

(2001) 09 DEL CK 0233

In the Delhi High Court

Case No : IAs. 7479 of 2000 and 10932 of 2000 in S. No. 1652/00

Shri Satwant Singh Dogra

APPELLANT

Vs

Shri Narender Singh and others

RESPONDENT

Date of Decision : 04-09-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, 151

Citation : (2001) 09 DEL CK 0233

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. G.N. Aggarwal, for the Appellant; Mr. Ravinder Sethi Mr. Javed Hussain, Mr. D.K. Garg and Ms Priya Gandhi, for the Respondent

Judgement

A.K. Sikri, J.—Along with the Suit for possession, declaration, mandatory injunction and permanent injunction, the plaintiff has filed IA.7479/2000 under Order XXXIX Rules 1 and 2 read with Section 151, CPC for ad-interim injunction. Ex-parte injunction Order dated 31st July, 2000 was granted. It was modified to some extent by Order dated 19th October, 2000. The defendants 2 and 3 have filed application no. 10932/2000 for vacation of ex-parte Order dated 31st July, 2000 as modified by Order dated 19th October, 2000. Both the applications were heard together and are being disposed of by this Order.

2. Late S.Hazara singh was the owner of free hold plot of land baring no.27, block-A, measuring 600 sq.yds. in Hauz Khas, New Delhi. By will dated 24th April, 1965 he bequeathed this property in favor of his four sons. The plaintiff, being one of the sons, inherited 1/4th share of the property. After the death of Sardar Hazara Sing there was a family settlement among four brothers and the property was divided in four shares. The plaintiff got front portion of first floor which was under the tenancy of one Shri N.K.Shama. The plaintiff is NRI. On 13th November, 1991 he executed Power of Attorney in favor of the defendant no.1 whereby he empowered the defendant no.1 to deal with and look after the

properties of the plaintiff in Distt. Hoshiarpur and other parts of India. Authority given included power to sell these properties also. The defendant no.1 on the basis of this Power of Attorney sold the share of the plaintiff to the defendants 2 and 3. In fact, the defendants 2 and 3 purchased the entire property i.e. they purchased other three portions of the property from the other three brothers for which appropriate Sale Deed were executed in favor of the defendants 2 and 3. The Sale Deed was executed in respect of the plaintiff's portion also and duly registered with the Sub-Registrar. It was preceded by agreement to sell and other connected documents. The total consideration for the share of the plaintiff was Rs.25 lakhs. The defendants 2 and 3 got the tenants vacated, took possession of the entire property and thereafter reconstructed the entire property. At this stage, the present Suit was filed by the plaintiff on the allegations that the defendant no.1 was never authorised to sell the Suit property to any person and the Agreement to Sell dated 24th November, 1999 and the subsequent Sale Deed are null and void. The plaintiff has also made detailed averments alleging that the defendants colluded with each other in selling the property of the plaintiff. In fact the defendant no.6 was the counsel for the plaintiff and eviction petition was filed through him against the tenant Sh.N.K.Sharma. The plaintiff has attributed the acts of collusion and fraud to defendant No.6 as well. Thus in this manner, the plaintiff is seeking repossession of his portion of the property. Although as mentioned above, detailed allegations of fraud are made against all the defendants, it may not be necessary to reproduce these allegations and the submissions made by the plaintiff on the basis of these allegations. The Court has to see the prima case at this stage and to come to conclusion as to whether the plaintiff is entitled to ad-interim injunction as prayed for at this stage or not. For this purpose some of the salient facts may be noted:

As per the family settlement among the four brother,s the property was partitioned and the share of the four brothers as per this family settlement are as under:-

Kuldip Singh : Ground Floor (rear side flat) Bachhitar Singh: Ground Floor (front side flat) Legal heirs of Kulwant Singh (wife Amarjit Kaur & son Manjit Singh): First Floor (read side flat) Satwant Singh: First Floor (front side flat) 2. The entire property was let out and the total rent from the entire property was Rs.8,250/-.Rent of the portion of the property in the share of the plaintiff paid by Mr. N.K.Sharma was Rs.3000/- p.m.

3. The defendant no.2 purchased the entire property . It is not in dispute that other three brothers also sold their respective shares, received full consideration and executed Sale Deeds in favor of defendant No.2. They have no dispute with he defendant no.2

It is the case of the defendant no.2 that all the owners of the property had decided to sell their property and the defendant no.2 was contacted though the defendant no.3. The defendant no.2 who is the building contractor showed his

willingness to buy his property with tenants only if all the owners were agreeable to sell their respective shares. Sale consideration for entire property was fixed at Rs.84 lakhs i.e. Rs.21 lakhs for each owner. Still the defendant no.2 ultimately paid the plaintiff in respect of his share a sum of Rs.25 lakhs.

4. All the tenants including Mr. N.K.Sharma gave the possession of the portions in their possession to the defendant no.2.

It is the case of the defendant no.2 that the defendant no.2 got the possession from the tenants by setting the cases with them. The manner in which the possession was taken is stated in para XIV of the written statement.

5. Agreement to Sell dated 24th November, 1999 between the defendant no.1 on behalf of the plaintiff and the defendant no.2 is not in dispute. It is also not in dispute that pursuant thereto a sum of Rs.5 lakhs was paid as advance by means of cheque dated 11th November, 1999 which was deposited in the Bank account of the plaintiff and was duly encased on 31st December, 1999. It is also not in dispute that balance consideration of Rs.20 lakhs was paid by the defendant no.2 by cheque dated 23rd December, 1999 drawn in favor of the plaintiff and this cheque is also deposited in the account of the plaintiff. Thereafter, on payment of this consideration Sale Deed was executed in favor of the defendant No.2.

6. The most significant aspect to be noticed is that the plaintiff himself wrote a letter to his attorney requesting him to make fixed deposit of Rs.1,50,000/- out of the amount of Rs.5 lakhs deposited in the account of the plaintiff purportedly as advanced under the Agreement to Sell. This letter is annexed by defendants 2 and 3 along with their written statement and the plaintiff does not dispute having written this letter. However, later on the plaintiff changed his instruction and instructed the attorney to make two F.D.Rs. of Rs.2,50,000/- each. On that basis the banker of the plaintiff, namely, UCO Bank made F.D.Rs. of Rs.2,50,000/- each. The defendants have also produced copies of these F.D.Rs. as well as Certificate dated 2.5.2000 from the UCO Bank which inter alia records as under:

"As per records the following FDs. were issued on instruction and application signed by Mr. Satwant Singh Dogra against cross Cheque No.854590 dtd. 11.11.90 of Union Bank, Kashmiri Gate, New Delhi amounting Rs.Five Lacs."

Thus the Certificate of the bankers shows that a cheque in the sum of Rs.5 lacs drawn on Union Bank was deposited in the plaintiff's account. It is the same cheque which is given by defendant No.2 as advanced the time of entering into Agreement to Sell. This certificate further shows that the plaintiff issued instructions to his bank to prepare two F.D.Rs. of Rs. 2.5 lakhs each against this amount of Rs.5 lacs which were in fact issued by the bank. Therefore, not only the plaintiff had the knowledge of receiving the said amount of Rs.5 lacs but has specific instructions to the bank to make two cheques of Rs.2.5 lakhs each belies his theory of fraud being played upon him by the defendants. This conduct of the plaintiff is self-destructive of his stand that he was totally oblivious about the alleged deal or that defendant No.1, his attorney, sold his share of the property

without his knowledge, consent or authority.

7. The matter does not end here. Balance consideration of Rs.20 lakhs is also paid. That too be means of account payee cheque. This cheque is deposited in the account of the plaintiff maintained by UCO Bank. Again the plaintiff gives specific instructions and application signed by the plaintiff himself whereby he requested the bank to keep that money in fixed deposit under "Capital Gain Scheme". On his instructions the said deposit receipt is issued. Defendants have again placed on record a copy of the deposit receipt as well as Certificate from the UCO Bank confirming that the plaintiff had given such instructions. T his clearly confirms that the plaintiff was not only in the know of he entire transaction of sale of share of his property but he was rather party to it.

7. In view of the aforesaid facts, the plaintiff has prima facie failed to substantiate his theory of fraud being played upon him. The circumstances under which the entire deal of the property in question whereby other three brothers have also sold their respective share to defendant No.3 coupled with overt acts and conduct of the plaintiff himself having knowledge of the receipt of the money and specific instructions as to how the said money is utilised are the circumstances which would militate against the stand taken by the plaintiff and would prima facie show that the plaintiff himself believed that the General Power of Attorney which he has executed in favor of defendant No.1 is proper authority in favor of defendant No.1 deal with the suit property on behalf of the plaintiff. In fact it is not even the case where acting on the said General Power of Attorney defendant No.1 has entered into some transaction at the back of or without the knowledge of the plaintiff. Once it is held that there was proper authority given by the plaintiff to defendant No.1 to deal with the suit property with further covenant in the said General Power of Attorney that plaintiff would rectify all acts of defendant No.1 even if defendant No.1 had entered into this particular sale transaction without the knowledge of the plaintiff that would have been immaterial. However, in the instant case the facts and circumstances show that the plaintiff was through out informed about the transaction by defendant No.1 on his behalf with defendant No.2 and there is a stamp of approval by him as he not only accepted sale consideration by depositing the same in his account, he even dealt with said money after it was deposited in this account. The deposit of Rs.20 lakhs in Capital Gain Scheme shows that he wanted the money to be deposited in an account so that he is not burdened with capital gain. Therefore, the stand now taken in the plaint alleging collusion and fraud played by the defendants clearly shows that it is an after thought plea raised by the plaintiff after the deal was completed in all aspects which culminated into even execution of sale deed. The conduct of the plaintiff exposes him of double speak.

4. In view of these glaring covert and overt acts of the plaintiff himself, it is difficult to swallow his allegations of collusion among the defendants inter se to defraud the plaintiff. Therefore, prima facie this argument of the plaintiff that there was no authority given to defendant No.1 by General Power of Attorney

dated 13.11.91 to deal with the property in question is also not acceptable. The said General Power of Attorney clearly empowers the circumstances explained above would also show there was nothing wrong that giving possession by Shri Sharma to defendant No.2 as after the purchase of the property, defendant No.2 stepped into the shoes of the plaintiff and had all authority to deal with the tenant. Once counsel for the plaintiff in the eviction suit came to know of aforesaid deal and that the possession had been given by the tenant to the new owner, I do not find anything objectionable in his conduct in withdrawing eviction petition once he came to know that the possession had been handed over by the tenant to the new owner.

5. Even the balance of convenience is not in favor of the plaintiff. After the purchase of the property defendant No.2 has reconstructed the same by spending substantial amount. He has paid full consideration to the plaintiff and his three brothers as well. He has dealt with the tenants also who were in occupation of the property at the time of purchase of the suit property by defendant No.2. Thus he seems to be a bona fide purchaser for consideration and who is a builder by profession after spending substantial amount on developing the property. If he restrained from dealing with the same the injury which is going to be caused to him is much more than the injury which the plaintiff is likely to suffer in case injunction is not granted and plaintiff ultimately succeeds. Moreover, insofar as the interest of the plaintiff is concerned that stands fully secured inasmuch as defendant has agreed to deposit a sum of Rs.45 lakhs in this Court and he has also given an undertaking that the intending purchaser to whom the flat in question is sold would be specifically informed about the present litigation and, Therefore, rule of laches pendency would also secure the plaintiff. Various judgments cited by the learned counsel for the plaintiff would have no application to this case. He cited the following judgments:

1. Gangubai Bablya Chaudhary and Others Vs. Sitaram Bhalchandra Sukhtankar and Others, .
2. Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd., .
3. Satyabrata Biswas and others Vs. Kalyan Kumar Kisku and others, .
4. Smt. Shefali Roy Vs. Hero Jaswant Dass and others, .
5. Sohanlal Dugar Vs. Dwarka Nath Jha, Chairman and others, .
6. Umapati Choudhuri and Others Vs. Subodh Chandra Choudhuri and Others, .
7. S.B. Industries, Freegunj and Another Vs. United Bank of India and Others, .
6. The proposition of law laid in these cases is well settled. However, none of these help the plaintiff on the facts of this case.
7. Counsel for the plaintiff submitted that defendant has filed Suit No.2358/2000 wherein this Court has passed ex-parte injunction order dated 19.10.2000 attaching the aforesaid amount of Rs.25 lacs, namely, two F.D.Rs. of Rs.2.5 lacs

each and one fixed deposit of s.20 lacs. Obviously the aforesaid ex-parte order was obtained by defendant No.2 when the plaintiff had filed the instant suit and obtained injunction to the effect that defendant No.2 shall not deal the property as mentioned in order dated 19.10.2000.

8. The ex-parte injunction order dated 31-7-2000 as modified by order dated 19-10-2000 is accordingly vacated. IA.7479/2000 filed by the plaintiff is dismissed and IA.10932/2000 filed by defendant No.2 under Order XXXIX 4 CPC is hereby allowed. Defendant No.2 is, however, directed to deposit a sum of Rs.45 lakhs in this Court within a period of four weeks from today. This amount shall be kept in a fixed deposit in the name of the Registrar or this Court by the Registry. Defendant No.2 shall also be governed by his statement that he shall inform the intending purchaser of the suit property about the pendency of the present case. After this order when the aforesaid injunction is vacated, it would be open to the plaintiff to file an appropriate application in Suit No.2358/2000 for vacation/modification of the order dated 19.10.2000.

9. Needless to mention here that what is stated here in above is only a prima facie view and tentative expression.