

Anil Kumar Vs. thekardum

Anil Kumar Vs. thekardum

SooperKanoon Citation : sooperkanoon.com/510164

Court : Madhya Pradesh

Decided On : Jan-07-2005

Reported in : AIR2006MP73

Judge : N.K. Mody, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 34, Rules 1 and 2 - Order 39, Rules 1 and 2; Code of Criminal Procedure (CrPC) - Sections 145

Appeal No. : M.A. No. 2772 of 2003

Appellant : Anil Kumar

Respondent : thekardum

Advocate for Def. : K.B. Bhatnagar and ;K.G. Gupta, Advs. (for Nos. 6 to 11) and ;Deepak Okhede, P.L. (for No. 12)

Advocate for Pet/Ap. : Umesh Trivedi, Adv.

Disposition : Appeal dismissed

Judgement :

ORDER

N.K. Mody, J.

1. Being aggrieved by the order dated 24-11-2003, passed in Civil Suit No. 33-A/2003 by District Judge Mandla, whereby the application filed by the appellant under Order XXXIV, Rules 1 & 2, CPC has been dismissed, the present appeal has been filed.

2. Short facts of the case are that the plaintiff/appellant filed civil suit for specific performance of the agreement dated 19-6-2002, whereby the appellant/plaintiff entered into an agreement with respondent No. 1 to sell the suit property for a sum of Rs. 4,00,400/- and paid a sum of Rs. 21,000/- as earnest money and also obtained the possession of the suit property. It was alleged by the plaintiff/appellant in the plaint that a sum of Rs. 2,23,500/- was paid from time to time right from 19-6-2002 to 21-10-2002. When respondent No. 1 refused to execute the sale deed in spite of notice in favour of plaintiff/appellant and also executed the sale deed in favour of respondent No. 6 on 8-5-2003, the suit was filed along with an application under Order XXXIX, Rules 1 & 2, CPC for protecting the possession and also for restraining the respondents from the suit property.

3. The respondents submitted the reply and opposed the prayer of temporary injunction. In the reply, execution of the agreement dated 19-6-2002 and the receipt of the earnest money of Rs. 21,000/- was not disputed and it was also not disputed that the possession was handed over to the plaintiff/appellant but this fact was denied that further amount of Rs. 2,02,500/- has been paid after execution of the agreement up to 21-10-2002 on different different dates. It was alleged by the respondents that at the time of execution of agreement on 19-6-2002, an impression was given by the plaintiff/appellant that the sale will take place within a period of fifteen days to two months and a power of attorney was also taken from respondent No. 1 on 26-6-2002 but no amount was paid as alleged by the plaintiff/appellant on different different dates and since number of persons started to visit the suit property, therefore, the respondent No. 1 complained with the Collector Mandla on 18-11-2002. It was also alleged that the plaintiff/appellant has not come with clean hand as before filing of the present suit earlier also a suit was filed on 17-4-2003, which was numbered as civil suit No. 40-A/2003 and was withdrawn on 12-5-2003. It was alleged that since the intentions of the plaintiff/appellant were not bona fide, therefore, the respondent No. 1 sold the suit

properly to respondent No. 6 on 8-5-2003. It was also denied that any notice issued by the plaintiff/appellant was received by the respondent No. 1.

4. Learned trial Court after considering all the aspects of the case found that the plaintiff/appellant is not in possession of the suit property and dismissed the application, aggrieved by this, the present appeal has been filed.

5. learned Counsel for the plaintiff/appellant submits that since respondent No. 1 has admitted the execution of the agreement and also handing over the possession of the suit property to the plaintiff/appellant, therefore, the burden on respondent No. 1 to prove that the possession was redelivered by the plaintiff/appellant to the respondent No. 1, and the Court below has committed error in dismissing the application on this ground. learned Counsel further submits that the payments were made by the plaintiff/ appellant right from 19-6-2002 to 21-10-2002 on various dates and there was no permission mentioned for completing the transaction, therefore, it could not have been said that the plaintiff/appellant was at fault any time. Apart from this, it is also submitted that since there was no time limit for completing the transaction, therefore, the time was not the essence of the contract. The Court below has committed error in holding that the plaintiff/appellant has not come with clean hand because earlier suit which was filed by the plaintiff/appellant was of no affect. There was no necessity to plead that fact in the present suit. learned Counsel also submits that the Court below also committed error in not placing reliance on the order of S.D.M. dated 9-4-2003, wherein the proceedings were drawn under Section 145, Cr. P.C. and the plaintiff/appellant was found in possession on spot inspection.

6. learned Counsel Shri K.B. Bhatnagar appearing for respondents Nos. 6 to 11 submits that the documentary evidence which is shown relating to payment of Rs. 2,02,500/- cannot be believed at this juncture because none of the payment has been made by the plaintiff/appellant through bank. For this, learned Counsel Shri K.B. Bhatnagar has placed reliance on a decision of this Court reported in 2003 (2) MPWN 66, Rama alias Ramalal v. Badrilal, wherein this Court while disposing of the application under Order XXXIX, Rules 1 & 2, CPC in a suit for specific performance has observed that so far as payment of Rs. 1,37,000/- as earnest

money is concerned, had it been paid by cheque or demand draft, which could have been the best piece of evidence to show that parties really intended to enter into a sale transaction of suit land and pursuant to which, received a sum of Rs. 1,32,000/-by way of part of sale consideration. It was also observed in the above case that it is not clear for want of any evidence tendered at this stage as to whether plaintiff/appellant paid this sum and if so whether, he was in a position to pay on the alleged date and if so from where he arranged to pay.

7. learned Counsel for respondent Nos. 6 to 11, Shri K.B. Bhatnagar further submits that the notice dated 5-5-2003, alleged to have been sent by plaintiff/appellant to respondent No. 1 is under certificate of posting and not by registered post. For this, learned Counsel has placed reliance on a decision of the Hon'ble Apex Court reported in 1994 AIR SCW 1 : : AIR 1994 SC678 Gadakh Yashwantrao Kankarrao v. E.V. alias Balasaheb Vikhe Patil, wherein the Hon'ble Apex Court in a election matter in para 60 has observed that:-

60. Gadakh's version that he sent the letter dated 16th May, 1991 (Exh. Q) under certificate of posting is unbelievable. A certificate of posting is easy to procure and does not inspire confidence. Moreover, the circumstances belie his version. With his considerable means and past experience of elections, he would have sent such a letter by registered post to ensure its delivery and create cogent evidence of its dispatch. Moreover, he would not merely send such a letter but have his denial published in newspapers because of its significance during elections. We have no doubt that Gadakh's conduct belies his belated denial at the trial.

8. In the present case also, when the dispute was going on a peak between the parties as the respondent No. 1 lodged the complaint on 18-11-2002 with the Collector, Mandla and plaintiff/appellant also filed an earlier suit on 7-4-2003, it is unbelievable that notices will be sent under certificate of posting.

9. learned Counsel Shri K.B. Bhatnagar has placed reliance on 1995 AIR SCW 3521 : : AIR 1995 SC2372 ; Gujarat Bottling Co. Ltd. v. Coca Cola Company, wherein the Hon'ble Apex Court in para 50 has observed as under:-

50. In this context, it would be relevant to mention that in the instant case GBC had approached the High Court for the injunction order, granted earlier, to be vacated. Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39, Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings.

10. In view of aforesaid decisions, this Court does not find any reason to interfere in the order passed by the Court below. The appeal stands dismissed. No order as to costs.

11. However, it is made clear that the observations made by the Court below shall not come in the way while disposing of the suit finally.