

Kamal Chugh and ors. Vs. Narinder Kumar Gulati and ors.

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Court : Delhi

Decided On : Sep-27-2002

Reported in : 2003(69)DRJ572

Judge : S. Mukerjee, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 39, Rules 1, 2, 3 and 4

Appeal No. : IAs Nos. 6716, 8554, 8558 and 8559/02 in Suit No. 1245/2002

Appellant : Kamal Chugh and ors.

Respondent : Narinder Kumar Gulati and ors.

Advocate for Def. : Valmiki Mehta, Sr. Adv. and ; Sanjiv Sindhwant, Adv.

Advocate for Pet/Ap. : Kailash Vasudev, Sr. Adv.,; Anil K. Kher and; Rishi Manchan

Judgement :

S. Mukerjee, J.

1. There are two separate aspects arising for consideration. The first is regarding the ex parte stay, while the second aspect is in relation to the continuance of the ad-interim stay order already granted, or whether any interim order at all is warranted and if so, to what extent and of what nature.

VALIDITY OF THE EX PARTE INJUNCTION GRANTED IN favor OF THE PLAINTIFF

2. An interesting question has arisen as to whether in a suit, where there is a Caveator upon whom copies are served but for some reason Caveator's counsel, does not appear and ex-parte, ad-interim injunction is granted, then whether the compliance with Order 39 Rule 3 CPC is still to be carried out or not.

3. The submission of learned counsel for the defendant is that in this case neither process fee was filed nor dusty summons or dusty orders were got collected, and no affidavit at all has been filed, even though a one page letter of intimation about the stay order, had been received by the defendant.

4. The contention of the plaintiff on the other hand, is that once there is a Caveator which has been served with the papers and the names of the Caveator's is shown in the list, thereafter only letter of intimation is required and there is no necessity to send the complete set of papers all over again or to file an affidavit. In this case it is the admitted position that designated advocate of the Caveator had been served with the complete set of papers prior to the matter being listed in the Court.

5. Learned counsel for the defendant has in support of his stand relied upon the judgment of the Supreme Court reported as A. Venkatasubbiah Naidu v. S. Chellappan and Ors. : AIR 2000 SC3032 and the judgment of this Court reported as Interling Services Pvt. Ltd. v. Sh. S.P. Bangera : 65(1997)DLT228 .

6. To my mind, wherever there is a Caveator who has been served with a complete set of papers in advance of the case being listed in the Court, and the name of the Caveator's shown in the cause list, there can be no necessity for compliance with Order 39 Rule 3 of the Code of Civil Procedure. The reason is simple. Once there is a Caveator who has filed a Caveat, and the compliance of the caveat has been done that party (Caveator) is before the Court and the ad-interim order being passed is not an order of ex-parte nature, or an order at pre-notice stage. As such the provisions of Order 39 Rule 3 CPC would not be attracted at all.

7. Once Caveator has been served with the complete set of papers, thereafter it is not within the control of the plaintiff as to when exactly the case will be listed. The Registry of the Court may raise one or more objections or for any other reason the matter may be listed after a gap of a few days. However as soon as the name of the defendant/Caveator's counsel is shown in the list, that is itself intimation of all practicing Advocates, about the case being taken up on the date of listing, and as such the order passed is not an order passed ex-parte or at pre-notice stage.

8. In the letter which admittedly was sent by learned counsel for the plaintiffs and was admittedly also received by the defendants, the complete details of the Suit No., the date of listing and the orders passed have been communicated by the learned counsel for the plaintiffs. He has also conveyed that the complete set of documents stands already served earliest in terms of the caveat. To my mind, the main purpose of such an intimation is to ensure that the defendant come to know about the injunction against him at the earliest, and does not have to wait from the Court summons/service of orders in routine course through the Process Serving Agency etc. which may take a longer time. Once the intimation has admittedly been received, atleast in the case of the Caveator, there can be no question of the said party claiming the vacation of stay on that count.

9. The matter may be considered from another angle also.

10. The rigour of Order 39 Rule 3 CPC is not to be held against the plaintiffs in such cases of Caveator on account of defendant having been duly served, and the defendant's counsel name having been duly recorded in the official list of business of the High Court.

11. After the order was reserved, learned counsel for defendant cited : AIR 2000 SC3561 but that judgment is on the point-that once Court directs notice by Court order, then compliance thereof is to be by actual notice and not by deemed service since Caveator's name is shown in the list.

12. In view of the above there is no merit of the submission of the learned counsel for the defendants that on account of non-service of another complete set of pleadings and documents and/or on account of non-filing of affidavit, the injunction

granted is liable to be vacated on that short ground alone.

AD INTERIM INJUNCTION TILL THE DISPOSAL OF THE SUITWHETHER
WARRANTED AND IF SO THE NATURE AND EXTENTTHEREOF

13. The facts of this case, to the extent admitted by both parties, may briefly be capsulated vide agreement to sell dated 19.1.1993 executed between one Ms. Promilla Kapoor and the plaintiffs 1 & 2, the said plaintiffs 1 & 2 agreed to purchase the entire property bearing No. N-79, Panchsheel Park, New Delhi - 110017, for total consideration of Rs. 1.20 Crores. Proceedings for Income-tax clearance had also been taken in relation to this transaction between Ms. Kapoor and the plaintiffs.

14. After the plaintiffs came into possession of the property, they in turn agreed to sell to defendants 1 & 2 the first floor of the property to be re-built, at Rs. 65 Lacs, vide agreement to sell dated 29.10.1993.

15. On 26.8.1994 Income-tax permission was obtained in relation to the transaction between the plaintiffs and the defendants.

16. The possession of the first floor was also handed over to defendants 1 & 2 on 24.8.1995.

17. A Power of Attorney was thereafter executed by plaintiff No. 3, in favor of Defendant No. 3, on 20.5.1997.

18. It is customary in such transactions where payment has been made and possession of property has been transferred pursuant to agreement to sell, that one of the family members of the purchaser is given a Power of Attorney so that the seller's presence may not be necessary, at the time of registration of the sale deed.

19. On 7.6.2002, a sale deed was executed by Ms. Promilla Kapoor in favor of the plaintiffs for the entire property, after the said property had been converted to free-hold, vide document dated 4.4.2000.

20. In the intervening period, after the property had been converted to free-hold and before the sale deed of the entire property took place between Ms. Promilla Kapoor and the plaintiffs, the defendants 1 & 2, it appears, by taking advantage of the Power of Attorney dated 20.5.1997 which was already executed by plaintiff No. 3 in favor of Defendant No. 3, got a sale deed executed between themselves, in which vendor, is shown to be the original owner Ms. Promilla Kapoor making the sale through Shri Rohit Gulati (Defendant No. 3) acting as the subsequent attorney of the first attorney (Shri K.L. Chugh Plaintiff No. 3).

21. Thus a piquant situation has developed whereby so-to-say the second stage purchaser of The first floor, has jumped over the head of his immediate seller (viz Plaintiffs 1 & 2), and has rather got executed a sale deed in his (defendant's) favor even before the sale deed in favor of the plaintiffs, by showing the defendant No. 3 who is the son of defendant No. 1 to be the attorney through attorney of the original seller Ms. Promilla Kapoor.

22. The said piquant situation has been further complicated by the fact that while incorporating the terms and conditions of the sale deed dated 18.10.2000, the defendants 1 & 2 have deviated/departed from certain terms and conditions of the agreement to sell between the plaintiffs and the defendants, including in particular with reference to a preemption clause, agreed to between the parties, and duly embodied in their agreement to sell dated 26.10.1980.

23. Other grievances in relation to the said sale deed in favor of defendants No. 1 & 2, are that (a) the proportionate land share has been enlarged, and (b) the share of 1/3rd of free-hold conversion charges and charges for the total property, have been given the go-bye. Certain other covenants, including . purely residential user have been allegedly dropped.

24. Above all the plaintiffs are aggrieved of what they describe to be a totally fraudulent exercise of the defendants using the Income-tax Clearance Certificate pertaining to transaction between Ms. Promilla Kapoor and the plaintiffs, as if the same were an ITCC between Ms. Promilla Kapoor and themselves.

25. There are certain other elaborations of the aspect of false or the fraudulent ITCC user as also apprehensions of the plaintiffs that the plaintiffs could be in difficulty of re-opening of its Income-tax assessments etc., with which I do not propose to deal in detail lest the same operate to the prejudice of any one of the parties, and in any case the niceties and further extrapolation of this point need not be gone into by me as I feel I should confine for interim purchases only to the aspect that it appears to be the admitted position that there was no ITCC directly between Ms. Promilla Kapoor and the defendants, and therefore the sale deed executed on 18.10.2000 by defendant No. 3 acting as Attorney through Attorney of Ms. Promilla Kapoor, is under a cloud to that extent.

26. The matter was heard at considerable length and both parties made their submissions from their own respective stand-points, and each claimed to be the victim of black-mail and arm-twisting activities of the other.

27. The stand of the defendants primarily was that defendant has purchased the first floor and admittedly has paid the full price as agreed and as such there can be no doubt about the defendants entitlement to ownership of the said first floor. According to learned Senior Counsel for defendant the whole dispute boils down to and revolves around the so-called right of preemption as contained in Clause 11 of the agreement to sell (but not incorporated in the final impugned sale deed), which clause defendants submits is to be held as void on account of uncertainty. The submission of defendants submits is that the clause be held as void on account of uncertainty of price or bases of computation thereof. Shri Valmiki Mehta, learned Senior Counsel, for the defendants submits that such a pre-emption clause, at the highest, can amount to an agreement to sell the first floor back to the plaintiffs, which necessarily requires consensus ad-idem. The most significant aspect is that either there should be an agreed price, or a mechanism to work out the price, such as a stipulation to the effect that on repayment of price initially paid by defendants plus interest year by year at 'X' %, the plaintiffs will be entitled to preemptively buy back the first floor.

28. The absence of any parameters governing computation of price, according to him is fatal, and therefore the non-inclusion of that unenforceable clause in the

final sale deed, is immaterial and in consequential.

29. The further alternative contention of Shri Valmiki Mehta, learned Senior Counsel for the defendants is that, in any case, the defendant has already carried out substantial compliance of the 'pre-emption clause', by sending a communication dated 3.10.1998 to the plaintiffs, informing them that the defendants had a buyer for Rs. 1.60 Crore, to which plaintiffs No. 1 & 2 replied back, that the offer is highly excessive and called upon the defendants to furnish further particulars.

30. To my mind, on a prima-facie appreciation, this aspect of compliance with the pre-emption clause needs to be dealt with in the first instance. Either the clause contained in the agreement to sell (and which the plaintiff contended should have been there in the impugned final sale deed), is either to be held as vague and unenforceable or as vocative of Sections 10 and 11 of the transfer of Property Act (in case we proceed upon the stand taken by the plaintiff), or would have to be read down to imply merely the stipulation of an opportunity being extended to the plaintiff to exercise his right of preemption, by being allowed to jump in at the last moment and to purchase the first, floor at whatever consideration amount, which has been hard bargained between the defendant and some other third party.

31. It could have been understood if the response of the plaintiffs, had been to give a counter offer-cum-conditional waiver by responding that the 'rate quote is too high', but we are prepared to purchase to say Rs. 1 crore'. In case you have an offer above Rs. 1.0 crore which would abide by the terms of the agreement to sell dated 19.1.93, and not containing any terms undermining or taking away the benefit of the term of the said agreement to sell dated 29.2.93, then we (plaintiffs) waive our right to pre-emption subject to sale being effected in favor of a third party at the price of Rs. 1.60 crore or more'.

32. It could have been added in response of the plaintiff that 'in case the sale is not concluded at the value of Rs. 1.60 crore, then for any Lesser value, below that amount, further option will have to be extended to us (plaintiffs) in accordance with The terms and conditions of the agreement to sell dated 29.2.93.'

33. The response of the plaintiff not having been on above lines, those aspects of challenge no longer ensure to the favor of the plaintiff, whether we consider the terms of Clause 11 of the agreement to sell dated 19.1.93 to be void and unenforceable under clause Sections 10 & 11 of the Transfer of Property Act or alternatively we consider the option of pre-emption as having been satisfied and exhausted by the communications dated 3.10.98 and 16.10.98 which are document Nos. 3 & 4 to the defendant's documents as filed on record.

34. Coming back now to the main grievance of the plaintiffs viz. regarding the impugned action on the part of the defendants No. 1 & 2 in getting a sale deed executed in their favor, by their own son (defendant No. 3), and by procuring the creation of a sale deed document having clauses materially different, and at variance with the agreement to sale dated 19.1.93, and rather operating to the prejudice and undermining the essential sub-stratum of some of the vital terms and conditions of the said agreement to sell between the parties.

35. The Learned Senior Counsel for the defendants understandably Kept the focus away from the admitted position before transaction was completed and once the payment was made and possession delivered the defendants thereafter completed the execution of document at the level of their own family itself by the son (defendant No. 3) executing the sale deed in favor of the parents (defendants 1 & 2).

36. No doubt the payment having been made by the defendants and possession was with them and on the moral stand point the defendant did not commit any grave crime. He had paid money and was entitled to complete the paper work.

37. The Plaintiffs had also provided to the defendants convenient opportunity for carrying out this bit of manipulation, by keeping the General Power of Attorney in effect all through in favor of the defendant No. 3 who thereby became the attorney of the attorney in relation to original owner Mr. Promilla Kapoor.

38. It is the admitted position that the said Power of Attorney in favor of defendant No. 3, had a provision for a further sale to be effected by the defendants in favor of some third party,

39. After the property was converted to free-hold, and the transaction in favor of the plaintiffs became a transaction of valid and lawful transfer of the entire property in there favor of the plaintiff it was then appropriate and required on the part of the plaintiff to have immediately got the sale deed executed in their own favor, and then to have executed a sale deed in favor of the defendants 1 & 2.

40. In case the defendants No. 1 and 2 were not cooperating in contributing their share of 1/3rd of the free-hold conversion charges or sale deed expenses, then the appropriate recourse would have been to serve a notice upon the defendants informing them about the compliances required of them and offering to execute a sale deed as per the agreed terms and conditions already contained in the agreement to sell dated 19.1.93.

41. In case the defendants did not cooperate after due service of notice, the plaintiffs ought to have thereupon revoked the General Power of Attorney in favor of the defendant No. 3. The plaintiff did not adopt either of these valid recourses.

42. Equally, the defendants No. 1 & 2 also did not act in accordance with their rights and obligations in law. It is not, and cannot be a valid defense on their part that they had done all what was needed of them and/or that they had called upon the plaintiffs to executed he sale deed and/or that it was only on account of the plaintiffs acting unreasonably that the execution and registration of sale deed remained pending and/or that thereforee, the defendants 1 & 2 felt constrained to get the sale deed executed in their favor by using the services of defendant No. 3 who is their own son and attorney of attorney.

43. In the entire written statement there is no allegation to the effect that the plaintiffs were in any manner averse to or not cooperating in execution of sale deed in favor of the defendant.

44. There is also no Explanationn whatsoever as to why or how the ITCC obtained by Ms. Promilla Kapoor in relation to her transaction viz-a-viz plaintiffs for the entire property, could be hijacked and utilised by the defendants for executing the sale deed in their own favor.

45. Moreover, it is not and it cannot be the case of the defendants that their transaction was really with Ms. Promilla Kapoor, and that the plaintiff was only an intermediary.

46. Once the first floor was sold by the plaintiffs 1 & 2 in favor of defendants No. 1 & 2, it was obligatory on the part of the defendants to stick to that situation, in both the 'de-jure' and also the 'de-facto' sense. Defendants are acknowledging that the transaction was of sale between themselves and plaintiffs. As such the deviation and departure from the terms and conditions of the agreement to sell dated 19.1.93, concludes the situation as, far as the establishing of a mala fide or colourable motive, atleast for prima-facie purposes.

47. When the matter was argued out and my questions put to the Ld. Senior Counsel for the defendants, made it perhaps apparent to the defendants that this aspect of essential conditions of agreement to sell having been given a go-by in the impugned sale deed, was weighing heavy on my consideration, the defendants thereupon filed what they described to be 'proposed terms of settlement on behalf of the defendants'.

48. These are dated 28.9.2002 and duly supported by the affidavit of the defendant No. 1. In and by the said document, the defendant have tried to revert back in the form of an undertaking to the Court/on clarification to the executed registered sale deed which has been impugned in the suit, or most of the aspects on which departure had been made from the agreement to sell dated 19.1.93, except in relation to the pre-emption clause, which obviously the defendants are insisting to be void and unenforceable or alternatively satisfied by exchange of letters.

49. On a conspectus of what has been said above. I have pondered over the three tests governing the grant of interlocutory injunction, I find that the plaintiffs has established both strong prima-facie case and balance of convenience in their favor. As regards the irreparable injury aspect also I find that if the defendants are not enjoined from effecting any further sale, that would operate to cause irreparable injury to the plaintiffs since the defendants No. 1 and 2 have eliminated plaintiffs No. 1 and 2 from the picture and also the terms and conditions of the

basic agreement to sell dated 19.1.93, and any third party who now enters into the first floor as the bona fide purchaser for consideration without notice, may in law be entitled to, insist upon the terms and conditions of the impugned sale deed dated 18.10.2000.

50. The learned Senior Counsel for the defendants has also drawn my attention to the latest decision of the Apex Court in Hindustan Petroleum Corporation v. Sriman Narayan and Anr. : AIR 2002 SC2598 and in particular, to the following passage :-

'The decision whether or not to grant an interlocutory injunction has to be taken at a time when the exercise of the legal right asserted by the plaintiff and its alleged violation are both contested and remain uncertain till they are established on evidence at the trial. The relief by way of interlocutory at the trial. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before which that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff 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 favor at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weight one need against a other and determine where the 'balance of convenience' lies'

51. Even by the said yard-stick, I find that the plaintiff is entitled to grant an injunction to mitigate the risk of injustice to the plaintiff, till the matter is resolved by the final disposal of the suit. Any sale or third party rights created by the defendants under the impugned sale deed, would result in injury by violation of plaintiff's right for which the plaintiff cannot be compensated in damages.

52. The defendants having acted at their own initiative and peril, do not need to be protected from the eventuality of there own creation and as such not being able to exercise their right to sell or transfer or alienate the premises in the meanwhile.

53. In view of the above, I consider this to be a fit case for grant of ad interim injunction in favor of the plaintiff and against the defendants restraining the defendants, their employees, agents attorneys, representatives and servants from disposing of or creating any third party interest in the suit property, i.e. first floor portion of the said building with a store room measuring approx. 70 sq. ft. in the basement and a proportionate share in the land underneath of the property N - 79, Panchsheel Park, New Delhi - 17 in any manner except in strict conformity with the terms of the Agreement to Sell dated 19.1.1993 executed before the Plaintiff No. 1 & 2 the Defendants Nos. 1 & 2, and not without disclosing in writing the pendency of these proceedings as a recital to the documents with the third party.

54. While concluding, I do feel some element of compassion and sympathy for the defendants who have paid the entire consideration, and but for their folly (or so it prima-facie appears), would have been in a position to enjoy the rights of transfer/alienation of the first floor in favor of third parties.

55. To my mind for properly balancing the equities, grant of stay has to conditional in most cases. The condition may be of actual costs of contest or indemnification of top in price of immoveable property or waiver of one out of possible alternative stands/contentions/ reliefs or anything else which appears to the Court granting injunction, to be required and/or proper.

56. The plaintiff's, stand as reflected by their response in October 1998, is that they need not respond to each offer of third party, but rather to their (plaintiff's) assessment of fair sale value in absolute terms.

57. To this end, I feel that it would be required and warranted that the first party by made to convey its offer in a sealed cover regarding purchase the first floor on the same terms and conditions as are contained in the agreement to sell dated 19.1.93 and subject to further consideration thereof by this Court the sealed offer will have to be accompanied by an undertaking by the plaintiffs that this is a final exercise of option of pre-emption by them, and that subject to the terms of the impugned sale deed being brought, in line with the agreement to sell dated 19.1.93, the plaintiffs option of pre-emption shall stand as satisfied/exhausted/eliminated upon the defendants bringing any third party before

the Court, for amount even one rupee higher than the amount contained in the sealed bid of the plaintiff, subject to the third party so brought by the defendants agreeing to a sale deed in line with the agreement to sell dated 19.1.1993, save and except for the pre-emption clause which shall stand exhausted, and therefore not required to be repeated in the future transfer documents in favor of the third party. This sealed bid and undertaking of the plaintiffs should come on record within a period of two weeks from today, failing which the matter be placed before court for additional condition to be imposed upon the plaintiffs, by way of security for possible fall in price of the first floor. The bid if it be filed, will be opened now or at later stage after hearing the parties on the aspect.

58. I also propose to expedite the final disposal of the suit itself by separate orders to that effect.

SUIT NO. 1245/2002

1. Amended plaint and court fee be filed within a week. Written statement within one week thereafter. Replication within three weeks from the date of this order. Both the parties to file their respective originals documents after exchanging advance copies within 4 weeks from the date of this order.

2. The matter to be listed for admission/denial of documents before the Joint Registrar on 15.11.2002. The evidence by way of affidavits would have to be filed by the plaintiffs within 15 days thereafter and by the defendants before the date fixed. The matter be listed for cross-examination before Mr. Sanjiv Sharma Advocate of this Court who is appointed Local Commissioner as per prescribed scale of fee to record cross-examination on the said date and to continue day by day from 4. 00 p.m. onwards, on consecutive days. On the date immediately after the conclusion of evidence, the matter be listed in the Court for final hearing.

Application is 6716/2002 stands disposed of.

IA 8554/2002 (U/o VI Rule 17)

The amendments sought do not change the nature of the suit and are aimed at bringing on record subsequent events as well as to make up the deficiency of court

fee. The amendments being necessary for complete and efficacious adjudication, is allowed.

Application (IA 8554/02) stands disposed of.

Amended plaint with court fee be filed within a week.

is 8558/2002 (U/o 39 Rule 1 & 2 CPC)

For the reasons detailed in relation to is 6716/2002 and in view of disposal of suit itself having been expedited, the defendants are restrained from carrying out any structural changes, additions or alternations except after obtaining leave of this Court.

Application (I.A. No. 8558/02) stands disposed of.

I.A. No. 8559/02 (Under Order 26 Rule 9 CPC).

Learned counsel for petitioner did not press this application at this stage. Application is accordingly dismissed as withdrawn.

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