

Veena Arora Vs. Devinder Kumar Mahndru

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Court : Delhi

Decided On : Apr-30-2010

Judge : Aruna Suresh, J.

Acts : Specific Relief Act - Sections 6, 38, 39 and 41; ;Contract Act - Section 62; ;Transfer of Property Act - Section 53A; ;Registration Act - Section 17; ;Code of Civil Procedure (CPC) - Order 6, Rule 17 - Order 39, Rules 1 and 2

Appeal No. : CS(OS) No. 649/2006 and IA No. 4360/2006

Appellant : Veena Arora

Respondent : Devinder Kumar Mahndru

Advocate for Def. : S.P. Kalra, Sr. Adv. and; O.P. Wadhwa, Adv.

Advocate for Pet/Ap. : Chetan Sharma, Sr. Adv. and; Amit Bhardwaj, Adv.

Disposition : Application allowed

Judgement :

Aruna Suresh, J.

IA No. 4360/2006 (under Order 39 Rules 1 & 2 CPC)

1. Plaintiff has filed this application seeking temporary injunction against the defendant for restraining him from forcibly dispossessing the plaintiff from second

floor roof with terrace rights of the suit property and also restraining him, his servants, agents, assignees, representatives, attorneys or any other person acting on his behalf from creating any third party interest in the second floor roof with terrace rights of the suit property till pendency of the suit.

2. In brief, case of the plaintiff is that suit premises i.e. M-31, Rajouri Garden, New Delhi was initially owned by one Shri Ashok Narang and Smt. Geeta Narang. The said two persons sold ground floor of the said premises to one Shri Devinder Mahna, first floor to Shri Gagandeep and second floor to Shri Devinder Kumar Mahindru, the defendant for a consideration of Rs. 5,00,000/- each vide separate Sale Deeds dated 31st March, 2005. Later on all aforesaid three persons sold their respective shares in the suit premises to plaintiff's husband Shri Raj Kumar Arora, plaintiff's son Gaurav Arora and herself for Rs. 6,00,000/- each, which was paid by Raj Kumar Arora vide three cheques dated 15th May, 2005. On 18th May, 2005 defendant had received full amount for selling his share in the suit premises consisting of second floor/terrace in favour of the plaintiff. Plaintiff and her family members received complete physical possession of the suit premises. Shri Devinder Mahna executed requisite Sale Deed in respect of ground floor in favour of Raj Kumar Arora on 22nd July, 2005 which was got registered on 18th August, 2005. However, Gagandeep and Devinder Kumar Mahndru refused to execute the Sale Deed and demanded more money from the plaintiff and her family on the plea that prices of the property had increased. Since defendant refused to execute Sale Deed in favour of the plaintiff in respect of the suit property, plaintiff filed the present suit seeking declaration as owner of the second floor of the suit premises, mandatory injunction against defendant to direct him to execute the Sale Deed in respect of the suit premises and a decree for permanent injunction to restrain him from creating any third party interest in the suit property.

3. During pendency of the suit, plaintiff moved an application under Order 6 Rule 17 of the Code of Civil Procedure (hereinafter referred to as 'CPC') and sought amendment of the plaint with permission to claim a relief of specific performance of the contract. The said application was allowed by this Court on 6th August, 2007.

4. Controverting the claim of the plaintiff, defendant has alleged in his written statement that in May, 2005 he along with Gagandeep had agreed to sell their respective portions of the suit property for a total sum of Rs. 69,00,000/- (Rs. 35,00,000/- for the first floor and Rs. 34,00,000/- for the second floor). Raj Kumar Arora had handed over three cheques for Rs. 6,00,000/-each to defendant and Gagandeep as earnest money and further gave a cheque of Rs. 57,00,000/- as security not to be encashed as he wanted to apply for a bank loan. In February 2006, Raj Kumar Arora gave him photocopies of three bankers' cheque of Rs. 7,00,000/- each dated 27th February, 2006 issued by Indian Overseas Bank, New Rajinder Nagar, New Delhi and requested defendant and Gagandeep to execute the sale documents on assuring that Rs. 21,00,000/- each would be paid at the time of registration of the Deed in two different installments, to which the defendant and Gagandeep did not agree. It is also the case of the defendant that a false criminal complaint was also lodged by the plaintiff against him and his relatives and Gagandeep and after getting a stay order from this Court forced them to sell two portions of the suit premises for Rs. 62,00,000/- instead of Rs. 69,00,000/- as agreed before and thus an Agreement to Sell dated 2nd May, 2006 was entered into duly signed by both the parties as well as Advocate of the plaintiff's husband. According to said Agreement, Rs. 41,00,000/-were to be paid at the time of execution of the sale documents for first and second floor and the balance amount of Rs. 9,00,000/- in two interest free installments by 2nd August 2006, which plaintiff's husband and son did not comply with. Therefore, it is prayed that plaintiff is not entitled to the reliefs claimed by her.

5. Mr. Chetan Sharma, learned senior Counsel appearing on behalf of the plaintiff has argued that interim order was granted by this Court on 20th April, 2006. Since there is no change in circumstances on facts and law, the said order is not required to be vacated. Plaintiff has come to the court with clean hands and no facts have been suppressed. He has further argued that in case third party interest is created by the defendant, irreparable loss and injury would be caused to the plaintiff, which cannot be compensated in terms of damages. It is further submitted that since plaintiff is in possession of the suit premises, her possession has to be protected till her rights are determined on merits. It is pointed out by him that no counter-claim has been made by the defendant and no suit has been filed under

Section 6 of the Specific Relief Act to claim back the possession of the suit premises from the plaintiff and therefore, the only efficacious legal remedy available to plaintiff was to file the present suit for declaration, mandatory and permanent injunction as well as for specific performance of the contract.

6. Mr. S.P. Kalra, learned senior Counsel appearing on behalf of the defendant has submitted that agreement is alleged to be of 2005 and the possession was also delivered in 2005, whereas suit was filed in 2006. He has submitted that a criminal case was filed by the plaintiff against the defendant and Gagandeep and in the said criminal proceedings an Agreement dated 3rd May, 2006 was executed. This Agreement is a modification of the previous Agreement and by virtue of it, previous Agreement stood revoked. In view of Section 62 of the Contract Act, plaintiff cannot enforce the original oral contract for sale of the property. Therefore, since plaintiff has failed to pay the consideration amount against purchase of the said property, she is not entitled to any relief as claimed by way of this application. He has referred to para 6 of the replication to emphasize that execution of Agreement dated 3rd May, 2006 is admitted by the plaintiff and she is bound by the same. Even after the amendment of the plaint, no further payment has been made by the plaintiff nor she has issued any cheque for Rs. 57,00,000/-. Plaintiff has not come to the court with clean hands and is not entitled to any discretionary relief of injunction as prayed.

7. Learned Counsel for the defendant has also argued that alleged Agreement to Sell was oral and therefore, plaintiff cannot sought protection of her possession under Section 53A of the Transfer of Property Act (hereinafter referred to as 'TP Act'). He further submitted that sale of immovable property needs compulsory registration under Section 17 of the Registration Act. Since agreement was oral and no written agreement was executed between the parties nor registered, plaintiff is not entitled to any interim relief of injunction as prayed. In support of his submissions, he has referred to Mool Chand Bakhru and Anr. v. Rohan and Ors. : JT 2002 (1) SC 465, Sanjay Kaushish v. D.C. Kaushish and Ors. : AIR 1992 Delhi 118 and Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra (Dead) Through LRs. : (2004) 8 SCC 614.

8. Following are the admitted facts:

(i) Shri Ashok Narang and Smt. Geeta Narang were the previous owners of the suit property from whom defendant purchased second floor and Gagandeep purchased first floor. Whereas ground floor was purchased by Devinder Mahna for consideration of Rs. 5,00,000/- each.

(ii) The area of land underneath the suit property measures 200 square yards.

(iii) Devinder Mahna sold ground floor of the property in favour of Raj Kumar Arora, husband of the plaintiff, Gagandeep sold the first floor of the suit property in favour of Gaurav Arora whereas defendant sold the second floor with terrace rights to the plaintiff.

(iv) Devinder Mahna executed a registered Sale Deed dated 22nd July, 2005 in respect of the ground floor of the property in favour of Raj Kumar Arora and got it registered on 11th August, 2005.

(v) Cheques for Rs. 6,00,000/- each (three cheques), being value of each floor, were issued in faovur of defendant, Gagandeep and Devinder Mahna by Raj Kumar Arora.

(vi) Possession of the suit property was handed over to the plaintiff, her husband and her son respectively. Plaintiff along with her family members is residing in the entire suit property since the date of purchase of the property.

9. Plaintiff claims that Rs. 6,00,000/- for the second floor were paid in full and final settlement of the consideration amount whereas according to defendant, it was payment of earnest money only and total consideration amount which was required to be paid for the second floor was Rs. 34,00,000/-.

10. Order 39 CPC regulates grant of temporary injunction and interlocutory orders, which a court can grant during the pendency of a suit. Order 39 Rule 1 CPC speaks of cases in which temporary injunction can be granted by the Court. Pre-requisites for grant of injunction which the plaintiff is required to satisfy the Court are when:

(a) any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) there is a threat from the defendant, or he intends, to remove or dispose of his property with a view to defrauding his creditors,

(c) there is threat from the defendant to the plaintiff of his dispossession or otherwise to cause injury to him in relation to any property in dispute in the suit.

11. In any of the abovesaid circumstances, Court can grant a temporary injunction to restrain such act, or make such other orders for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further orders.

12. Order 39 Rule 2 CPC speaks of injunction to restrain repetition or continuance of breach. As per this clause, Court has the power to grant injunction on such terms as to the duration of injunction, keeping an account, giving security, or otherwise in a suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, on an application moved by the plaintiff seeking temporary injunction to restrain the defendant from committing breach of contract or injury complained of, or any breach of the contract or injury of a like kind arising out of the same contract or relating to the same property or right.

13. Section 38 of the Specific Relief Act (hereinafter referred to as 'the Act') speaks of perpetual injunction when can be granted and Section 39 of the Act speaks of mandatory injunction when can be granted.

14. Section 41 of the Act restricts the power of the Court to grant injunctions under Sections 38 and 39 of the Act. Relevant part of Section 41 of the Act, material to the present case, reads as follows:

Section 41. Injunction when refused.- An injunction cannot be granted-

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

xxx xxx xxx xxx

(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

(g) to prevent a continuing breach in which the plaintiff has acquiesced;

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;

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15. Thus, it is clear that a party would be entitled to relief of temporary injunction under Order 39 Rules 1 and 2 CPC, provided it satisfies the Court that it has a prima facie case; that balance of convenience is in its favour and that irreparable loss and injury would be caused to it if interim relief is not granted. These three phrases are not rhetoric phrases but elastic words to meet a wide range of situation in given set of facts and circumstances. The burden is always on the plaintiff to satisfy the Court that a prima facie case exists in his favour that non-interference by the Court would result in irreparable injury to him which cannot be compensated by way of damages and that balance of convenience, under the circumstances of a case, tilted in his favour. Court has to exercise sound judicial discretion to find out the amount of substantial mischief or injury which is likely to be caused to one party if injunction is refused and compare it with mischief or injury that is likely to be caused to the other party if the injunction is granted.

16. In *S.C. Shukla and Ors. v. Delhi Development Authority and Anr.* (73) 1998 DLT 131, this Court has observed:

5. As per settled law, culled out from various decisions, relief under Order XXXIX Rule 1 and 2 can be given to an applicant provided the applicant is in a position to satisfy the Court that the applicant has a 'prima facie case'; that the 'balance of convenience' is in his favor and that 'irreparable loss/injury' would be caused to him if the relief is not granted to him. The phrases 'prima facie case'; 'balance of convenience' and 'irreparable loss' are not rhetoric phrases for incantation, but words of width and elasticity to meet myriad situations, presented by men's ingenuity in given facts and circumstances, hedged with sound exercise of judicial discretion to meet the end of justice. The burden is always on the applicant/plaintiff to satisfy the Court that there is a 'prima facie case' in his favor which needs adjudication at the trial. The existence of prima facie right and infringement of the enjoyment of his property or the right, is a condition for the grant of temporary injunction. However, satisfaction that there is a 'prima facie case' by itself is not a sufficient ground to grant injunction. The Court further has to satisfy itself that noninterference by the Court would result in irreparable injury to the party seeking relief and that there is no other remedy available to the party except the one to grant injunction and that the applicant needs protection from the consequences of apprehend injury. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages. While granting relief under the above provisions the Court has also to see that the 'balance of convenience' must be in favor of granting injunction. In other words, the Court, while granting or refusing to grant injunction, is expected to exercise sound judicial discretion to find out the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit the subject matter should be maintained in status quo, an injunction under the above provisions would be granted by the Court. Their lordships of the Supreme Court in case *Dalpat Kumar v. Prahlad Singh* reported as : AIR 1993 SC 276 have held that before granting injunction the Court would be circumspect and look to the conduct of the party, the probably injuries to either party and whether the plaintiff could be adequately

compensated if the injunction is refused.

17. Similarly in Pepsi Co. Inc. and Anr. v. Hindustan Coca Cola and Ors. : 2001 (94) DLT 30, it has been observed by this Court:

13. A party would be entitled to relief under Order 39 Rules 1 and 2 provided it satisfies the Court that it has a prima facie case; that balance of convenience is in his favor and that irreparable loss and injury would be caused to him if interim relief is not granted. The aforesaid three phrases are not rhetoric phrases but elastic words to meet a wide range of situation in given set of facts and circumstances. The burden is always on the plaintiff/applicant to satisfy the Court that a prima facie case exists in his favor. The Court must further satisfy itself that non-interference by the Court would result in irreparable injury to a party seeking relief. Irreparable injury means that the injury must be a material one, one that the Court cannot adequately compensate by way of damages. The Court is expected to exercise sound judicial discretion to find out the amount of substantial mischief or injury which is likely to be caused to one party if injunction is refused and compare it with mischief or injury that is likely to be caused to the other party if the injunction is granted.

18. Keeping in mind the above said principles of law and coming back to the facts of case in hand, admittedly, plaintiff is in possession of the suit property by virtue of Agreement to Sell between her and the defendant. True that, no written contract was executed between the parties. Plaintiff purchased the requisite stamp papers for executing the Sale Deed from the defendant. However, defendant did not execute the Sale Deed as was required nor got it registered. Only dispute raised by the defendant is that amount of Rs. 6,00,000/- was paid as earnest money whereas he was to be paid balance amount of Rs. 28,00,000/- at the time of execution of the Sale Deed, which plaintiff or her husband failed to do.

19. Even if plea of the defendant is prima facie accepted as correct, admittedly, plaintiff was put in possession of the suit property in part-performance of the contract. It is pertinent that previous owners of the property sold their respective portions to three members of plaintiff's family. One of the sellers; Devinder Mahna executed the requisite Sale Deed in respect of ground floor in favour of Mr.Raj

Kumar Arora, husband of the plaintiff. It seems that defendant and Gagandeep became dishonest and refused to execute the Sale Deeds for first and second floors of the suit property. Another suit, being CS(OS) No. 651/2006, has been filed by Gaurav Arora against Gagandeep, claiming the same relief in respect of the first floor of the property, which has been claimed in the present suit. Plaintiff has placed on record various documents like water, electricity bills, telephone bills, gas connection bills and letters received from Bank to show that she is in possession of the property since after its purchase.

20. As pointed out above, possession of the plaintiff is not in dispute. Therefore, plaintiff has a prima facie case in her favour.

21. Section 53A of TP Act is an equitable doctrine which creates a bar or estoppel in favour of the transferee against the transferor. Many a times it is noted that transferee takes possession of the property in part-performance of the contract and he is willing to perform his part of the contract. However, transferor for one reason or the other does not complete the transaction by executing a Registered Deed in favour of the transferee as required under the Law. At times, he tries to get back the possession of the property. Therefore, Section 53A was added to the Transfer of Property Act in the form of equity of part-performance. This was done to disallow the transferor to take unfair advantage of his fault and evict the transferee from the property.

22. Doctrine of part-performance aims at protecting the possession of such transferee provided certain conditions contemplated in the said Section are fulfilled. These essential conditions are:

(1) there must be a contract to transfer for consideration of any immovable property;

(2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

(4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;

(5) the transferee must have done some act in furtherance of the contract; and

(6) the transferee must have performed or be willing to perform his part of the contract.

23. If these conditions are fulfilled, then in a given case there is equity in favour of the proposed transferee who can protect his possession against the proposed transferor even though a registered Sale Deed conveying the title is not executed by the proposed transferor. In such a situation, equitable doctrine of part-performance provided under Section 53-A of TP Act comes into play and it provides that:

the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract.

24. It is submitted by counsel for the defendant that principal condition to invoke Section 53-A of TP Act is a written contract signed by the defendant or by someone on his behalf and such writing must be in such words from which terms necessary to constitute the transfer can be ascertained. Whereas in the present case, there is no written contract of transfer executed by the defendant containing a clear and unambiguous terms of transfer and in absence of a written agreement, plaintiff is not entitled to any protection under Section 53-A of TP Act.

25. It is argued by counsel for the plaintiff that payments were made by cheque and possession was given to the plaintiff. There was an oral agreement between the parties and Sale Deed was to be executed to which defendant refused. Therefore, terms and conditions of the oral contract could not be reduced into writing and this, in no manner, disentitled the plaintiff to claim protection to her possession.

26. I do not find much force in the submissions of counsel for the plaintiff for the simple reason that defendant has admitted that he handed over the possession of the suit property to plaintiff after receiving a sum of Rs. 6,00,000/-, which according to plaintiff was for full and final consideration amount, whereas, according to defendant, the same was paid as earnest money.

27. Be that as it may, it is for the Trial Court to adjudge at the relevant stage whether Rs. 6,00,000/-were paid as an earnest money or were paid as full consideration amount of the sale. I need not interpret the entire provisions contained in Section 53-A of TP Act for deciding this application. It is left open for the Trial Court to consider the scope of Section 53-A of TP Act vis--vis the facts and circumstances of this case while deciding the case on merits. Fact remains, plaintiff is in possession of the suit property. She, therefore, has a strong prima facie case in her favour. Under the circumstances, when she was given possession in view of part-performance or in full performance of the contract, as the case may be, her possession is required to be protected.

28. In Mool Chand Bakhru's case (supra), appellant had filed a suit for possession and mesne profits against the transferee alleging that transfer of the possession could not be protected under Section 53-A of TP Act as there was no written contract between the parties and in absence of a written agreement, defendant's possession could not be protected. The said case was decided on merits after trial was complete.

29. However, in the present case, oral Agreement to Sell is not in dispute. Plaintiff has sought declaration to the fact that she is owner and in possession of the suit property and has claimed relief of specific performance of the contract. Whether an oral agreement for sale can be construed as part-performance of the contract, is again a question to be looked into and decided by the Trial Court at the relevant stage. I need not go into details of the case on merits while disposing of this application, which, if done, would prejudice the case of the parties on merits.

30. Rambhau Namdeo Gajre's case (supra), was filed by the respondent for possession of the land claiming himself to be the owner with averment that appellant had wrongfully dispossessed him of the suit land. In the said case,

appellant had taken a defence and invoked the doctrine of part-performance enshrined in Section 53-A of TP Act. Under the circumstances, it was observed by Supreme Court that appellant was not entitled to any protection under the said Section as he had not purchased the property from the respondent but from someone else.

31. None of the above cited cases, therefore, are of any help to the defendant under the facts and circumstances of this case. True that, Agreement to Sell does not create any interest of the proposed vendee in the suit property but the fact remains, once vendee is put in possession of the property and has sought relief of specific performance and declaration claiming herself to be owner of the suit property having paid the full consideration amount and on refusal of the defendant to execute Sale Deed in her favour, she is entitled to protection of her possession may be as owner till rights of the parties are decided on merits.

32. Defendant has placed on record certified copy of Agreement to Sell dated 2nd May, 2006 executed between Gagandeep, himself and Gaurav Arora and Veena Arora, plaintiff in respect of first and second floor of the property in suit. As per this agreement, it was admitted by the defendant that plaintiff was already in physical possession of the suit property for the last about eleven months of execution of the said agreement. Price of the property was settled at Rs. 62,00,000/- to be paid by the purchaser to the seller, out of which Rs. 12,00,000/- had already been paid. It is on the basis of this agreement that defendant claimed that initially the sale consideration amount was agreed at Rs. 69,00,000/-, which was subsequently reduced to Rs. 64,00,000/-. Present suit had already been filed when this agreement was executed. Probably this agreement was executed when plaintiff lodged a criminal complaint against defendant and Gagandeep.

33. Be that as it may, defendant has not sought any counter-claim seeking enforcement of this agreement or seeking payment of balance amount from the plaintiff. Fact remains that agreement in question is the agreement which was entered into between the parties on oral terms in May, 2005. Effect of this agreement, is again to be analyzed by Trial Court while deciding the case on merits. Plaintiff has placed on record stamp papers which were purchased by her

for execution of the Sale Deed.

34. Under the circumstances of the case, balance of convenience tilts in favour of the plaintiff. It is she who will suffer irreparable loss and injury, if her possession is not protected and defendant creates third party interest in the suit property as it would not only lead to multiplicity of litigation but would also cause discomfort and inconvenience to the plaintiff and her family members, who are residing therein. It is pertinent to mention here that staircase for going to the first and second floors is from inside the courtyard in ground floor and there is no independent access to the first floor and second floor from outside the building. Probably that was one of the reasons that the entire property by three previous owners, including the defendant, was sold to three different members of plaintiff's family by virtue of three separate Sale Deeds.

35. Injury would be such, which cannot be compensated in terms of damages, whereas in case the defendant succeeds, he shall have every right to sell the suit property in favour of third person and that too at the rate prevalent in the market at the relevant time. Hence, application is allowed. Ex parte order dated 20th April, 2006 is hereby confirmed. This is without prejudice to the rights of the parties on merits.

36. List before Regular Bench on 12th May, 2010.

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