

(2009) 09 PAT CK 0021
In the Patna High Court
Case No : MA No. 38 of 2004

Sri Ashok Goenka and Proprietor Premier Synthetics and
Premier Synthetics

APPELLANT

Vs

Chandra Bhushan Singh and Others

RESPONDENT

Date of Decision : 15-09-2009

Acts Referred:

Citation : (2010) 3 CivCC 57

Judgement

Ramesh Kumar Datta, J.—In both these Miscellaneous Appeals identical issues arise on practically the same set of facts and therefore with the consent of the parties the matters have been heard together and are being disposed of by this common order at the stage of admission itself.

2. M.A. No. 38/04 is directed against the order dated 24.11.2003 passed by the Ist Sub-Judge, Danapur in Title Suit No. 24 of 2003 by which he has allowed the petition dated 17.4.2003 filed by the plaintiffs-respondents Ist Set under Order 39 Rules 1 and 2 read with Section 151 of the CPC and directed that the defendants-appellants shall not make attempt to dispossess the plaintiffs from the disputed land till the disposal of the suit.

3. M.A. No. 39 of 2004 is also directed against the order dated 24.11.2003 passed in Title Suit No. 19 of 2003 by which also a petition dated 17.4.2003 under the same provisions has been allowed in the same terms.

4. The defendants-appellants and the defendants-respondents II set Nos. 3 to 5 are common in both the appeals.

5. Both the suits had been filed by the plaintiffs-respondents Nos. 1 and 2 in the respective appeals for a direction upon the defendants-appellants to execute a registered sale-deed in favour of the plaintiffs in respect of Schedule-I property and if the defendants fail to do so within the time fixed by the court the sale-deed be executed and registered through the process of the court and according to law conveying absolute title to the plaintiffs. The further relief sought for in

the suit is for restraining the defendants by an order of ad-interim injunction from executing and registering the sale-deed in favour of any other persons with respect to the suit land and in any manner disposing of the land or creating any encumbrance thereon detrimental to the interest of the plaintiffs till disposal of the suit and confirm the possession of the plaintiffs over the suit land.

6. The defendant-appellant No. 2 and defendant-appellant No. 1 are the firm and proprietor of the said firm which is the owner of the suit land in both the cases.

7. The case of both the sets plaintiffs was that the defendants-appellants had entered into an agreement with them and executed in both the cases an agreement for sale on 27.3.2002 for the sale of the respective suit lands and as per the terms and conditions of the agreement for sale 5 kathas of land in each of the case would be sold at the rate of Rs. 63,000/- per katha and the total consideration money comes to Rs. 3,15,000/-, out of which the plaintiffs in each case have already paid the advance money of Rs. 2,50,000/- at the time of execution of the agreement and the balance amount of Rs. 65,000/- was to be paid at the time of registration of the suit land. It was asserted that the defendants-appellants gave possession of the suit land to the respective plaintiffs. It was further agreed that the sale-deed would be executed and registered in between 27.3.2002 and 31.1.2003. However, the request by the plaintiffs for such registration was not paid heed to and even the legal notice sent on 16.12.2002 in each of the cases had no effect and the defendants-appellants failed and neglected to perform their part of contract and hence the suit was filed.

8. The defendants-appellants appeared in the suits and filed their written statements in which, inter alia, apart from raising the plea of maintainability it was alleged that the agreement for sale is most fabricated, sham, without consideration and a document prepared by means of practicing fraud. The statement regarding payment of the amount of Rs. 2,50,000/- in each of the cases was denied as concocted and further stand taken is that the agreement for sale could not have been executed in view of the amendment made in the Registration Act and such a document could not be a legal document in the absence of registration.

9. The plaintiffs thereafter filed the aforesaid petitions dated 17.4.2003 under Order 39 Rules 1 and 2 read with Section 151 CPC with the prayer for ad-interim injunction restraining the defendants from executing and registering the sale-deed in favour of any other persons with respect to the suit land or in any manner disposing of the land or dispossessing the plaintiffs from the suit land. It was alleged in the injunction petition that after receiving the summons in the suit on 22.3.2003 the defendant-appellant No. 2 had executed and registered a sale-deed for the suit land on 24.3.2003 in favour of the defendants-respondents Nos. 3 to 5. Show cause to the said injunction petitions was filed on behalf of the defendants-appellants in which the fact of having entered into an agreement for sale with the plaintiffs was denied and further stated that the land in question

had been sold to the defendants-respondents Nos. 3-5 who were the bonafide purchasers and have been put in actual physical possession over the suit land.

10. The learned trial court, however, upon hearing the parties passed the aforesaid impugned orders in the terms as mentioned above.

11. Learned Counsel for the appellants submits that the unregistered agreement for sale dated 27.3.2002 under which the plaintiffs-respondents claim part performance having been put in possession of the suit land is barred by the provisions of Section 17(1A) of the Registration Act read with Section 53A of the Transfer of Property Act. It is contended that on the basis of the said unregistered agreement for sale no plea regarding part performance could have been raised by the plaintiffs-respondents or entertained by the court below as the same is completely barred under the provisions of Section 17(1A) of the Registration Act which has been inserted into the said Act by Act 48 of 2001. It is thus urged that the court below could not have taken into account any claim of possession on behalf of the plaintiffs on the basis of any clause contained in the said unregistered agreement for sale and granted any relief on the basis of the same.

12. Learned Counsel further submits that even otherwise the law is well established that an agreement for sale does not create any interest in the property but only entitles a party to bring a suit claiming the equitable right of purchase on the basis of Section 53A of the Transfer of Property Act and thus the order of injunction cannot travel beyond the scope of the said Section. It is argued that the rights u/s 53A can only be utilized for the purpose of protecting the defendants' possession and he cannot be permitted to claim any title on the basis of such provision.

13. In support of the said proposition Learned Counsel relies upon a decision of a learned Single Judge of this Court in the case of Phool Kumari Devi Vs. Krishna Deo Upadhyaya and Another, in paragraph-7 of which it has been held as follows:

7. An order of injunction restraining the defendant in a suit for specific performance of contract from making repairs or construction on the suit premises, as may be necessary, does not fall in any of the three categories. It is well established that an agreement to sale does not create any interest in the property. It only provides a cause of action to him to bring a suit claiming an equitable right of purchase based on Section 53A of the Transfer of Property Act. The order of injunction, therefore, cannot travel beyond the scope of Section 53A of the said Act. It is well settled that the right conferred by Section 53A is a right available to the defendant to protect his position. The defendant cannot claim any title on the basis of the provisions contained therein. As is said sometimes, the right u/s 53A is to be used as a shield but not as a sword.

14. It is further submitted by Learned Counsel that since legal title in the suit land continues in favour of the appellants from the very beginning the same could not have been given to the plaintiffs and the plaintiffs being further

debarred from raising the plea of part performance in view of the amended provisions of Registration Act it was not open to the court to issue an order which virtually amounts to accepting such plea of the plaintiffs. It is contended that in such circumstances neither law permits such an order nor the question of balance of convenience or irreparable loss can be held to be in favour of the plaintiffs. In support of the same he relies upon a decision of a Division Bench of this Court in the case of Kalyanpur Lime Works Ltd. Vs. The State of Bihar and Another, in paragraph-10 of which it has been held as follows:

10. We have also been addressed on the question whether the appellant can be sufficiently compensated by money in respect of any loss suffered before specific performance of the contract. The learned Advocate General has drawn our attention to Section 12, Explan. And Sections 54 and 56, Specific Relief Act. He has also drawn our attention to Section 19, Specific Relief Act, which says that any person suing for the performance of a contract may also ask for compensation for its breach, either in addition to or in substitution for such performance. Personally, I do not see any reason why the appellant cannot be compensated by money for any loss he may suffer, provided the appellant is entitled to compensation in addition to specific performance, under the law, as to which I express no opinion at this stage. If, as I have already stated, there is no question of stopping the quarrying operations during the pendency of the suit for specific performance, the question of compensation will remain whether an order of injunction is or is not passed. It cannot surely be urged that in a suit for specific performance the plaintiff is entitled to ask, during the pendency of litigation, that the defendant in whom the legal title still vests should be restrained from using the property. If the plaintiff were so entitled, then in a suit for specific performance the defendant would be required to vacate the property which he had contracted to sell or lease. That surely cannot be the law.

15. Learned Counsel for the appellants has vehemently argued that there is no factual basis for the court below to come to the conclusion that the plaintiffs were in possession over the land in question and the reliance upon Clause 5 of the alleged agreement for sale for the said purpose was completely uncalled for and barred by the newly amended provisions of the Registration Act. It is submitted that further reliance upon an order passed in 144 Cr. P.C. proceeding shows that the decision is perverse as no issue of possession has been or could have been decided in the said proceedings. Similarly no reliance could have been placed on certain criminal cases filed by the plaintiffs against the defendants-respondents Nos. 3 to 5.

16. Learned Counsel for the respondent Nos. 3 to 5 has supported the stand of the appellants on the aforesaid grounds and further sought support from a decision of this Court in the case of Ramashish Rai Vs. Baijnath Mishra and Another, in paragraph-5 of which it has been laid down as follows:

5. Be that as it may, admittedly, the plaintiff's case is that there was an oral agreement to sell of the suit land and on payment of consideration money the

plaintiff was put in possession. There is no dispute that a suit for Specific Performance of Contract can be filed on the basis of oral agreement. The question for consideration in this case is whether the plaintiff has a legal right to restrain the defendant from alienating the suit land by obtaining an order of temporary injunction. It is well settled that an agreement to sell creates a right in personam and it does not create any right in the property. An agreement to sell gives a right to the proposed purchaser to bring a suit for specific performance of contract to sell but he cannot claim any interest in the property till his suit for specific performance is decreed. Learned Counsel appearing for the petitioner placed reliance on a judgment delivered by me which is reported in Lallan Prasad Vs. Parmeshwar Singh, The ratio decided by me in that judgment does not help the petitioner rather it totally goes against the petitioner. In the said judgment this Court observed:

I have heard Learned Counsel for the parties and have gone through the orders passed by both the courts below. In my opinion, both the courts below have committed serious illegality and material irregularity in granting temporary injunction in the facts and circumstances of the case. The courts below have overlooked the settled principles of law that an agreement to sell creates right in personam and it does not create any right in property. An agreement to sell gives a right to the proposed purchaser to bring a suit for specific performance of contract to sell but he cannot claim any interest in the property till his suit for specific performance is decreed. In the case of Jiwan Das Vs. Narain Das, it has been held by a Division Bench that an agreement to sell creates a right in personam and not in the estate such right created against a vendor to obtain specific performance can ultimately bind any subsequent transferee till, therefore, a decree of specific performance is obtained the vendor or a purchaser from him is not entitled to full enjoyment of the property even if a decree for specific performance of contract is obtained and no sale deed is actually executed, it cannot be that any interest in the property is passed. Consequently, temporary injunction cannot be granted till sale deed is executed on the basis of decree of specific performance of contract to prevent the transferee under the sale deed from enjoying possession.

17. Learned Counsel for the respondent Nos. 1 and 2, on the other hand, submits that the court below has rightly granted injunction in view of the fact that subsequent to the filing of the suit the registered sale-deed was executed in favour of the respondent Nos. 3 to 5 on 24.3.2003 and an attempt was made to dispossess the plaintiffs from the suit land. It is further submitted by him that the fact of possession having been handedover to the plaintiffs is clearly mentioned in Clause 5 of the agreements for sale both dated 27.3.2003 in favour of the plaintiffs of both the cases. According to Learned Counsel apart from what was stated in Clause 5 the court below has also rightly relied upon Section 144 Cr. P.C. proceedings and other criminal cases filed by the plaintiffs against the respondent Nos. 3 to 5 when an attempt was made to dispossess them as supported by evidence as indicated by the plaintiffs. It is further submitted by

Learned Counsel for the plaintiffs-respondents that the appellants have sold their lands to respondent Nos. 3 to 5 and they cannot claim any further interest in the matter and it is not open to them to challenge the injunction order by filing these appeals.

18. In support of the aforesaid stand Learned Counsel relies upon a decision of the Supreme Court in the case of Ashwinkumar K. Patel Vs. Upendra J. Patel and Others, paragraphs 11 and 12 of which are quoted below:

11. A reading of the judgment of the trial Court shows that though the agreement of sale executed in favour of the plaintiff was, according to the said Court, invalid because of its being in breach of the Tenancy Act still, in view of the compromise decree and the subsequent admission of the defendants 1 to 14 and report of the Court Commissioner in special suit No. 293 of 1996, the trial Court held that plaintiff was in "permissive possession" as this was accepted by the owners. It held that a possessory right was sufficient to permit the plaintiff to have an order of temporary injunction in his favour.

12. Therefore, without going into the validity of the agreements executed by the owners in favour of the plaintiff or defendants 15 to 28, or the validity of the sale deed executed by defendants 15 and 28, we are of the view that the trial Court was right in coming to the conclusion that the plaintiff has made out a prima facie case. The trial Court has given several reasons for the grant of temporary injunction and, in our view, the two reasons given by the High Court were, on the facts, not sufficient to warrant a remand.

19. Learned Counsel relies upon paragraphs 4 and 5 of a Division Bench decision of the Calcutta High Court in the case of Muktakesi Dawn and Others Vs. Haripada Mazumdar and Another, for the proposition that an injunction restraining pendente lite transfer can be granted in such suits so as to preserve the property in status quo during the pendency of the suit.

20. I have considered the rival submissions of the parties and the materials on the record. It is evident from the impugned orders that the court below has not at all taken into account the effect of Section 17(1A) of the Registration Act, 1908 as inserted by the amending Act 48 of 2001. The said provision is quoted below:

Section 17(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said Section 53A.

21. It is evident from the said provision that any document containing contracts to transfer for consideration, any Immovable property for deriving the benefit u/s

53A of the Transfer of Property Act must be registered if it has been executed after the commencement of the Amending Act of 2001 and in case such document is not registered on or after such commencement it will have no effect for the purpose of invoking the doctrine of part performance u/s 53A. The doctrine of part performance protects the right of a transferee of an agreement for sale if he has been put in possession or continues in possession in part performance of the contract or has done some act in furtherance of the contract. Prior to the amending Act of 2001 a party could claim the benefit of such possession on the basis of the doctrine of part performance even if the agreement for sale was not registered but the same has now been specifically debarred by the amending Act. That being the position, it is not open to the courts of law to permit any such plea of possession or right to continue in possession on the basis of any unregistered document. In the present matter despite the legal provision being to the contrary, by the impugned orders of injunction the court below has put a stamp of legality over the alleged possession claimed by the plaintiffs on the basis of an unregistered agreement for sale dated 27.3.2002. The same is clearly not permissible under the law.

22. Even otherwise this Court does not find that apart from the said Clause 5 of the unregistered agreements for sale there was any material before the court on the basis of which it could have come to the conclusion regarding the plaintiffs being in possession over the suit land. Thus the finding of prima facie case in favour of the plaintiffs-respondents is perverse being based on practically no material on the record apart from the reliance upon the unregistered documents which is impermissible after the Amendment Act 48 of 2001.

23. Even otherwise as has been laid down by this Court in the case of Fool Kumari Devi (supra) no title could have been claimed by the plaintiffs on the basis of the mere agreements for sale which only entitle them to approach the court for further relief of specific performance of contract but such agreements for sale did not create any interest in the property in their favour which they can use to injunct the owner of the land so far as the right and title over the suit land is concerned.

24. The reliance placed by Learned Counsel for the plaintiffs-respondents on the decision of the Supreme Court in Ashwinkumar K. Patel's case (supra) is of no avail as in the said case the suit was between two sets of purchasers; one directly from the owners of the land and other from the alleged power of attorney holder from the owners but in the said case the clear stand of the owners of the land was that they have put the plaintiff in possession and in the said circumstances the Apex Court held that such possessory right would entitle the plaintiff to an injunction as against the other purchaser of the land who has no possession over the land.

25. So far as the case of Sm. Muktakesi Dawn (supra) is concerned the only issue decided therein is that an injunction restraining the pendente lite transfer can be granted in an appropriate case where relief for specific performance is

sought. There can be no dispute with the said proposition. However, in the present matter the subsequent sale has already been made through a registered deed of sale by the appellants in favour of respondents Nos. 3 to 5.

26. Thus, on a consideration of the entire facts and circumstances of the case, this Court is clearly of the view that the impugned orders dated 24.11.2003 passed in Title Suit No. 24/03 and Title Suit No. 19/03 cannot be sustained being contrary to the law of the land apart from there being no factual basis for the grant of injunction in such terms and the same are accordingly set aside. The appeals are allowed.

27. However, considering the fact that the plaintiffs would be put to serious difficulties and inconvenience if there is any further sale of the properties in dispute the appellants and the respondents Nos. 3 to 5 are restrained from making any further sale of the properties in question.

28. It is pointed out by Learned Counsels that both the suits are at the stage of hearing and two witnesses have already been examined in Title Suit No. 24/03 while the other case is ready for examination of the witnesses. In the said circumstances, the learned court below is directed to proceed expeditiously in the matters and dispose of both the title suits within a period of six months from today.