3, who was originally holding the Power of Attorney of Appellant No. 1, is acting in collusion with the remaining Respondents in order to grab the suit property. Therefore, the Appellants are not willing to continue the Agreement and, therefore, the suit is filed and injunction application Ex.5 filed for injunction during the pendency of the suit.

5. The plaint and application Ex.5 have been contested by Respondents by filing a Written Statement, as well as reply to the application at Ex.5, wherein they have taken a stand that the physical or mental condition of Appellant No. 1 is not known to them. However, they have paid an amount of Rs. 10 crores to the Appellants who have not produced the receipts thereof before the Trial Court. The Appellant No. 1 was in sound physical and mental condition at the time of execution of the Agreement to Sell dated 29.04.2010, assigning the decree. The remaining amount of Rs. 66 crores is to be paid to the Appellants only after the title of the suit property is cleared and the responsibility to ensure this is upon the Appellants. Without making any settlement with the heirs of the original owner or getting the title of the property in question cleared, the Appellants have filed the suit, solely with a malafide intention of depriving the Respondents of the suit property even after receiving a huge amount of Rs. 10 crores. Not only this, the Appellant No. 1 has taken blank, undated cheques of Rs. 66 crores, as security towards the settlement with third parties, which was to be made within a period of four months, as per the Agreement. However, before the said period expired, the Appellants have filed the suit with an intention of backtracking from the terms of Agreement. According to the Respondents, after assignment of the Decree in their favour, the Appellants have no right in the suit property. The possession of the suit property is with the Respondents, as per Possession Receipt dated 31.07.2010. The Respondents/ Defendants assert that the Appellants/ Plaintiffs have no prima-facie case and the balance of convenience is not in their favour, and neither would they suffer irreparable loss if an injunction is not granted in their favour.

6. Mr. Y.N. Oza, learned Senior Advocate appearing on behalf of the Appellants, has vehemently submitted that the Trial Court has committed a grave error in dismissing the application at Ex.5 and not granting an interim injunction. That the Respondents have taken undue advantage of the illness of Appellant No. 1, and Respondent No. 3, who was the Power of Attorney of Appellant No. 1, has colluded with the other Respondents in trying to grab the suit property. It is further submitted that the Agreement dated 29.04.2010, is an unregistered one and cannot be relied upon as it is not admissible in evidence. The said

Agreement does not transfer title or possession until the settlement with the heirs of the original owner and third parties is arrived at. The later Agreement dated 02.08.2010, is a registered one, and governs the position between the parties. As per this document, the possession of the subject land is to be handed over at the time of execution of the Sale Deeds. It is contended that the earlier Agreement dated 29.04.2010 would cease to operate upon execution of the latter one dated 02.08.2010. However, the Trial Court, while dismissing the application at Ex.5, has relied upon the earlier unregistered document, which is not admissible in evidence, while brushing aside the later, registered, document. It is vehemently submitted that the Appellants are in possession of the suit property and the Respondents have got the Possession Receipt dated 31.07.2010 executed on a stamp paper worth Rs. 100/-. This document is not admissible in evidence, as it is not a registered document. The Possession Receipt dated 31.07.2010 has been executed in Vadodara whereas the land is situated in Rajkot, which further erodes its credibility. The Appellant No. 1 has revoked the earlier Power of Attorney conferred on Respondent No. 3 and constituted his daughter, Appellant No. 2, as his Power of Attorney. The evidence produced by the Respondents in support of their purported possession of the suit property is fabricated and created with the design and motive of grabbing the property. The Trial Court has committed grave error in placing credence on such evidence. It is forcefully urged by the learned Senior Advocate that documents which are required to be registered, cannot be looked into if they are not registered, and such documents cannot be relied upon or admitted in evidence. The learned Senior Advocate has argued that the earlier unregistered Agreement dated 29.04.2010 does not subsist after execution of the registered Agreement dated 02.08.2010, therefore, the reliance placed by the Trial Court on the earlier unregistered document, while rejecting the application at Ex.5, is erroneous.

7. Referring to Section 17(b) and (e) of the The Registration Act, 1908, it is submitted by the learned Senior Advocate that as the Agreement to Sell and the Possession Receipt are instruments regarding immovable property, which create, declare, assign, limit or extinguish right, title or interest in the suit property, they are required to be got registered. As the Agreement dated 29.04.2010 and Possession Receipt dated 31.07.2010 are unregistered documents, they cannot be relied upon as they are inadmissible in evidence.

8. It is further submitted that the Appellants have a good prima-facie case and the balance of convenience is in their favour. Serious and irreparable injury which cannot be compensated in terms of money, would be caused to them if an injunction is not granted to in their favour as an amount of Rs. 66 crores is still to be paid by the Respondents. It is, therefore, prayed that the impugned order be quashed and set aside and an interim injunction be granted to the Appellants, pending the suit.

9. In support of the above submissions, the learned Senior Advocate has relied upon the following judgments:

(1) Vora Ibrahim Akbarali v. State of Gujarat 1968 GLR 939 , (2) Satish Kumar and Others Vs. Surinder Kumar and Others, , (3) Suthar Dahyabhai Girdharbhai v. Suthar Pursottamdas Girdharbhai (since deceased by his heirs Kamalaben 1976 GLR 534 ,(4) Gohil Amarsing Govindbhai (decd.) by L.Rs. Vs. Shah Mansukhlal Chhaganlal (Decd.) by L.R., , (5) Ambalal Jethabhai Patel Vs. Valand Parshottamdas Naranbhai and Another, ,(6) I.T.C. Limited Vs. George Joseph Fernandes and Another, , (7) Dina Ji and Ors. v. Daddi and Ors., AIR 1990 SC 1153, , (8) National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., , and (9) Avinash Kumar Chauhan v. Vijay Krishna Mishra AIR 2009 SCW 979.

10. The Appeal has been strongly resisted by Mr. Mihir H. Joshi, learned Senior Advocate for Respondents Nos. 1 and 2. It is submitted that admittedly, the Appellants have received an amount of Rs. 10 crores from Respondent No. 1 pursuant to Agreement dated 29.04.2010. However, they have not produced the receipts regarding this payment before the Trial Court. The said Agreement dated 29.04.2010 states that the balance amount of Rs. 66 crores is to be paid after title clearance is obtained and settlements are made with the heirs of the original owner and third parties. The responsibility of doing this is upon the Appellants. As and when the Appellants fulfil their responsibility as per the Agreement and after the title clearance for the land is obtained and Sale Deeds executed, the Respondents would be ready and willing to pay the balance amount of Rs. 66 crores. It is forcefully contended that the Agreement dated 29.04.2010 has not been challenged by the Appellants in the suit. Moreover, there is a specific statement in the Agreement dated 02.08.2010, that the Agreement dated 29.04.2010 is to be considered as part and parcel of the said Agreement. On one hand the Appellants have challenged the Agreement dated 02.08.2010 in the suit, and on the other hand, they are relying upon the same in the present Appeal. There is a dichotomy in the stand taken by the Appellants who cannot be permitted to approbate and reprobate in the same breath. If the Appellants are placing reliance on the registered Agreement dated 02.08.2010, then it goes without saying that they also accept the terms and conditions of the Agreement dated 29.04.2010, which has been made a part of the said Agreement. It is further urged that the Possession Receipt dated 31.07.2010 is not required to be registered. It is further contended that the Appellants have not disputed their signatures on any of the said documents. That there is an assignment of the decree in favour of the Respondents and the Agreement dated 29.04.2010, by which the decree is assigned, has been made a part and parcel of the registered Agreement dated 02.08.2010. The learned Senior Advocate for the Respondents Nos. 1 and 2 submits that it is an admitted position that the Appellants have received a sum of Rs. 10 crores and blank, undated cheques for Rs. 66 crores have also been given to the Appellants for settling the claim of the heirs of the original owner. At no point of time have the Appellants disputed the execution of any of the documents or their signatures upon them. That the documents in question do not show that they have been executed by a person who is not in a proper mental and physical condition. That the Appellants have not produced

even a single document establishing their possession over the suit property whereas the Respondents have produced sufficient material on record such as bills, communication to the Police Commissioner, communication to the Police Inspector, communications with the Mamlatdar and District Collector and receipt of Paschim Gujarat Vij Company, apart from the Possession Receipt dated 31.07.2010, to prove their possession over the suit property. It is contended that the Appellants do not have a prima-facie case in their favour, nor have they succeeded in proving balance of convenience or factor of irreparable loss. The Trial Court has not committed any error in dismissing the application at Ex.5, and the said order does not deserve interference by the Court, therefore, the Appeal from Order be dismissed.

11. Mr. Percy C. Kavina, learned Senior Advocate appearing for Respondent No. 3, has adopted the arguments advanced by Mr. Mihir H. Joshi, learned Senior Advocate on behalf of Respondents Nos. 1 and 2. In addition thereto, it is submitted that the plaint contains no particulars regarding the so-called fraud, undue influence and coercion, as alleged by the Appellants. The stand taken by the Appellants is not supported by any averment in the plaint, or material on record. In the absence of material particulars, such submissions are fatal to the cause of the Appellants. That the case of the Appellants is based only on the ground of the physical ailment of Appellant No. 1. It cannot be deduced therefrom that he was not in a sound mental condition to execute the documents in question, as there is no material on record to show that he was mentally handicapped in taking such decision. It is further submitted that the Plaint does not disclose any cause of action. No concrete material has been produced on record by the Appellants to substantiate the stand taken in the plaint and before this Court, therefore, the appeal deserves to be dismissed.

12. The learned Senior Advocate has placed reliance upon the following judgments in support of his submissions:

(1) Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, , (2) Afsar Sheikh and Another Vs. Soleman Bibi and Others, , (3) Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others, and (4) Ramesh B. Desai and Others Vs. Bipin Vadilal Mehta and Others, .

13. Mr. Kashyap K. Pujara, learned advocate for Respondent No. 4, has adopted the arguments advanced by Mr. Mihir H. Joshi, learned Senior Advocate for Respondents Nos. 1 and 2.

14. In rejoinder, Mr. Y.N. Oza, learned Senior Advocate for the Appellants, has reiterated his earlier submissions.

15. I have heard the learned advocates for the respective parties, perused the impugned order and the documents on record. The learned Counsel for the respective parties have submitted three paper-books containing documents, which have been perused.

16. The Trial Court, after appreciating the material on record, has come to the conclusion that the Appellants have not been able to prove the existence of a prima-facie case, balance of convenience or irreparable loss in their favour. At the stage of deciding an application for grant of temporary injunction, these are the factors that have to be looked into. It emerges from the record that the Possession Receipt dated 31.07.2010, which is Notarized, bears the signature of Appellant No. 1, and his photograph is also affixed thereupon. The signature and photograph of Respondent No. 1 is also affixed thereupon. Appellant No. 2, who is the daughter of Appellant No. 1, has signed as a witness to the said document. The principal stand taken by the Appellants is that on 02.08.2010, when the Agreement dated 02.08.2010 was entered into between the parties, Appellant No. 1 was under treatment for an attack of paralysis. The Appellant No. 1 had constituted Appellant No. 2, as his Power of Attorney for the purpose of executing the Agreement with the Respondents. On the basis of the material on record, the Trial Court has come to the conclusion that the aspect regarding the physical and mental condition of Appellant No. 1 is a matter of evidence. In the view of this Court, no error has been committed by the Trial Court in arriving at this conclusion as the physical or mental condition of the Appellant No. 1 and its effect on the documents on record, as well as the allegations of undue advantage being taken by the Respondents, cannot be verified or decided except by taking evidence. It has been noted by the Trial Court that the decree passed in Special Civil Suit No. 350 of 2000, has been assigned to Respondent No. 1 by Agreement dated 29.04.2010, which document bears the signature of Appellant No. 1. Further, the Possession Receipt dated 31.07.2010 bears the recital that the possession of the suit property is being voluntarily handed over to the Respondents. It is relevant to note that the Appellants have not denied the execution of the documents or their signatures thereupon, at any stage. Therefore, the Trial Court was justified in recording at this stage, that the Respondents were in possession of the suit property by virtue of Possession Receipt dated 31.07.2010. It is true that the Appellants have challenged the legality of the document in the suit. If any relief is granted relying upon this contention, it would amount to deciding the issue in that regard, at the interim stage without affording an opportunity to the other side. As the suit is still pending, the admissibility in evidence, or otherwise, of the documents in question, cannot be gone into. In the considered view of this Court, there is no error in the conclusions drawn by the Trial Court. No authoritative pronouncement regarding the evidentiary value of the documents on record, their interpretation or effect in this regard can be made at this stage, as to do would materially affect the final decision in the suit.

17. Taking into consideration the entire material on record, in the considered view of this Court, the impugned order of the Trial Court suffers from no error or illegality so as to warrant interference from this Court. The learned advocates for the respective parties have placed reliance upon various judgments in support of the submissions advanced by them. Insofar as the reliance placed upon the

judgments cited by the learned advocate for the Appellants are concerned, they mostly relate to the registration of documents and admissibility of such documents as evidence. As already stated hereinabove, the veracity, and appreciation of the documents and their admissibility in evidence are aspects that are to be looked into by the Trial Court at the time of the final decision of the suit. It would not be appropriate to comment upon the evidentiary value of the said documents at this stage, as to do so would result in grave prejudice being caused to the parties. The judgments relied upon by the learned Senior Advocate for the Appellants are, therefore, not being considered or discussed. As the aspect of fraud, coercion and undue influence is also a matter of evidence, the judgments relied upon by the learned advocates for the Respondents are also not being gone into.

18. The Possession Receipt, prima-facie, indicates that the possession of the suit land has been delivered to the Respondents. It bears the signature of Appellant No. 1 and his photograph is affixed thereupon. Appellant No. 2 and another individual have signed as witnesses thereto. Another relevant aspect is that there is no positive assertion in the Plaint that the Appellants are in possession of the suit land. The Agreement dated 29.04.2010 is not disputed or challenged by the Appellants. What is challenged in the suit is the Agreement dated 02.08.2010. This very Agreement is now being relied upon by the learned Senior Advocate for the Appellants on the ground that it is registered and should have been considered by the Trial Court. It is recorded in the Agreement dated 02.08.2010 that the earlier Agreement dated 29.04.2010 is a part and parcel of the later Agreement. The interse rights and obligations of the parties, on the basis of the said Agreements are to be decided in the suit, and the Trial Court has rightly not gone into the said aspect at the stage of deciding the application for grant of interim injunction. It is also significant that looking to the Prayer-6(A) in the injunction application Ex.5, the Appellants have claimed their possession on the basis of judgment and order dated 07.02.2001 in Civil Suit No. 350 of 2000. The Appellants have though challenged the legality of the Possession Receipt, but have not made any statement in the injunction application that the Possession Receipt was not acted upon and possession was not given to the Respondents. Therefore, prima-facie, it appears that the Appellants were not in possession of the suit property on the date of filing of the suit.

19. At the stage of deciding the application for grant of temporary injunction, what is to be looked into is whether the Plaintiff has a prima-facie case, whether the balance of convenience is in his favour and whether he would suffer irreparable loss if the injunction is not granted. It emerges from the material on record that the Appellant No. 1 has entered into an Agreement to Sell the suit property for Rs. 21,92,600/- with the original owners. It is not disputed that an amount of Rs. 10 crores has been paid by the Respondents to the Appellants. The receipts of the said payments have been placed on record by the Respondents. There is no denial that blank, undated cheques of Rs. 66 crores have been handed over by the Respondents to the Appellants. The Respondents

have produced material on record regarding their possession, the veracity of which is to be looked into by the Trial Court at the time of deciding the suit. From a perusal of the entire material on record, it does not transpire that the Appellants have been successful in proving that they have a prima-facie case or that the balance of convenience is in their favour. Further, it cannot be concluded from the material on record that the Appellants would suffer irreparable loss or injury, if an injunction is not granted to them.

20. Considering the above factors, in the view of this Court, the Trial Court has not committed any error or illegality in dismissing the application at Exhibit 5, and not granting an interim injunction to the Appellants.

21. For reasons stated hereinabove, the present Appeal from Order deserves to be dismissed and is, accordingly, dismissed. Notice is discharged.

22. In view of the dismissal of the main Appeal from Order, no orders are required to be passed in Civil Application, which is disposed of, accordingly.

23. However, keeping in mind the nature of the suit, the Trial Court may expedite the trial of Special Civil Suit No. 186 of 2010.

24. After pronouncement of the Judgment, Mr. Sandeep R. Limbani, learned advocate for the Appellants, prays that the judgment be stayed, as the Appellants would like to approach the Apex Court. In view of the fact that no interim stay has been granted either by the Trial Court or this Court, this prayer cannot be acceded to.