

(2000) 08 GUJ CK 0113

In the Gujarat High Court

Case No : APPEAL FROM ORDER No 304 of 2000

Swarup Kunvarba Balvantsinh Udavat

APPELLANT

Vs

Pratapsinh Nathusinh Jadeja

RESPONDENT

Date of Decision : 31-08-2000

Acts Referred:

Arbitration Act, 1940 — Section 34

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 104(1)

Citation : (2000) 4 GLR 868

Hon'ble Judges : H.H. Mehta, J

Bench : Single Bench

Advocate : J.V. Japee, for the Appellant; H.D. Chudasama, for the Respondent

Judgement

H.H. Mehta, J.—At the time of admission hearing of this Appeal From Order, the learned advocates for both the parties requested this Court to admit this appeal and dispose of this appeal finally. At the request of both the parties' advocates, this Appeal From Order is admitted and the matter is taken up for final hearing.

2. This is an appeal under Sec. 104(1) of the Civil Procedure Code, 1908 read with Order 43 Rule 1(r) of the Civil Procedure Code, 1908, filed by original defendants challenging the legality and validity of joint order dated 10th August, 2000 passed below application Exhs. 5 and 95 in Special Civil Suit No. 11 of 2000 which is pending on the file of the learned Civil Judge (S.D.), Himatnagar (who will be referred to hereinafter as the learned Judge of the trial Court).

3. The appellants are the defendants, while the respondent is a plaintiff in aforesaid Special Civil Suit No.11 of 2000, and therefore, the parties will be referred to as the plaintiffs and defendants respectively at appropriate places.

4. The facts leading to the present appeal, in a nutshell, are as follows:-

Certain agricultural lands of ownership of defendant no.1 are situated in village Sunokh, Tal. Bhiloda, Dist. Sabarkantha. On or about 15th October, 1988, defendant no.1 executed an agreement to sell (Banakhat) in favour of plaintiff to

sell an agricultural land bearing Survey No. 253 admeasuring Acres 19Gunthas 18. It is the case of the plaintiff that the said land bearing Survey No.253 was given to plaintiff for cultivation as defendant no.1 had no issue and thus the plaintiff was a Ganotiya since many years before 14/10/1988. It is the case of the plaintiff that on 15/10/1988, defendant no.1 agreed to sell the said land to plaintiff for Rs. 1,36,150/- and on that very day, plaintiff paid hard-cash of Rs.90,000/- to defendant no.1. Defendant no.1 acknowledged the receipt of that amount of Rs.90,000/- by putting a separate endorsement below aforesaid agreement to sell. On 15/10/1988, the defendant no.1 allowed the plaintiff to continue his possession in the said suit land, and since then the plaintiff is in possession of the suit land. As per the case of the plaintiff, he paid Rs.9,000/- to defendant no.1 on 15/3/1997. As per the case of the plaintiff, he has paid in all Rs. 99,000/- as against the total consideration of Rs. 1,36,150/-.

It is the case of the plaintiff that defendant no.1 is now not executing the final sale deed and as the prices of lands are shot-up, she does not want to sell the said land to plaintiff as per the Banakhat. Plaintiff has averred that he has come to know through others that defendant no.1 is trying to sell out the suit land to some third parties. Therefore, on 5th February, 2000, the plaintiff filed Special Civil Suit No. 11 of 2000 against the defendant No.1 in the Court of the learned Judge of the trial Court for specific performance of said Agreement to sell (Banakhat) dt. 15/10/1988. The plaintiff also prayed for a decree of perpetual injunction restraining the defendant no.1, her agents and servants and other persons from interfering with the possession of the plaintiff in the suit land.

On the date on which the plaintiff filed the suit, he also filed an application Ex.5 against defendant no.1, seeking an interim injunction restraining the defendant no.1 from transferring or assigning the suit land to anybody and also from interfering with the possession of the plaintiff in the suit land. On that day, the learned Judge of the trial Court was pleased to issue urgent show cause notice returnable on 8th February, 2000.

5. The defendant no.1 appeared and contested the suit as well as an application Ex. 5 by a common written statement Ex.37 on 21/2/2000. In written statement Ex.37, defendant no.1 has come out with her case that there are about 10 fragments in the suit land and 20 years before 21/2/2000, that 10 fragments of land were sold with possession to ten different persons. In her written statement, she gave details as to which fragment of land was sold to whom and for what amount. She has admitted in her written statement that on the date of suit, she was not in possession of the suit land, but said ten purchasers of 10 different fragments of land who purchased that 10 fragments before 20 years are in possession of the suit land, and therefore, the plaintiff has no prima facie case to obtain an interim injunction. She has taken other contentions to deny the pleadings of the plaintiff pleaded in the plaint, but on the main point of possession, she has denied that the possession of land is with the plaintiff. As per her case, that 10 different persons are in possession of the suit land. She has

also alleged that at the relevant point of time, sale deeds were not executed in favour of that 10 persons, but sale deeds for 10 fragments were executed by her in favour of that 10 persons on 8/2/2000, i.e. after filing of the suit.

6. On coming to know about aforesaid pleadings of the defendant no.1, plealdd in Written Statement Exh.37 the plaintiff submitted an application and sought permission to implead that 10 persons as defendants in the suit. That 10 persons are the defendant nos. 2 to 19. After joining the defendant nos. 2 to 19 in that suit, plaintiff submitted one application Ex.95 requesting the Court to grant an interim injunction restraining the defendant nos. 2 to 19 from transferring or assigning the suit land to any other persons and also from interfering with the possession of plaintiff in the suit land. Earlier application Ex.5 against defendant no.1 and subsequent application Ex.95 against the defendant nos. 2 to 19 were heard together. After hearing said two applications (viz. Exs.5 and 95), the learned Judge of the trial Court passed an order dt. 10th August, 2000 below applications Ex.5 as well as Exh.95 and granted interim injunction pending the suit restraining the defendants from interfering with the possession of the plaintiff in the suit land.

7. Being aggrieved against the dissatisfied with the said order dt. 10th August, 2000 below Ex.5 as well as Ex.95, the original defendants Nos. 1 to 19 have preferred this Appeal From Order.

8. During the pendency of this Appeal From Order, the appellants submitted one application dt. 22nd August, 2000 for amending appeal memo. By that amendment, the appellants wanted to add five new paragraphs in the form of grounds in appeal memo. The respondent submitted his written statement dt. 24/8/2000 in reply to that amendment application.

9. After hearing the learned advocates for both the parties, amendment application dt. 22nd August, 2000 was allowed and the appellants were permitted to amend the appeal memo by adding new five grounds which are Grounds Nos. 3(Q) to 3(U).

10. Thereafter, this appeal was taken up for hearing at the admission stage and during the course of arguments, learned advocates for both the parties submitted that this appeal be disposed of finally on merits, and that is how this Appeal From Order is being disposed of finally.

11. I have heard Shri J.V.Japee, the learned advocate for the appellants and Shri J.N.Jadeja, learned advocate for and on behalf of Shri H.D.Chudasama, learned advocate for the respondent, in detail, at length.

12. Shri J.V.Japee, the learned advocate for the appellants has furnished copies of plaint, written statement of defendant no.1 and copy of Banakhat on the basis of which the plaintiff has filed the suit for perusal of this Court.

13. Admittedly, the plaintiff has filed the suit for specific performance of an agreement to sell (Banakhat) dt. 15/10/1988. That Banakhat is at Mark 4/1 in

the suit. As per this Banakhat, coupled with affidavit of the plaintiff which he filed in support of Ex.5, it is the case of the plaintiff that he is in actual physical possession of the suit land as on the date of filing of the suit. As against this case, at the initial stage, when defendant no.1 was the sole defendant in the suit, she contended in her written statement Ex.37 that she is not in possession of the suit land but some other persons who are subsequently joined as defendant nos. 2 to 19 are in possession of the suit land. For claim of defendant nos. 2 to 19 for possession in the suit land, she has pleaded the case that about 20 years ago, before the date of her written statement, 10 different fragments of the suit land were sold to 10 persons and possession of that 10 fragments of land were given to that persons. In continuation of that pleading, she has further pleaded in her written statement that on 8/2/2000, she has executed sale deeds in favour of that 10 persons and since 20 years before the date of filing of her written statement, that ten persons are in possession of the suit land.

14. Shri J.V.Japee, the learned advocate for the appellants has argued that defendant nos. 2 to 19 have not filed their separate written statement in that suit but by submitting a Pursish Ex.166 adopted the written statement Exh.37 filed by defendant no.1, and therefore, defendant nos. 2 to 19 are supporting the case of the defendant no.1, which is pleaded in her written statement Ex.37. Shri Japee has further argued that in view of the fact that 10 different fragments were sold before 20 years to defendant nos. 2 to 19 they are in possession of said lands and plaintiff is not in possession of the suit land. If the plaintiff is not in a position to satisfy the learned Judge of the trial court prima facie for his possession of the suit land, then the learned Judge of the trial court can refuse an interim injunction.

15. Here in this case, the learned Judge of the trial Court accepted the case of the plaintiff that he is in possession of the suit land as on the date of filing of the suit. He negatived the case of the defendants that defendant nos. 2 to 19 are in possession of the suit land and not the plaintiff.

16. In this type of appeals filed under O. 43 Rule 1 of C.P.Code, the scope and powers of the Appellate Court are somewhat restricted. It is now well settled principles of law that granting or refusing temporary injunction rests on the sound exercise of discretion of the Courts and such exercise of discretion cannot lightly be interfered with by the Appellate Court unless it is shown that such exercise of discretion is unreasonable or capricious. In case of Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi, , wherein Hon"ble Supreme Court has held as under-

" It is well established that where the discretion vested in the Court under Sec. 34 of the Indian Arbitration Act has been exercised by the lower court, the appellant court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellant stage, the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter

at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate court that in exercising its discretion, the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion.

17. The area of interference of discretionary orders passed by the Courts below in exercise of the discretion vested in them by the appellate court in appeal against such orders is although not so much restricted as in the case of a revision under Sec. 115 of C.P.Code. Still it is as wide as the normal and ordinary appellate powers of an appellate court in deciding the appeals, the power is indeed very much restricted in its scope. The area of interference of such discretionary orders by the appellate court is circumscribed by limitations and such interference would be legally permissible only where the order under review is passed by the Courts below, acting unreasonably and capriciously or ignoring relevant facts and adopting unjudicial approach. Certainly, in exercising the appellate powers, the appellant court cannot substitute its own exercise of discretion of that of the trial Judge. In case of SMT. LALITHAKSHI ANNADANAGONDA vs. SADASHIVPPA BASAPPA, reported in AIR 1984 KAR 74, a well settled legal position is reiterated that wherein an application by the plaintiff for a temporary injunction against the defendant, trial court has, duly considered all matters and into proper exercise its judicial discretion, passed an order refusing the application for temporary injection, the appellate court has no jurisdiction to interfere with the order passed by the trial court, merely on the ground that another view is possible on the point.

18. Under the circumstances, in view of the above legal position, the power of the appellate court in the matter of injunction is rather circumscribed. The appellate court would be slow to interfere with the exercise of discretion and would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage, it may have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner, the fact that the appellate court would have taken a different view, may not justify interference with the trial court's exercise of discretion. This view is reiterated in case of Bindeshwar Narayan Singh and Others Vs. Managing Committee, Shri Sundarmal Hindi High School and Others, .

19. Keeping in mind the above legal position, for powers of this Court, contention of the rival parties are dealt with.

20. Shri Japee has argued the case in such a way that he took me through the written statement filed by defendant no.1 parawise and commented upon the

order challenged in this appeal. It is well settled principles of law that at the stage of deciding application Ex.5, the court has only to see as to whether plaintiff has got a prima facie case or not. In order to make out a prima facie case, necessary for granting interlocutory injunction, the plaintiff need not establish his title. It is enough if he can show that he has a fair question to raise as to existence of the right which he alleged and can satisfy the Court that the property in dispute should be preserved in its present actual condition until such question is finally disposed of. It is also well settled principles of law that Court must also before disturbing any man's legal right, stripping him off any of the rights with which law has clothed him be satisfied, that the probability is in favour of his case, ultimately failing in the final. A mere issue of the suit existence of a doubt as to the plaintiff's right to the property does not itself constitute a sufficient ground for refusing an injunction, though it is always a circumstance which calls for the attention of the Court. It is also well settled principles of law that before the issue of a temporary injunction, the Court must satisfy itself that the plaintiff has a prima facie case, does not mean that the Court should examine the merits of the case closely and come to a conclusion that plaintiff has a case in which he is likely to succeed. This would amount to prejudging case on merits. All that, the court has to see is that on the face of it, a person applying for injunction has the case which needs consideration and which is not bound to fail by virtue of some apparent defects. What the court has to determine in granting injunction is whether there is a bonafide contest between the parties and when there is a fair and substantial question to be decided as to the rights of the parties in the suit, it is not necessary for the purpose nor is it right that the Court should further examine the question in dispute or anticipate the decision of the question in the suit itself . The court is not required to decide what is correct answer to be given to the question in the hearing of the suit, but merely whether there is a fair point for trial.

21. Here in this case, the plaintiff has come with a case that defendant no.1 executed an agreement to sell on 15/10/1988. That agreement to sell is at Mark 4/1, wherein, it has been stated in Para 5 that plaintiff is cultivating that suit land on share basis and that possession of the suit land was with the plaintiff as a Ganotiya, and that possession was allowed to be continued with the plaintiff. The defendant no.5 has challenged this Banakhat on more than one ground. The fact that this Banakhat is a false or bogus or got up is a question of fact and one has to go for trial with the evidence. she has acknowledged receipt of Rs.90,000/- received from the plaintiff in Para 2 of this Banakhat. She has also acknowledged the receipt of payment of Rs.9,000/- made by the plaintiff to her on 15/3/2000.

21. As against this, defendant no.1 has admitted that she is not in possession of the suit land, and therefore, injunction can be granted against defendant no.1, but she has advanced her case that the suit land is in 10 fragments and those 10 fragments were already sold to defendant nos. 2 to 19, twenty years before the date of filing of her written statement. At that time, no documents were executed. It is interesting to note that defendant no.1 has advanced here case

that she executed sale deeds in favour of purchasers of 10 fragments on 8/2/2000. It means that she executed sale deeds in favour of defendant nos. 2 to 19 after filing of the suit. The suit is filed on 5/2/2000, and therefore, the documents on which the defendant nos. 2 to 19 are placing reliance, are admittedly executed by defendant no.1 after 5/2/2000. It seems that defendant no.1 has executed such agreements with a view to see that she may not have to execute a final sale deed pursuant to the Banakhat dt. 15/10/1988 executed in favour of plaintiff. It is interesting to note that whatever pleadings are pleaded by defendant no.1 in her written statement Ex.37 are mere pleadings. The defendant nos. 2 to 19 have not filed any affidavit in support of pleadings pleaded in written statement Ex.37.

21. It is further interesting to note that after joining the defendant nos. 2 to 19 as defendants in the suit, plaintiff submitted an application Ex.95 for an interim injunction restraining the defendant nos. 2 to 19 from interfering with the plaintiff in the suit land. It is also interesting to note that defendant nos. 2 to 19 have not replied the application Ex.95. They have not controverted the pleadings pleaded in Ex.95, and therefore, the defendant nos. 2 to 19 have no courage to say that they are in possession of the suit lands since before 20 years. It is one thing that defendant no.1 says that defendant nos. 2 to 19 are in possession of suit land since before 20 years, and it is another thing that defendant no.2 to 15 have to say specifically on oath that they are in possession of the suit land since before 20 years. Under the circumstances, when the defendant nos. 2 to 19 are relying on sale deeds executed after filing of the suit, that possession is rightly refused for consideration by the learned Judge of the trial court.

24. I have gone through the order challenged in this appeal. The learned Judge of the trial court has dealt with even a minor contention of the defendants in his order and he has considered each and every material produced by plaintiff as well as defendants, and thereafter he has come to a conclusion that plaintiff is in actual possession of the suit land as on the date of the filing of the suit. It is well-known that possession is nine points of ownership. In a number of cases decided by the Apex Court, it is held that when subject matter is in dispute, that subject matter must be maintained, till final disposal of the suit. When the plaintiff has prima facie shown that he is in possession of the suit land under Banakhat, then that possession is required to be protected till final disposal of the suit.

25. In view of above stated facts and circumstances, this court finds that the learned Judge of the trial Court has exercised his discretion judiciously by keeping in mind the well settled principles of law with regard to interim injunction. This court also finds that the order challenged in this appeal cannot be said to be unreasonable or capricious or ignoring relevant facts and adopting unjudicial approach.

26. In view of what is stated hereinabove, this appeal is devoid of merits and it requires to be dismissed and accordingly it is dismissed. Interim relief granted on 18th August, 2000 is hereby vacated. There shall be no order as to costs.

Today in the Second Session, learned advocates for both the parties are present before the Court. Shri J.V.Japee, learned advocate for the appellants submits and requests that final order of the Judgment delivered in this matter be stayed for six weeks as he wants to move the Superior Court to challenge the Judgment. Shri Jadeja, learned advocate for the respondent objects to this prayer.

Looking to prayer of the Appellants, operation of the final order of this Judgment is stayed for six weeks from today. Both the parties are directed to obey the order passed by this Court (Coram: Y.B.Bhatt, J.) dt. 18th August, 2000 for a period of six weeks from today.