
(2014) 03 BOM CK 0091

In the Bombay High Court

Case No : Appeal from Order No. 12 of 2013 and Civil Application No. 1142 of 2013

Shankar Govindlal Patwari

APPELLANT

Vs

Sanjay Rameshwar Sharma and Others

RESPONDENT

Date of Decision : 14-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 43 Rule 43
Specific Relief Act, 1963 — Section 20
Transfer of Property Act, 1882 — Section 54

Citation : (2014) 5 ABR 89

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : Amol S. Sawant, for the Appellant; M.S. Kulkarni, Advocate for Respondent No. 1, Shri Girish Rane, Advocate for Respondent No. 2, Shri N.N. Desale, Advocate, for the Respondent

Judgement

T.V. Nalawade, J.—The appeal is admitted. Notice after admission made returnable forthwith by consent. Both sides are heard for final disposal. The appeal is filed under the provision of Order 43 of the CPC against the order made on temporary injunction application filed by present respondents in Special Civil Suit no. 133 of 2012 which is pending in the Court of the Civil Judge, Senior Division, Dhule. The suit is filed for relief of specific performance of contract by respondent No. 1. Relief of temporary injunction is granted against the appellant, owner of the property, and he is restrained from making construction over the suit property till decision of the suit.

2. The suit is filed in respect of open space bearing CTS No. 3238 admeasuring 59.04 square meters and situated within limits of Dhule Corporation. It is the case of the respondent No. 1/plaintiff that defendant No. 1 had agreed to sell the suit property to him under written agreement dated 16-9-2011. It is contended that the plaintiff was already in possession of the suit plot as it was given on lease basis for keeping his motor cycles.

3. It is the case of the plaintiff that by putting pressure on defendant No. 1, the appellant got executed sale deed from defendant No. 1 on 12-9-2012. It is contended that defendant Nos. 3 and 4 are influential persons from Dhule, defendant No. 5 is working as Police Station Officer of Dhule Police Station and all of them joined hands with defendant No. 2 to help him to get possession of the suit property illegally. It is contended that the plaintiff was put behind the bars by involving him in false criminal case and then his motorcycles were removed from the suit premises and the possession was obtained by defendant No. 2 on 23-9-2012.

4. It is the case of the plaintiff that in the month of June-July 2011 possession of the suit property was given to him by defendant No. 1 on lease basis and the agreed annual rent was Rs. 25,000/-. It is contended that on the date of agreement of sale i.e. 16-9-2011, he gave amount of Rs. 75,000/- as earnest money and the amount of Rs. 25,000/- already given was also treated as earnest money and the consideration for sale was Rs. 21 lakh.

5. It is the case of the plaintiff that the sale deed was to be executed within six months from the date of agreement. It is contended that he had made arrangement of money within three months from the date of agreement and he had approached the defendant No. 1 with a request to execute the sale deed. It is contended that defendant No. 1 first gave excuse that his brother had created dispute about Will executed by their mother and then he gave excuse that his cousin sister was suffering from cancer and she was bed ridden. It is contended that only due to conduct of defendant No. 1, sale deed could not be executed.

6. It is the case of the plaintiff that two to three days prior to the date of suit, defendant No. 2 started digging pits on the suit plot for making construction. It is contended that defendant No. 2 has not obtained permission of local body for making construction. The suit came to be filed on 16-10-2012. The plaintiff has prayed for relief of specific performance of aforesaid contract, for possession of the suit property, for declaration that the sale deed executed in favour of defendant No. 2 is null and void and alternative relief of return of earnest money with compensation of Rs. 20 lakh. In application filed at Exhibit 5, temporary injunction was sought to restrain defendant No. 2 from making construction over the suit property.

7. Defendant No. 1, previous owner, has denied that he had agreed to sell the suit property to the plaintiff. He has denied his signature appearing on the agreement produced by the plaintiff. He has contended that false record is created by the plaintiff and the plaintiff is in habit of grabbing property by creation of false record and by using force. He has denied that, he had given possession of the suit property to the plaintiff and he has denied that he had given the property on lease basis and he had received consideration from the plaintiff. He has contended that he has sold the suit property to defendant No. 2 for lawful consideration and defendant No. 2 was put in possession under the sale deed. Defendant No. 2 has made similar contentions. He has contended that

prior to the date of sale deed, public notice was given by defendant No. 1 and objections were called. He has contended that the plaintiff did not raise any objection to the transaction. He has denied the allegation that he took help of defendant Nos. 3 to 5 and got possession illegally. He has contended that the plaintiff wanted to grab the property illegally and when he failed in that attempt, he filed this false suit. It is contended that after the date of sale deed, plaintiff had kept some motor cycles illegally on the suit plot and when he refused to remove, report was given to the police and police took action against the plaintiff. He has contended that he is bona fide purchaser for valuable consideration without notice and he wants to make construction over the suit property for residential and commercial use. He has contended that necessary permission from local body is already obtained.

8. Defendant Nos. 3 and 4 have filed written statement and they have denied the allegations made against them. One of them had signed as a witness on the sale deed executed by defendant No. 1.

9. The trial Court has observed that there is serious issue between the parties, it needs to be tried and till then the party needs to be restrained from changing the nature of the property. The trial Court has refused to consider the affidavits filed by two witnesses who were expected to prove the agreement. Affidavits are filed against the plaintiff and they are to the effect that defendant No. 1 had not signed on the agreement in their presence. Some circumstances like discrepancies in the record of application made to the local body for getting permission are discussed. The circumstance that caveat was filed by defendant No. 2 against neighbours and not specifically against the plaintiff is also considered against defendant No. 2. The opinion of handwriting expert filed by defendant No. 1 for proving that the agreement does not bear his signature is also ignored by holding that it is only an opinion and at present there is no evidence of the expert on the opinion.

10. The provision of Order 39 Rule 1 of the CPC shows that the temporary injunction application needs to be decided on the basis of affidavits and documents. The relief can be granted only when three grounds mentioned in this provision are made out and they are as follows:-

(a) that any property in dispute in a suit is in danger or being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

11. It is settled position of law that for getting relief of temporary injunction the party is expected to satisfy three conditions like (i) making out a prima facie

case; (ii) showing that balance of convenience lies in his favour; and, (iii) irreparable loss will be caused to him if no relief of temporary injunction is given. All the three conditions need to be satisfied for getting relief of temporary injunction. In view of nature of relief, the Court considering such application is expected to consider convenience of both the sides.

12. The suit is filed for relief of specific performance of contract. In such a case even at the time of consideration of temporary injunction application, the plaintiff is expected to make out a prima facie case in respect of his entitlement to get relief of specific performance of contract. It always needs to be kept in mind that under agreement of sale party like plaintiff does not get any right or interest in the suit property. In that regard provision of section 54 of the Transfer of Property Act, 1882 is relevant which reads thus:-

54. "Sale" defined.

Contract for sale.-- A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

13. So, the plaintiff is also expected to make out a strong prima facie case in respect of his entitlement to get the relief of specific performance and for that he is expected to make out a prima facie case in respect of readiness and willingness as required by section 20 of the Specific Relief Act, 1963.

14. In the present case even if the defence of the defendant No. 1 that the document of agreement is forged one, is ignored, it can be said that the document itself cannot be read at present in favour of the plaintiff. From the document it can be said that the plaintiff wants to prove that he got the possession under this document as the previous so called annual rent amount was also treated as earnest money, according to the plaintiff. No record of previous possession. In such a case, the stamp duty as prescribed in Article 25 (Explanation I) of the Bombay Stamp Act, 1958 needs to be paid. The stamp duty is not paid and the document is liable to be impounded. Further, the witnesses, who could have proved execution of agreement of sale have filed affidavits against the plaintiff. Thus, at present there is no material with the plaintiff to make out prima facie case in respect of agreement of sale and to show that he is entitled to get the relief of specific performance. Merits are not required to be considered in detail but prima facie case is required to be made out by the plaintiff.

15. In the agreement it is mentioned that sale transaction was to be completed within six months from the date of agreement. It appears that only vague contention is there in the pleadings about readiness and willingness which the defendant No. 1 has denied. The conduct of the plaintiff also needs to be considered while considering the application filed for temporary injunction. It appears that there is no explanation as to why the plaintiff did not take steps and

make record to show that he was ready and willing to perform his part of the contract. After many months of expiry of the fixed period and only after starting of construction by defendant No. 2, the owner, the plaintiff came to the Court.

16. If due to grant of relief of temporary injunction un-deserving benefit will be given to a party and Court will not be in a position to undo the wrong done to the other side, the Court is not expected to grant such relief. The plaintiff is not in possession of the property. Defendant No. 2 is now the owner of the property and there are aforesaid circumstances. It is not sure as to how much time will be required to decide the suit and when the decision will become final. In this case, granting of relief of temporary injunction will amount to restrain the defendant No. 2, the owner, from making construction over the property, develop the property for indefinite time. The defendant No. 2 has shown willingness to give undertaking to the Court that he will remove the construction and hand over the vacant possession to the Court or as per the order of the Court if the matter is decided against him. In view of this circumstance, the defendant No. 2, the owner, cannot be prevented from making construction. In such a case, not only prima facie case, but strong prima facie case needs to be made out by the plaintiff for getting relief of temporary injunction. If such relief is granted against the defendant No. 2 irreparable loss will be caused to him. So, construction can be allowed subject to some conditions like preventing the defendant No. 2 from alienating the property and taking an undertaking from him as per the statement made before this Court.

17. Learned counsel for the respondent/plaintiff has placed reliance on a case reported as 2009 (0) BCI 623 (Julien Educational Trust v. Sourendra Kumar Roy). In this case the Apex Court has observed that the question as to existence of a concluded contract or otherwise is a matter of evidence and can only be gone into during trial. In the facts and circumstances of that case, the Court held that irreparable loss will be caused to the party seeking injunction if injunction is not granted. Balance of convenience was also in favour of the said party.

18. Facts of each and every case are always different. The facts of the present case are different from the facts of the reported case. The plaintiff has not made out prima facie case, balance of convenience is not in his favour and it cannot be said that irreparable loss will be caused to him if relief is not granted to him. Thus, the trial Court committed error in granting relief to the plaintiff. In the result, the appeal is allowed. The order made by the trial Court on temporary injunction application at Exhibit 5 is hereby set aside. The application for the relief of temporary injunction stands rejected. The appellant, original defendant No. 2 to give undertaking to the Court to the effect that if the suit is decreed in favour of the plaintiff, he will pull down the construction and hand over the vacant possession of the property to the Court or as per the order of the Court. The defendant No. 2 is not to alienate the property till the decision of the suit. The application filed for action for breach of injunction is to be decided with the suit itself. The trial Court should not get influenced by the order of this Court

while deciding the suit or while deciding the application filed for action for breach of injunction. Time of four weeks is given to the plaintiff to challenge the order of this Court and during this period no construction is to be made by the defendant No. 2. Undertaking is to be filed in the trial Court within one week. Civil Application No. 1142 of 2013 stands disposed of.