

(2011) 03 PAT CK 0081

In the Patna High Court

Case No : Misc. Appeal No. 173 of 2010

Sri Gopi Nath Kashyap and Smt. Asha Kashyap Alias Asha
Devi

APPELLANT

Vs

Dwarika Pd. Kashyap, Satya Prakash Kashyap and Anant
Prakash Kashyap

RESPONDENT

Date of Decision : 09-03-2011

Acts Referred:

Citation : (2011) 03 PAT CK 0081

Final Decision : Allowed

Judgement

Gopal Prasad, J.—This miscellaneous appeal is directed against the order dated 08.02.2010 passed by the Sub-Ordinate Judge-V, Patna City in Title Suit No. 15 of 2009 by which he has rejected the petition under Order XXXIX Rule 1 and 2 read with Section 151 of the CPC for grant of interim injunction.

2. The Plaintiffs are the Appellants. The Plaintiffs filed a suit for declaration of right, title and possession of the Plaintiffs over suit property as well as cancellation of the sale deed dated 09.09.2008 executed by Defendant No. 1 in favour of Defendant Nos. 2 and 3 as illegal, unauthorized and without consideration, inoperative and void ab initio with a further prayer that if the Plaintiffs are found to have been dispossessed of the suit property then the Plaintiffs be put in actual physical possession and recovery of possession as well as also pray for ad interim injunction restraining the Defendants from selling or transferring the suit land and maintaining status quo.

3. The case of the Plaintiffs is that the Defendant No. 1 is the brother of the Plaintiff No. 1 and Defendant No. 2 and 3 are the sons of Defendant No. 1. The Plaintiffs got the suit property under a compromise decree dated 05.01.1999 passed in a T.P.S. 161 of 1998 by Sub-Judge 1, Patna City in which Defendant No. 1 was also party who also got separate share in the property under the same compromise decree. The Plaintiffs were coming in possession of the suit property. The Plaintiffs have executed a general power of attorney on 07.12.2007 in favour

of Defendant No. 1 to look after the suit property as the Plaintiffs had to go to Madurai (Tamil Nadu) in connection with his business. In the mean time the Patna Municipal Corporation Authority declared the suit premises as dangerous and demolished the structure thereon. After demolition of structure on the suit land, the vacant possession of the suit premises were handed over to the Defendant No. 1 as attorney. Hence the suit premises were given in possession of the Defendant No. 1 as attorney holding the power of attorney on behalf of the Plaintiffs. The Plaintiffs have returned on 05.09.2008 from Madurai and cancelled the power of attorney on 05.09.2008 by a registered instrument and also informed the Defendant No. 1 regarding the cancellation orally on 05.09.2008. The intimation of the cancellation of power of attorney also communicated by speed post dated 06.09.2008 and in addition to this Plaintiffs also informed the Defendant No. 1 regarding cancellation of power of attorney through mobile on 08.09.2008 at 7:16 P.M and on 09.09.2008 at 9:15 A.M by mobile phone bearing No. 0452-3295262 of Reliance to the mobile of the Defendant No. 1. The further case of the Plaintiffs is that the Defendant No. 1 in order to grab the property dishonestly executed an absolute sale deed on 09.09.2008 in favour of his son Defendant No. 2 and 3 even after the cancellation and communication of the cancellation of power of attorney. That Defendant No. 2 and 3 on 16.09.2008 came to suit land and proclaimed that they are purchaser from Defendant No. 1 and tried to take forcible possession. Hence, necessitated the suit.

4. The case of the Defendants is that it is admitted that the Plaintiffs were absolute owner of the suit property which was under rent to different persons and Plaintiffs shifted to Madurai leaving the suit property under the control of Defendant No. 1. The tenants on said premises were not paying rent. The Plaintiff decided to sell. The Defendant No. 1 offered for purchase and the Plaintiffs agreed to sell the suit premises for a consideration of Rs. 29,51,000/- It is asserted that instead of Rs. 29,51,000/- and 29,70,000/- was paid by Defendant No. 1 to the Plaintiff. After receiving the aforesaid amount the Plaintiffs executed the power of attorney in favour of Defendant No. 1 on 07.12.2007 to look after and even to sell the suit land. In pursuance of power of attorney the Defendant No. 1 has executed a registered sale deed in favour of his sons. It has further been pleaded that the Defendant No. 1 has received a speed post on 06.09.2008 but it was congratulation of Defendant No. 1 for evicting the tenant instead of communication of the cancellation of the power of attorney. It is asserted that the Defendant had no knowledge about the cancellation of power of attorney and further asserted that the telephone call received on 08.09.2008 and 09.09.2008 on mobile for different occasion and there was no talk of cancellation of power of attorney and they learnt about the power of attorney only when a Complaint Case No. 847 of 2008 filed against the Defendant.

5. During the pendency of the suit a petition under Order XXXIX Rule 1 and 2 of the CPC was filed by the Plaintiff for restraining the Defendant by interim injunction from alienating, transferring, mortgaging and making any construction

over the suit property or changing the physical feature of the suit land with assertion that on 21.09.2008 the Defendant tried to dispossess the Plaintiff forcibly and again on 16.09.2008 Defendant tried to take forcible possession and further on 27.11.2009 at about 9:00 A.M. the Defendants were digging the suit land for making illegal construction with the help of anti social element for which the matter was reported to the police but local police taken no action and it was intimated that no action will be taken as the matter is sub-judiced.

6. The Defendant gave a reply to the petition under Rule XXXIX Order 1 and 2 of the C.P.C stating inter alia that the suit property was in possession of the tenants. Plaintiff had no time to pursue the same and thereby the Plaintiff decided to sell. The Plaintiff contacted Defendant No. 1 with a request to purchase and the Defendant accepted to purchase and a sale agreement scribed and typed as suit and the Defendant even paid entire consideration money of Rs. 29,51,000/- but in stead of sale deed a power of attorney was executed and the Defendant got the suit land vacated and sold the suit property in favour of Defendant No. 2 and 3 on 09.09.2008 under a power conferred under the power of attorney dated 07.12.2007. The Defendant No. 2 and 3 after purchase are developing the suit property at their cost subject to decision in the litigation and it is asserted that the Plaintiff having come to know about the demolishing of the building in possession of tenant and handing over the possession of Parti piece of land to Defendant No. 1 and the Plaintiff came to Patna and congratulated the Defendant on phone by the said letter sent under registered post on 06.09.2008 and the Plaintiff has booked the registered letter dated 06.09.2008 from Guljarbagh post and the same was received by Defendant No. 1 on 09.09.2008 and save and except registered letter EE 871364751 dated 06.09.2008 no other alleged notice ever served and further that the Defendant No. 1 was put in possession on 30.08.2008 by civil administration and put the Defendant No. 2 and 3 in possession on 09.09.2008 on the injunction petition.

7. On the respective submissions of the parties on considering the petition under Order XXXIX Rule 1 and 2 of the C.P.C read with Section 151 of the C.P.C and the rejoinder filed by the Defendant the trial court rejected the injunction petition on the ground that from perusal the memo No. 1832 by Public Information Officer-cum-Assistant Superintendent of Police filed on behalf of the Defendant shows that the Officer-In-Charge of Khajakala in his report found possession of the Defendant and on that basis held that from this document it is apparent that Defendants are in possession and has got his shops and residence and further on the basis of the sale deed executed by Defendant No. 1 in favour of Defendant No. 2 and 3 on 09.09.2008, the Patna Municipal Corporation has issued a rent receipt after mutation having been done and hence rejected the petition under Order XXXIX Rule 1 and 2 holding that unless the suit is decided regarding the sale deed the Plaintiff has no prima facie case and hence has neither balance of convenience in his favour nor irreparable loss. Hence, this miscellaneous appeal is challenging the order.

8. The learned Counsel for the Appellants, however, contended that the trial court while refusing to grant injunction by impugned order misdirected in relying upon the police report in memo of public information office about possession of the Defendant as well as mutation order on the basis of sale deed executed by Defendant No. 1 in favour of Defendant No. 2 and 3 as the same was dated 09.09.2008 after the cancellation of the power of attorney on 05.09.2008. It has further been asserted that the order refusing to grant injunction on consideration of police report about possession is an extraneous consideration. It has further been contended that the learned lower court did not take into consideration the admitted fact of the parties that suit land allotted in share of the Plaintiff in a compromise decree passed in T.P.S. No. 161 of 1998 in which Defendant No. 1 was also a party and it is admitted that Defendant No. 1 came in possession of the suit land on the basis of power of attorney executed by the Plaintiff and further possession given to Defendant No. 1 as an attorney of the Plaintiff after demolition of structure on suit land by Municipal Authority and hence the possession of Defendant No. 1 on the suit property is as an attorney of the Plaintiff. The said power of attorney was cancelled on 05.09.2008 and fact regarding cancellation of power of attorney was communicated to Defendant No. 1 on 05.09.2008, 06.09.2008, 08.09.2008 and 09.09.2008. Hence, the sale deed executed by Defendant No. 1 on behalf of Plaintiff in favour of Defendant No. 2 and 3 on 09.09.2008 after cancellation of power of attorney on 05.09.2008 and communication thereto does not confer any right, title or even possession to either Defendant No. 1 nor to the Defendant No. 2 and 3. It is further contended that the case of Defendant that Defendant No. 1 had contract for sale for the suit property for consideration of Rs. 29,00,000/- and odd and the amount was paid but instead of sale deed power of attorney was executed. However, the contract for sale does not give any right over the land but only confer a right to file a suit for specific performance of contract and any breach of contract may give right to a claim for damage. Hence, for the breach of contract one cannot claim to have irreparable loss which cannot be compensated in terms of money. Hence, the Defendant neither irreparable loss nor balance of convenience in his favour to the contrary any construction or creation a third party interest may lead to a situation that if in case the Plaintiff succeeds it may lead to multiplicity of proceeding and harassment which cannot be compensated interim of money and lead to irreparable loss.

9. Learned Counsel for the Respondents, however, contends that admittedly the suit land was the property of the Appellants got by virtue of compromise decree but the power of attorney was executed and even agreement of sale entered into in pursuance of which the power of attorney was given and hence in exercise of the right given in the power of attorney a sale deed in favour of Defendant No. 2 and 3 was executed by Defendant No. 1 and further asserts that the Defendants were put in possession on the date of the execution of the sale deed and the Defendants are in possession has constructed the palacial building and even introduce Defendants in the shop and however submits that he is making the

construction on his own risk and Appellants have no right to put a clog on the development of the suit property at the cost and expense of the persons in possession and further that the suit is declaratory in nature and hence no injunction can be granted.

10. However, taking into consideration the respective submissions of the parties the question for consideration is whether the Appellants are entitled to get an order of injunction restraining the Defendants to make construction or under the fact and circumstance the Defendants are required to restrain from making any construction.

11. However having regard to the respective pleadings of the parties, the admitted case of the parties that Plaintiff got the suit land in his share in T.P.S. No. 161 of 1998 by a compromise decree in which Defendant No. 1 was a party. The admitted case is that a power of attorney was executed by the Plaintiffs in favour of Defendant No. 1 to look after the property and got the possession and the land in possession of tenant was demolished by Municipal Authority and handed over the possession to the Defendant No. 1 as an attorney of the Plaintiffs. The case of the Plaintiffs is that the said power of attorney was cancelled by registered instrument on 05.09.2008 has not been challenged by the Defendant and only challenged the case of the Plaintiff that communication made on 06.09.2008 by registered post regarding the cancellation is not a communication regarding the cancellation of power of attorney but a communication for something else. The further case is that the sale deed was executed by Defendant No. 1 in favour of Defendant No. 2 and 3 with respect to suit land of Plaintiffs and on the basis of power of attorney executed by Plaintiffs in favour of Defendant No. 1 through the power of attorney was cancelled on 06.09.2008 prior to the execution of sale deed. Hence, the question for consideration is whether the sale deed executed by the Defendant No. 1 in favour of Defendant No. 2 and 3 on 09.09.2008 with respect to the property of Plaintiff by virtue of power of attorney is legal and valid. Hence, points raised that fair question is to be gone into and the Plaintiffs have established a prima facie case in his favour. Hence, apparently a prima facie case is made out. However, the learned trial court misdirected itself in holding that there is no prima facie case. Taking into consideration the possession of Defendants on police report without considering the respective case and admitted position as apparent from the pleading and hence the finding recorded by the trial court is not sustainable that there is no prima facie case.

12. However, the Defendants have set up a case to claim the suit land on the basis of the contract for sale for 29 lakh and sale deed by Defendant No. 1 in favour of Defendant No. 2 and 3 on the basis of power of attorney. However, it is well settled that contract for sale does not confer any right on the property but give a right to file a suit for specific performance of contract to get a decree and to execute a sale deed and also right over the property only if he gets a decree and a sale deed is executed in pursuance of decree for specific performance of

contract. However, for a breach of contract the party can get damage but does not have irreparable injury which cannot be compensated in terms of money. However, once it is established that the prima facie case is made out the question for consideration is irreparable loss and balance of convenience.

13. However, having regard to the fact that the suit land admitted got by Appellants in P.S. and Appellants' claim is that the land on the basis of contract for sale and sale deed said to be executed in pursuance of right conferred on power of attorney which was cancelled on 05.06.2008 prior to execution of sale deed on 09.06.2008. However, it is not a case in which both the parties have admitted interest as it is not a partition suit and the case is not with regard to minor construction rather submission of the Respondents about construction of palatial building on suit property. However, allowing the construction to go and creating a third party interests will be great prejudiced to Appellants as in case he succeeds in suit he may not get the fruit of the decree and may lead him to multiplicity of proceeding causing harassment by future litigation causing irreparable loss. Whereas Defendants may in case of success have relief by way of damages for the breach of contract may not lead to irreparable injury which cannot be compensated in terms of money. Hence, the balance of convenience and irreparable loss lies in favour of the Appellant. An order of the interim injunction deserves to be passed.

14. However, reliance placed by the Respondent in decision reported in 1998 Pat 8 (Surendra Kumar Singh v. Sachi Kumar and Ors. 1998 PLR 8) for preposition that any construction made is subject to final result in the case. However, decision reported in. 1998 PLR 8 (Supra) neither mention the fact nor discuss the principle and hence is a decision for that case only whereas decision relied upon by the Appellants reported in Dharam Nath Ojha and Others Vs. Raghunath Ojha, it has been settled that if a lis has been admitted for adjudication then it becomes the duty of the court to preserve the subject matter of litigation by an appropriate order so that the same be available at the time of final adjudication and decree does not become a barren one. And further Defendants cannot be permitted to change the nature of property being changed which includes alienation and transfer of property unless case of irreparable loss is made out as held in decision reported in 2005 (1) PLJR SC 94 (Maharwal Khewaji Trust (Regd.), Faridkot V. Baldev Dass 2005 (1) PLJR SC 94).

15. Further reliance has been placed on decision reported in Pat. L. R. 1998 Patna 21 (Chandrika Pandey v. Ghanshyam Pandey and others Pat. L. R. 1998 Patna 21), however, it is a case where injunction prayed in a probate case and it was held that in probate case the genuineness or otherwise of will is adjudicated and not the title and hence injunction cannot be granted with respect of property and hence is not applicable to the fact and circumstance of the case.

16. It has further been contended by the Defendants-Respondents that suit is for declaration whereas the Defendants are in possession on the land and when the Defendants are in possession, the Appellants cannot be restrained by injunction.

It has also been contended that the Defendant is in possession and hence the injunction may not be granted and placed reliance on decision reported in . 1999 SC 130 (Ashwinkumar K. Patel v. Upendra J. Patel and Ors.) and 1999 PLR 112 (Savitri Devi Jaiswal and Ors. v. Girija Shankar Jaiswal and others). However, in case reported in. 1999 SC 130 (Supra) it was admitted that the owner put the Plaintiff in possession and held that Defendant 15 to 19 and 20 were not in possession and so Defendant could not interfere with Plaintiff's possession. However, under the facts and circumstances of the case, at hand, the admitted fact is that Appellants got the suit property by a decree in T.P.S. 161 of 1998 in which Defendant No. 1 was party. The Plaintiffs-Appellants thereafter executed the power of attorney and Defendant No. 1 came in possession of suit property by virtue of the power of attorney and hence his status with respect to land was as an attorney of the Plaintiff and in such circumstance the question for consideration whether Defendant after revocation of his power of attorney on 05.09.2008 was entitled to remain in possession of the premises of the Plaintiff when the possession of Defendant No. 1 was that of attorney or an agent of Plaintiff and interfere there with and this question has been answered in Southern Roadways Ltd., Madurai, Represented by its Secretary Vs. S.M. Krishnan, and where the question for consideration that whether the agent after revocation of his authority is entitled to remain in possession of the premises of the principal and interfere with and it is relevant to quote paragraph 19 which is as follows:

In this case, the Respondent's possession of the suit premises was on behalf of the company and not on his own right. It is, therefore, unnecessary for the company to file a suit for recovery of possession. The Respondent has no right to remain in possession of the suit premises after termination of his agency. He has also no right to interfere with the company's business. The case, therefore, deserves the grant of temporary injunction. The learned Single Judge of the High Court in our judgment, was justified in issuing the injunction. The Division Bench of the High Court was clearly in error in vacating it.

And this finding has been based upon Smt. Chandrakantaben Modi and Narendra Jayantilal Modi Vs. Vadilal Sapalal Modi and Others, where it has been held that the possession of agent is the possession of the principal and in view of this relationship Defendants-Respondents cannot be permitted to claim his own possession.

17. Hence having regard to the fact and circumstance of this case, which concerns with the status of attorney after revocation of the power of attorney and hence the general principal that the Plaintiffs-Appellants is not in possession of the suit premises not entitled to relief of injunction is not applicable to the fact and circumstance of the case. Hence the decision reported in 1999 PLR 112 (Savitri Devi Jaiswal and Ors. v. Girija Shankar Jaiswal and others) is consequently not applicable to the fact and circumstance of this case in view of the decision reported in Southern Roadways Ltd., Madurai, Represented by its

Secretary Vs. S.M. Krishnan, .

18. However, the learned court below without consideration of the admitted case of the party in pleading hold that Plaintiffs-Appellants have no prima facie case on the basis of police report and rent receipt issued on the basis of mutation on the basis of sale deed which has been challenged on the ground that the sale deed was executed on 09.06.2008 on the basis of power of attorney after the cancellation of power of attorney on 05.06.2008 and communication of the same. Hence, the learned court below misdirected to hold that Plaintiffs-Appellants have no prima facie case and in consequence no irreparable injury or balance of convenience and hence the finding recorded by the learned court below is not sustainable in the eye of law and hence is hereby set aside.

19. However, having regard to the fact and circumstance, any attempt of construction or alienation and creating a third party interest the Plaintiffs-Appellants may suffer irreparable loss and will not get the fruit of the decree. However, if the Defendants could not succeed, he may have the remedy by damage. However, the object of interlocutory injunction is to protect the Plaintiffs-Appellants against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action, if the uncertainty were resolved in his favour at the end of trial and hence weighing the respective need of the parties the balance of convenience lies in favour of the Plaintiffs-Appellants as if the injunction is not granted then the Plaintiffs-Appellants will suffer irreparably which cannot be compensated in terms of money and hence I find and hold that the case deserved the grant of temporary injunction and hence it is hereby ordered that Defendants-Respondents restrained from making any construction forthwith and creating a third party right, title and interest in the suit property. The miscellaneous appeal is allowed and it is hereby directed that the lower court shall proceed with the case on day to day basis and any adjournment will be subject to Order XVII of the CPC so that the suit may be disposed off preferably within one year.

20. Hence, the impugned order is set aside and the miscellaneous appeal is allowed.