

Sitaram Vs. Tularam and ors.

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Court : Madhya Pradesh

Decided On : Mar-23-1988

Reported in : AIR1989MP128

Judge : V.D. Gyani, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 39, Rule 1; [Transfer of Property Act, 1882](#) - Sections 53A

Appeal No. : Civil Misc. Appeal No. 6 of 1988

Appellant : Sitaram

Respondent : Tularam and ors.

Advocate for Def. : R.G. Waghmare and ;Wadnerkar, Advs.

Advocate for Pet/Ap. : S.D. Sanghi and ;N.K. Sanghi, Advs.

Disposition : Appeal dismissed

Judgement :

V.D. Gyani, J.

1. This is plaintiffs appeal against the trial Court's order dt. 24-12-1987, passed by the District Judge, Mandleshwar, in Civil Original Suit No. 1-A of 1987, rejecting this application for an ad interim injunction and vacating the ex parte order of

injunction passed in his favour on 16-4-1987.

2. Short facts of the case are : Appellant and respondents 1 and 2 are real brothers. Appellant filed a suit for specific performance of agreement dt. 13-3-1986, by which the respondent 1 had agreed to sell his agricultural lands bearing survey Nos. 84/3 and 84/5, admeasuring 2.95 acres and 1.70 acres respectively, situated in village Umariya, Tehsil Kasrawad, District West Nimar, to the plaintiff for Rs. 40,000/-, out of which, Rs. 30,000/- had been paid at the time of the agreement and the balance of Rs. 10,000/-, carrying interest at the rate of 2% per annum, was payable at the time of registration of sale deed. It was plaintiff-appellant's pleaded case that he was delivered possession of the land of 13-3-1986. The appellant has averred in plaint-para 3 that he went to pay the balance amount with interest to the respondent, who refused to accept it saying that he was not willing to sell the land. It has also been averred that the plaintiff on his part, had all along been ready and willing to pay the amount within the stipulated time (i.e. 13-3-1986), as per the agreement. A notice dt. 20-3-1987, was, therefore, served on the defendant-respondent 1, calling upon him to perform his part of the contract. This notice was received on 24-3-1987 and replied to by the respondent through his counsel on 26-3-1987, denying the alleged agreement and receipt of consideration of Rs. 30,000/-. It was also made clear to the plaintiff through this reply that he was in possession of the land solely on account of the fact that the land was given to him for cultivation on Munafa' basis for one year, which term was to expire on Baisakh Sudi Ekam of the year, corresponding to 29-4-1987 and he was, therefore, called upon to restore possession to the respondent 1, on expiry of the term.

3. According to the plaintiff, the cause of action for filing of the suit accrued to him on 13-3-1987, when he claims to have approached the respondent No. 1 for paying the remaining amount of Rs. 10,000/- with interest and called upon him to execute a sale deed, as agreed, but the respondent declined. The original agreement is on record.

4. Suit was filed on 15-4-1987, along with an application for an ad interim injunction under Order 39 Rule 2 read with Section 151 CPC. This application is

supported by an affidavit sworn by Anandram and Dulichand, attesting witnesses to the agreement dt. 13-3-1986. The trial Court on 16-4-1987 passed an order restraining the defendant-respondents from interfering with plaintiffs possession of the suit lands. This order was subsequently vacated on 24-9-1987 on an application made by the defendant-respondent under Order 39, Rule 4 CPC. Respondent 1 in his affidavit denied having entered into any agreement of sale of the suit land with the plaintiff. He also denied his signatures on the agreement, which according to him were forged. He further averred that on 13-3-1986 he was not in village Utawad, where the agreement is shown to have been executed. He was at village Jatashankar in Tehsil Bagli, District Dewas, where there was a religious fair and he was busy looking after arrangements for 'Maha Shivratri Yagnya'. A hand-bill, distributed on the occasion of 'Purnahuti' on 13-3-1986 has also been placed on record. He also filed an affidavit sworn by Shivram, brother of both the plaintiff and the respondent 1, their nephew Ganesh, who were also present at the 'Bhandara', held on the occasion of 'Purnahuti' at Bagli. The respondent has stated in his affidavit that the suit land was given to the plaintiff on 'Akshya Tritiya' of 1986, for cultivation for one year, on promise by him that he would hand over possession on expiry of the term. Accordingly the plaintiff, it is averred, having harvested crop of wheat and 'Bhindi' handed over possession of the suit land, which was later got ploughed in the month of Baisakh, by one Mangilal, servant of Shivram, respondent 2. It was also contended that the plaintiff in the garb of interim injunction was trying to remain in possession of the fields by fair means or foul.

5. On an application being made by the respondent No. 1 for vacating the ex parte injunction order passed on 16-4-1987, the trial Court on consideration of the material placed before it, vacated the ex parte injunction order dt. 16-4-1987. Plaintiff has, therefore, come up in appeal.

6. Shri Sanghi, learned counsel for the appellant strenuously urged that the trial Court having passed an order of injunction on 16-4-1987, erroneously vacated the same on 24-12-1987. It was also urged that the plaintiff-appellant was undeniably in possession of the suit land on the date of filing the suit, as is evident from the fact that the respondent had in his reply to the notice asked for possession being restored by the plaintiff.

7. The edifice of argument built up by Shri Sanghi, learned counsel for the appellant, with reference to host of authorities, appears to be quite imposing at first sight. His submissions in substance are two fold :

(1) that a transferee of property under an agreement is entitled to protect his possession u/s. 53A of the T.P. Act, if put in possession of property agreed to be sold;

(2) plaintiff-appellant being in 'settled possession' of the suit land, his possession should be respected.

A little probing, to the extent it is necessary to appreciate this argument would, however, reveal that what is lacking in the case is a solid foundation of facts to sustain the edifice of argument built up by the learned counsel.

8. Let us have a look at the case as pleaded by the plaintiff-appellant. Has he based it on his 'settled-possession' of the suit lands? He claims to have been put in possession of the land in part performance of the agreement dt. 13-3-1986. On the point of 'settled possession', reliance was placed by the learned counsel on decisions in Lallu Yeshwant Singh v. Rao Jagdish Singh AIR 1968 SC 620, Munshi Ram v. Delhi Administration, AIR 1968 SC 702 and Puransingh v. State of Punjab, AIR 1975 SC 1674 and it was submitted that the plaintiff is entitled to protect his possession and the court should grant injunction.

9. The concept of 'settled possession' is not so fluid as to accommodate the present case. A casual act of possession, stray or even intermittent act of trespass, would not mature into 'settled possession', as pointed out by the Supreme Court in Munshi Ram's case (AIR 1968 SC 702) (supra). The Supreme Court in Puransinghs case (AIR 1975 SC 1674) (supra), had occasion to deal with 'settled possession' and explained that 'settled possession' must extend over sufficiently long period and acquiesced in by the true owner. The possession of a trespasser, in order to mature into a 'settled possession', must be effective, undisturbed and to the knowledge of the owner and without any attempt at concealment.

10. A mere reading of the plaint would go to show that the plaintiff-appellant has nowhere disclosed the fact that he was given the suit land for cultivation for one year as pleaded by the respondent, whose reply dt. 26-3-1987, the plaintiff was having at the time of filing the suit, yet not a word in the plaint about the claim for delivery of possession advanced by the respondents, although this statement is heavily relied upon and repeatedly referred to with a view to show that the plaintiff was in possession of the suit land. This assumed silence as regards respondent's claim for delivery of possession, on the part of the plaintiff-appellant in his pleadings becomes more eloquent in the context of relief of interim injunction sought by him, This reply can and should not be read out of context. The term of 'one year' was to expire on Baisakh Sudi Ekam of the year 1987 (i.e. 29-4-1987). Plaintiff-appellant was, therefore, called upon to restore possession of the suit land to the defendant-respondent. Significantly, there is absolutely no mention in the plaint of this demand for possession by the respondent. However, in the meanwhile appellant has come out with a case of specific performance of an agreement dt. 13-3-1986. According to the plaintiff, the cause of action for filing the present suit accrued to him on 13-3-1987, when he approached the defendant with the remaining amount of Rs. 10,000/-, payable to him under the agreement. A reading of the plaint would go to show that the plaintiff-appellant has nowhere disclosed the fact that he was given the land in question for cultivation for a period of one year and it was on this basis that he was put in possession of the land, which was to be restored back on or before 29-4-1987. Execution of the alleged agreement has been denied by the defendant-respondent 1.

10A. It was further contended that in view of the reply given by the defendant to the plaintiff's notice that the plaintiff was in possession of the suit land on the date of institution of the suit and as such his possession should be protected by law. So far as the reply to the notice is concerned, as has been noted above, it should not be read in isolation. The defendant by his reply called upon the plaintiff to deliver possession of the suit land in question on expiry of the term of one year on Baisakh Sudi Ekam, corresponding to 29-4-1987. It cannot be lost sight of that the plaintiff-appellant had been called upon to restore possession on the basis of expiry of the term of one year, a fact which has nowhere been adumbrated by the plaintiff, either in the plaint or in his affidavit. On the other hand, during

continuation of this term of one year, he has come out with an agreement of which specific performance is sought and this agreement has been denounced as forged by the defendant-respondent.

11. Shri Sanghi, learned counsel pointed out from para 10 of the impugned order that the trial Court having granted ex parte interim injunction, faltered in vacating the same, solely relying on a decision of the Madras High Court in Krishnamoorthy v. Paramasiva, AIR 1981 Mad 310. It was vehemently contended by Shri Sanghi, learned counsel for the appellant that the trial Court wrongly vacated the injunction order passed on 16-4-1987. Shri Sanghi argued that the decision of the Madras High Court in Krishnamoorthy case (supra), relied upon by the trial Court, does not lay down good law. He referred to an earlier decision of the Madras High Court in S. F. Munnuswami Gounder v. Erusa Gounder, AIR 1975 Mad 25 and two decisions of the Bombay High Court in Venkat Dharmaji Gontalwar v. Vishwanath AIR 1983 Bom 413 and Sujanbai Haribhau v. Motiram Gopal Saraf, AIR 1980 Bom 188, to support his argument.

12. In his pursuit for a critical examination of the case-law governing the question of relief of temporary injunction, based on Section 53A of the T.P. Act, Shri Sanghi referred to a host of authorities and contended that the aforesaid Madras High Court decision does not lay down the correct law. The contention should not be brushed aside as pure academic. Learned counsel referred to the decision in S. F. Munuswami Gounder's case (supra), which holds the view that a transferee in possession under Section 53A of the T.P. Act, can ask for injunction for protecting his rights. He can claim injunction against the transferer restraining him from interfering with his possession.

13. Shri Sanghi pointed out that the decision in Krishnamoorthy's case (AIR 1981 Mad 310) (supra) is 'per incuriam' inasmuch as it ignores the existence of an earlier Division Bench decision of that very Court. He also referred to a single Bench decision of the Bombay High Court in Venkat Dharmaji's case (AIR 1983 Bom 413) (supra), which, dissenting from the aforesaid Madras case, has taken the view that temporary injunction can be granted to plaintiff, who under the agreement of sale has been put in possession of the suit land and prima facie

when the agreement itself recites that possession has been delivered to the plaintiff and execution is admitted by the defendant, then the plaintiff is entitled to the relief of injunction in a suit seeking specific performance of an agreement. The other case referred to in this connection is *Sujanbai Haribhan v. Motiram Gopal Saraf* (AIR 1980 Bom 188) (supra).

14. Really speaking, such a critical examination is not called for. *Krishnamoorthy's* case (supra) is a judgment *per incuriam*, inasmuch as it does not take into account an earlier Division Bench Decision in *S. F. Munuswami Gounder's* case (supra), on the subject. The Supreme Court in *Mamleshwar Prasad v. Kanhaiya Lal*, AIR 1975 SC 907 has propounded the necessity of consistency of rulings, certainty of law and comity of Courts, A decision once rendered, must later bind like cases. There may be exceptions to an earlier decision, but while differing or detracting from the earlier view, expressed therein, should also be considered, which is obviously not done in *Krishnamoorthy's* case (supra). A judgment being '*per incuriam*', its acceptability as a precedent is rendered doubtful. As against this view, propounded by the Madras High Court in *Krishnamoorthy's* case (supra) this Court in *Bhulkoo Ghaslya v. Mt. Hiriya Bai*, AIR 1949 Nagpur 410 has held that a part performer is entitled to protect his possession against any resolute man, out to dispossess him. This view is not only preferable, but is also a binding precedent. So far as this court is concerned.

15. *Shri Waghmare*, learned counsel appearing for the respondent submitted that the plaintiff was having the reply given by the defendant at the time of filing of the suit, yet he has not chosen to say a word about the claim for restoration of possession of land advanced by the defendant-respondent, although he has placed reliance on an alleged admission as regards plaintiff's possession of the suit land as contained in the reply (see-para 5 of the plaint). But this admission, as urged by *Shri Waghmare*, is in the context of calling upon the appellant to deliver possession and not admitting the alleged agreement. The admission which is relied upon should be read in its true perspective and not in a distorted manner.

16. Possession is a polymorphous term, which may have different meaning in different context. The meaning of '*possession*' depends on the context in which it

is used and, therefore, the alleged admission contained in the reply given by the defendant-respondent cannot be read out of context, so as to mean that he (plaintiff) was put in possession in pursuance of the agreement dt. 13-3-1986.

17. Shri Sanghi, learned counsel for the appellant also placed a host of authorities on principles governing temporary injunctions. These principles, on which the Court grants or confirms a temporary injunction, pending disposal of a suit, are now well settled. Interlocutory injunction is merely provisional in its nature. It does not conclude or purport to conclude a right, but is intended to keep the matters in status quo.

18. For the purpose of determining, whether temporary injunction should be granted, the Court must examine the merits of the case and the depth of investigations, which the Court must necessarily pursue for that purpose varies with each case. A reading of the impugned order would go to show that the trial Court has considered the agreement, which is the corner-stone of plaintiff's case. Any further comments on the said agreement is not desirable at this state.

18A. Coming to the case at hand, even if Krishnamoorthy's case (AIR 1981 Mad 310) (supra) is excluded from consideration, as it ought to be, it now remains to be seen, whether the impugned order calls for interference. The cases relied upon by the learned Counsel for the appellant are the cases where execution of the agreement was admitted by the defendant in Venkat Dharmaji's case (AIR 1983 Bom 413) (supra), two factors weighed with the learned Judge :

(i) the agreement itself recited that possession had been delivered to the plaintiff, and

(ii) execution thereof was admitted by the defendant it was in such a situation that the Court said that the plaintiff was entitled to relief of injunction in a suit seeking specific performance of the agreement.

19. Shri Waghmare, learned counsel appearing for the respondent rightly urged that discretion has been properly exercised by the trial Court and does not call for any interference.

20. In all cases it is a matter of discretion, whether an injunction will or will not be granted. But the manner of exercise of that discretion depends upon the precise nature of the particular right, which it is sought to protect and upon all the other material circumstances. An application for an injunction is an appeal to the extraordinary power of the Court and the plaintiff is bound to make out the case showing a clear necessity for its exercise, it being the duty of the Court rather to protect acknowledged rights than to establish new and doubtful ones. Discretion exercised by the trial Court is capable of correction by a Court of appeal, for where trial Judge has discretionary powers, the appellate Court has the like discretion and the like duty to exercise it. But an appellate Court will not interfere where the discretion of the lower Court has been properly exercised, as in this case, and it is for the appellant to show that a wrong discretion was exercised.

21. The doctrine of 'part performance, which Shri Sanghi, learned counsel for the appellant repeatedly invoked during the course of his arguments, has a number of essential requirements, which must be satisfied before a Court of Equity can be called upon to grant an injunction. The first of these requirements is that the acts of part-performance must itself be sufficiently referable to the agreement that has been entered into. The moot question that arises for consideration is, whether possession is referable to the agreement dt. 13-3-1986. Taking a total view of the material placed on record and the claim for restoration of possession advanced by respondent 1, on expiry of the term of one year, without commenting any further, it cannot be safely said at this stage that possession of the suit land as claimed by the plaintiff-appellant is referable to the agreement in question, which has been denounced as forged by the defendant. The view taken by the trial Court cannot be said to be unreasonable and does not call for any interference.

22. For the foregoing reasons, this appeal fails and is accordingly dismissed with costs. Counsel's fee shall be as per the schedule, if certified.