

Krishnamoorthy Koundar Vs. Paramasiva Koundar

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Court : Chennai

Decided On : Apr-02-1981

Reported in : AIR1981Mad310

Judge : Ramanujam and ;Sengottuvelan, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 37; [Transfer of Property Act, 1882](#) - Sections 53-A

Appeal No. : A.A.O. No. 757 of 1977

Appellant : Krishnamoorthy Koundar

Respondent : Paramasiva Koundar

Advocate for Def. : C. Krishnan, Adv.

Advocate for Pet/Ap. : T. Dhanyakumar, Adv.

Judgement :

Ramanujam, J.

1. This is an appeal filed by the first defendant in O. S. No. 284 of 1977 questioning the order of injunction granted by the court below pending the suit. The said suit O. S. No. 284 of 1977 is one for specific performance, of an alleged agreement of sale said to have been executed by the first defendant in favour of the plaintiff

agreeing to sell his properties for a sum of Rs. 24750. The plaint proceeds on the basis that even on the date of agreement viz., 16-8-1977 the first defendant received a sum of Rs. 14000 as advance agreeing to execute the sale deed within 30 days after getting the balance of the sale consideration. The agreement also recited that the possession of the properties ~as been given by the first defendant to the plaintiff in pursuance of the agreement of sale. The plaintiff's case is that in spite of the agreement of sale the first defendant has not executed the sale deed on receipt of the balance of the consideration and therefore he was constrained to file this suit for specific performance.

2. Along with the suit he also filed an application for injunction restraining the first defendant from interfering with his possession on the basis that he was in possession of the suit properties on the date of the agreement and such possession has to be protected till the disposal of the suit. In the written statement filed by the first defendant. the execution of the agreement was denied, and the receipt of Rs. 14000 as advance was also denied. The first defendant also denied the plaintiff's assertion that the possession of the suit properties was given on the date of the agreement. According to him the plaintiff had trespassed into the possession of the properties and with a view to sustain the possession of the trespassed properties he has come forward with a false claim for specific performance. The trial Court having held that the truth and genuineness. of the alleged agreement of sale has to be established in the suit at the stage of the trial chose to grant an injunction in favour of the plaintiff pending disposal of the suit. the said order has been questioned by the first defendant in this appeal. The court below having posed the question as to whether the plaintiff took possession of the suit properties on the date of the agreement, viz., 16-8-1977 held that the plaintiff took possession in pursuance of the agreement mainly relying on the recital in the agreement. We are of the view that in the circumstances of this case unless the plaintiff establishes the actual delivery of possession of the properties on the date of agreement of sale, he cannot merely rely on the terms of the agreement which is denied by the first defendant and the truth of which the plaintiff has to establish at the stage of the trial. Unless the plaintiff establishes prima facie that the first defendant gave the possession to the plaintiff in person on the date of the agreement of sale the plaintiff is not entitled to an injunction merely basing on the

terms of the agreement and the truth of which is yet to be established at the trial. In this view of the matter we find that the lower court is not justified in granting the injunction prayed for by the plaintiff.

3. Apart from this factual aspect there is one other impediment in the way of the respondent from getting the relief of temporary injunction in his suit for specific performance. Even assuming that the plaintiff was given possession of the suit properties on the date of the agreement of sale by the first defendant the question still is whether the plaintiff could claim the relief of injunction based on Section 53A of the Transfer of Property Act. Admittedly in this case the plaintiff has not yet got title to the properties. He can get title to the properties only if he succeeds in the suit and obtains sale deed in respect of the properties. It is well established that an agreement of sale does not create any interest in the property which is subject matter of the agreement. Therefore, the plaintiff if at all can claim only an equitable right based on S. 53-A of the Transfer of Property Act. Therefore the relief of temporary injunction claimed by the plaintiff pending the suit can be taken to have been claimed by the plaintiff only on the basis of S. 53-A of the Transfer of Property Act as mere possession of the plaintiff of the suit properties -on the date of the suit cannot be taken to enable him to obtain injunction from the court. If that will be the case even a trespasser in possession can approach the court and ask for an injunction to protect his possession. Therefore, we have to treat the plaintiff's application for temporary injunction pending the suit- as an application for claiming equitable relief under S. 53-A of the Transfer of Property Act. If the application for injunction is treated then the plaintiff cannot be granted the relief for the reason that S. 53-A can be used to resist the defendant when he seeks to dispossess the plaintiff. It is well established that Section 53-A of the Transfer of Property Act provides for a passive equity and not for an active equity. Therefore the plaintiff cannot seek his relief of injunction in a court of law based on S. 53-A of the Transfer of Property Act though he can use S. 53-A to debar the transferor who has agreed to sell the property from claiming any right in respect of that property. It is well established that the right conferred by S. 53-A is a right available to the defendant only to protect his possession on the basis of that section the defendant cannot claim any title and it merely operates as a bar to the plaintiff to ascertain his title. Though in English law the equity of part performance

is an active equity, which the plaintiff in possession may enforce in an independent suit or proceeding, such as a suit for specific performance or for an injunction to restrain dispossession such equity is not available after the amendment of the Transfer of Property Act in the year 1977. In this case the plaintiff used his right under S. 53-A not as a shield but as a sword. Hence the plaintiff is not entitled to the injunction sought for by him. In the result the order of the lower court is set aside and this civil miscellaneous appeal is allowed,

4. It is, however, made it clear that the observations made in this order will not prejudice the rights of the parties at the stage of the trial. Having regard to the fact that the suit is of the year 1977, the court below is directed to dispose of the suit at the latest within four months from this date. The learned counsel for the respondent contends that the first defendant in the suit is likely to alienate the suit properties and such alienation would likely to create complications if that is the apprehension of the plaintiff, he may approach the lower court for suitable directions. No costs.

5. Appeal allowed.