(2001) 02 DEL CK 0040

In the Delhi High Court

Case No : FAO (OS) No. 292 and 299 of 2000

Shri Ashok Kumar Ratra — APPELLANT

Vs

Smt. Simi Katyal and others
 Smt. Ram Piari Ratra Vs Smt. Simi Katyal and others — RESPONDENT

Date of Decision : 14-02-2001

Acts Referred:

Citation : (2001) 3 AD 506 : (2001) 91 DLT 82

Hon'ble Judges : Mukul Mudgal, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Mr. Vijay Kishan, Mr. Vikram Jetley, Mr. Sanjay Jain, Mr. Sunil Aggarwal and Mr. A.C. Bhasin, for the Appellant;

Judgement

Devinder Gupta, J.—These appeals have been preferred by the defendants against the order passed on 16.8.2000 by learned Single Judge on the application filed by the plaintiff/respondent under Order 39 Rules 1 and 2 of the CPC (for short "the C.P.C."). By the impugned order ex parte ad interim order of injunction was confirmed subject to the condition of the plaintiff depositing in Court within six weeks the entire balance consideration of Rs. 23.00.000/-.

2. Facts in brief are that on 7.8.1996 the plaintiff filed a suit seeking a decree for specific performance of agreement by directing the defendants to execute necessary transfer documents in her favor, pursuant to the agreement, which had been entered into between the plaintiff and late Shri Nanak Chand. Decree has been claimed, inter alia, alleging that on 6.5.1995 an agreement was entered into between her and late Shri Nanak Chand by which Nanak Chand had agreed to transfer property No. A-67, Saraswati Vihar, Delhi-110034 for consideration of Rs. 25,00,000/- out of which a sum of Rs.2,00,000/- was paid as earnest money and the balance payment of Rs. 23,00,000/- was to be made'' to Nanak Chand at the time of execution of the transfer documents. Unfortunately, Nanak Chand expired in the second week of July, 1995 leaving behind the defendants, who are his legal heirs. In August, 1995, the plaintiff

approached the legal heirs apprising them of their legal obligation to complete the transaction by accepting balance sale consideration but they failed to oblige the plaintiff. The plaintiff had no other option left except to send a notice dated 13.6.1996 through her counsel calling upon the defendant to fix a specific date and time for completion the sale transaction, to receive the defendant to fix a specific date and time for completion the sale transaction, to receive the balance sale consideration and deliver possession of the property. Despite due service of notice, the defendants failed to discharge their obligation. Accordingly, decree was prayed. The suit was resisted by the defendants.

3. Along with the suit the plaintiff had filed an application under Order 39 Rules 1 and 2 C.P.C. on which an ex parte ad interim order of injunction was passed on 13.8.1996 restraining the defendants from interfering or alienating the property. The defendants also filed application seeking vacation of the ex parte order of injunction and one of the grounds on which vacation of injunction was sought is that the agreement provide that on failure of Nanak Chand to execute sale deed, the plaintiff will be entitled to double the amount, paid by way of earnest money by the plaintiff.

4. On the basis of the aforementioned pleadings, parties were heard by learned Single Judge. On behalf of the defendants/appellants reliance was placed on a decision of the Supreme Court in Dadarao and Another Vs. Ramrao and Others, . Learned Single Judge did notice the judgment of Supreme Court but observed that since issues had already been framed on 19.11.1998, one of which was whether the plaintiff is entitled to relief for specific performance, the same can be decided only after trial of the suit as to whether or not relief for specific performance can be granted to the plaintiff. Therefore, judgment of Supreme Court in Dadarao''s case (supra) will not be applicable in as much as only at the time of final decision of the suit it will have to be seen whether a discretionary relief is or is not to be granted. Accordingly, ex parte order of injunction was confirmed but subject to the condition of deposit of the aforementioned sum, which was duly deposited by the plaintiff.

5. We have heard learned counsel for the parties.

6. Learned counsel for the defendants made his submissions on the basis of the decision in Dadarao''s case (supra). Learned counsel for the plaintiff/respondent on the other hand urged that as issues had already been framed, the suit has to go for trial. The plaintiff has now deposited the balance sale consideration, which would reflect the intention of readiness and willingness to perform her part of the contract.

7. Having considered the submissions made at the bar, we are of the view that the appeal deserves to be allowed and the impugned order deserves to be set aside. Rule 1 of Order 39 of the Code primarily concerns with the preservation of the property in dispute till legal rights are adjudicated. Injunction is a judicial process by which a party is required to do or to refrain from doing any particular

act. Order 39 Rule 1(c) provides that temporary injunction may be granted where, in any suit, it is proved by the affidavit or otherwise, 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. The court may be order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the court thinks fir until the disposal of the suit or until further orders.

8. It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the Court satisfying that: (1) there is a serious dispute question to be tried in the suit and that there is probability of the plaintiff being entitled to the relief asked for; (2) Irreparable injury or damage would ensure before the legal right would be established at the trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.

9. The burden is on the plaintiff to establish by affidavit on otherwise that there is a prima facie case in his favor, which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title, which has to be established, on evidence at the trial. Only prima facie case it is to be shown that substantial question raised, bona fide, needs investigation. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be material one, namely, one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favor of granting injunction.

10. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.

11. Learned Single Judge did not consider in the right prospective the existence of a prima facie case in plaintiff''s favor in the absence of which discretion could

not have been exercised in favor of the plaintiff. In para 2 of the decision in Dadarao''s case (supra) Supreme Court noticed the terms of the agreement and in para 6 gave its reasons for its conclusion that no decree for specific performance could have been passed in that case. The agreement in that case provided that on failure on the part of the vendor to execute the sale deed, the vendee would be entitled to an amount of Rs. 500/- in addition to earnest money. In that back ground Supreme Court observed that what was important was that the agreement itself had provided as to what would happen if either the seller refused to sell or the purchaser refuses to pay. In that event the agreement provided that in addition to the earnest money, a sum of Rs. 500/- was to be given back to vendor and that no sale deed will be executed. Agreement was categorical that a sale deed is to be executed only if both the parties agree to do so and in the event of any one of them resiling from the same, there was to be no question of the other party being compelled to go ahead with the execution of the sale deed. Observations of the Supreme Court made in para 6 of the judgment are as under:-

"The relationship between the parties has to be regulated by the terms of the agreement between them. Whereas the defendants in the suit had taken up the stand that the agreement dated 24th April, 1969 was really in the nature of a loan transaction, if is the plaintiff who contended that it was an agreement to sell. As we read the agreement, it contemplates that on or before 15th April, 1972 the sale deed would be executed. But what is important is that the agreement itself provides as to what is to happen if either the seller refuses to sell or the purchaser refuses to buy. In that event the agreement provides that in addition to the earnest money of Rs. 1,000/- a sum of Rs. 500/-was to be given back to Tukaram Devsarkar and that "no sale deed will be executed". The agreement is very categorical in envisaging that a sale deed is to be executed only if both the parties agree to do so and in the event of anyone of them resiling from the same there was to be no question of the other party being compelled to go ahead with the execution of the sale deed. In the event of the sale deed not being executed Rs. 500/-, was the only sum payable. This sum of Rs. 500/- perhaps represented the amount of quantified damages or as the defendants would have it interest payable on Rs. 1,000/-."

12. In the instant case, receipt-cum-agreement on the basis of which the plaintiff has came to the Court says:-

"I, Nanak Chand s/o Shir Khan Chand R/o Sant Nagar, Burari Road, New Delhi, have received a sum of Rs. 2,00.000/- (Rupees two lakhs only) by cash/cheque No. Cash from Shri/Smt. Shri Simi Katyal s/o, W/o Shri R.K. Katyal R/o D-77B, Saraswati Vihar, Pitam Pura, Delhi-110034, as a EARNEST MONEY against the sale of property No. Built un-property bearing No. 66, Block-A, area 190 sq. yds. at Saraswati Vihar, Delhi and have agreed to sell my above property for the sum of Rs. 25,00.000/- (Rupees twenty five lakhs only), balance payment i.e. Rs. 23,00.000/- (Rupees twenty three lacs only) will be paid by the purchaser up to

100 days, at the time of transferring the Power of Attorney/Sale Deed, on the following terms and conditions as under:-

(a) XXX XXX XXX

(b) XXX XXX XXX

(c) XXX XXX XXX

(d) XXX XXX XXX

(e) if the prospective purchaser fail to fulfill the above conditions, the transaction shall stand cancelled and earnest money will be for (SIC). In case I fail to complete the transaction as stipulate above the purchaser will get the DOUBLE amount of the earnest money. In the both condition, DEALER will get 2% commission from the faulty party."

[Emphasis supplied]

13. A bare reading of the aforementioned terms of the agreement would suggest that on failure of the vendor to complete the transaction, as stipulated within 10 days, the vendee was to get double the amount of earnest money and simultaneously on failure of the vendee to fulfill the condition, it was stipulated that the transaction shall stand cancelled and earnest money well be forfeited. Reading the contents of the agreement in the light of the ratio of decision in Dadarao''s case (supra), no other conclusion is possible except that it is a case in which there exists no prima facie case in favor of the plaintiff. The mere fact that issues had been framed, which admittedly were framed prior to the aforementioned decision of the Supreme Court, could not be a ground not have considered the question of existence of prima facie case. Such a question did come up before the Court after issues were framed, it was necessary, Therefore, to have considered the decision of Supreme court and find out that whether there was a prima facie case in favor of the plaintiff. Needless to say that in the light of decision of the Supreme Court, no prima facie case exists and, Therefore, impugned order cannot be sustained.

14. Consequently, the appeal is allowed. Impugned order is set aside and the application of the plaintiff/respondent is dismissed leaving the parties to bear their respective costs.