

Civil Revision

Present: The Hon'ble Justice Jyotirmay Bhattacharya

Judgment on 27.08.2010

C.O. No. 1365 of 2010

IMRAJ ALI MOLLA.

VERSUS

MADAN MOHAN SAHA & ORS.

Points:

Injunction-Injunction on the basis of an agreement for sale without praying for specific performance of contract whether can be granted-Specific Relief Act,1963-S 34

Facts:

The plaintiff filed a suit for declaration and injunction against the defendants/opposite parties. The plaintiff filed an application for temporary injunction. The plaintiff contended that the title of the defendants in the suit property cannot be perfected without registering the compromise decree passed by this Hon'ble Court through which the defendants are claiming title in the suit property as the right, title and interest in the suit property was conferred upon the defendants for the first time by the said compromise decree and such conferment was made in respect of this property which was a non-suit property in the suit wherein the compromise decree was passed. The defendants contended that since the plaintiff agreed to purchase the suit property on 'as is where is basis' and since such agreement was entered into between the parties after disclosure of the history of the title of the defendants in the suit property and further since the plaintiff executed the said agreement after being satisfied with regard to the title of the defendants

in the suit property, the plaintiff cannot compel the defendants to register the said compromise decree, as the defendants never agreed to do so in the said agreement. Trial Court granted an order of temporary injunction. In appeal the learned Appellate court reversed the order.

Held:

Of course, it is true that prima facie case does not mean a full proof case. Prima facie case means an arguable case i.e. whether a triable issue is raised in the suit or not? Para 21

When the plaintiff has not prayed for a decree for specific performance of the said contract in the said suit, the suit as it is framed, in my prima facie view, is barred under Section 34 of the Specific Relief Act. If that be so, then can the plaintiff get any interim relief by way of an injunction for restraining the defendants in dealing with the suit property during the pendency of the suit? The answer is no. Para 23

When the plaintiff himself has stated in his pleading that the said agreement for sale was created by fraud and misrepresentation and the terms of agreement which were agreed upon between the parties, were not included in the said agreement and even the sale price was also fixed by the defendants unilaterally, then can it be said that such an agreement is at all enforceable? Court is of prima facie view, such an agreement which, according to the plaintiff, is not a lawful agreement, is not enforceable in law. Again when the plaintiff himself claims that the consideration of such sale was not fixed bilaterally, there is no conclusion in the contract between the parties. Such a contract, in my prima facie view, is not enforceable in law. If a contract is not enforceable in law, then this court holds that the plaintiff has failed to make out any triable issue in the said suit. The balance of convenience and inconvenience is also against the grant of injunction, as

the plaintiff cannot seek enforcement of the contract when he himself disputes the title of the defendants in the said property. That apart when the defendants contended clearly that they are unable to give a better title to the plaintiff than what they have in it presently and further since the defendants are willing to refund the entire earnest money to the plaintiff, without forfeiting any part thereof though forfeiture of half of the earnest money was provided in the said agreement, this court holds that the plaintiff will not suffer any loss and/or injury even if the injunction as prayed for herein is not granted.

Para 24

Cases cited:

Bhoop Singh vs. Ram Sing Major & Ors. reported in AIR 1996 Supreme Court 196; Som Dev & Ors. vs. Rati Ram & Anr. reported in AIR 2006 Supreme Court page 3297

For the Petitioner : Mr. S.P. Roy Chowdhury, Mr. Anser Mondal,
Mr. S.N. Dutta

For the Opposite Party : Mr. Surojit Mitra, Mr. Amal Krishna Saha,
Mr. Tapan Sil

The Court: This application under Article 227 of the Constitution of India is directed against an order dated 6th April, 2010 passed by the Learned 13th Additional District Judge at Alipore, in Misc. Appeal No. 472 of 2007 reversing the order passed by the Learned Trial Judge on 9th October, 2007 in Title Suit No. 834 of 2007 at the instance of the plaintiff/petitioner.

2. Heard Mr. Ray Chowdhury, learned Senior Counsel, appearing for the plaintiff/petitioner and Mr. Mitra, learned Senior Counsel, appearing for the defendants/opposite parties.

3. Considered the materials on record including the impugned order.

4. Let me now consider as to how far the Learned Appeal Court was justified in passing the impugned order in the facts of the instant case. The plaintiff filed a suit for declaration and injunction against the defendants/opposite parties herein claiming various reliefs which are as follows:

a) Leave under Order 2 Rule 2 of the Code of Civil Procedure;

b) Declaration that letter dated July 30, 2007 and 6th August, 2007 of the defendants being Annexure "H" hereto is are illegal, null and void;

c) Decree directing the said letter dated July 30, 2007 and August 6, 2007 of the defendants being Annexure "H" hereto be delivered up and cancelled;

d) Perpetual injunction restraining the defendants and each of them and their servants and agents from relying on and acting upon or giving effect or further effect to the said letter dated July 30, 2007 of the defendants being annexure "H" hereto;

d1) Declaration that the defendants are bound to make, good and marketable title to the suit property by registering the decree dated December 4, 1997 passed by the Hon'ble High Court, Calcutta in Appeal No.55 of 1993 arising out of Suit No. 754 of 1990 and to obtain the sanctioned building plan from the Kolkata Municipal Corporation being part of the suit premises and thereafter bound to sell the suit property to the plaintiff;

e) Perpetual injunction restraining the defendants and each of them and their servants and agents from transferring alienating, encumbering or disposing of the suit property or any portion thereto mentioned in the Schedule hereunder to any third party other than the plaintiff in any way or manner whatsoever;

f) Mandatory injunction directing the defendants and each of them to place or present the decree dated December 4, 1997 being Annexure "B" hereto passed in Appeal No.55 of 1993 arising out of Suit No.754 of 1990 before the Registering Authority for registration forthwith;

g) Mandatory injunction directing the defendants and each of them and servants agents and assigns to apply and obtained the sanctioned building plan of the suit property from the Kolkata Municipal Corporation forthwith'

h) Injunction;

i) Receiver;

j) Attachment;

k) Costs;

l) Such further and other reliefs;

5 After filing the said suit, the plaintiff filed an application for temporary injunction inter alia praying for an order for restraining the defendants and each of them and their servants and agents from relying on and/or acting upon or giving effect to or further effect to the letter dated 30th July, 2007 of the defendants being Annexure 'H' to this said application and further for restraining the defendants their men and agents from transferring, alienating, encumbering or disposing of the said property or any portion thereof to any third party other than the plaintiff in any manner whatsoever. A temporary mandatory injunction was also sought for therein for issuance of direction upon the defendants to place or present the decree dated 4th

December, 1997 being Annexure 'B' to the said application passed in the Appeal No.55 of 1993 arising out of suit No. 745 of 1990 before the Registering Authority for registration and also for directing the defendants and each of them to apply and obtain sanction building plan from Kolkata Municipal Corporation in respect of the suit property.

6. The averment made by the plaintiff in his plaint as well in his application for injunction are almost identical. The plaintiff claimed that he entered into an agreement for sale with the defendants for purchase of the suit property at a consideration of Rs.2,85,000,00/- on the terms and conditions mentioned therein. A sum of Rs.40,000,00/- was also paid by the plaintiff to the defendants as earnest money towards part payment of the consideration money.

7. Subsequent to the execution of the agreement for sale by the parties on 26th February, 2007, it was detected that all the terms and conditions as discussed between the parties were not incorporated in the said agreement. Even the sale price of the said property was unilaterally fixed by the defendants. The defendants claimed to have acquired their title in the suit property in pursuance of a compromise decree passed by the Hon'ble High court on 4th December, 1997 in an Appeal No. 55 of 1993 arising out of suit No.754 of 1990. The plaintiff claims that since the defendants have acquired title on the basis of said compromise decree, such compromise decree is required to be registered compulsorily as per Section 17(e) of the Registration Act, 1908. The plaintiff further claimed that the title of the defendants in the suit property would not be perfected, unless the said decree is registered. As such the plaintiff repeatedly requested the defendants to register the said compromise decree first and thereafter to transfer the suit property to the defendants as per the said agreement. The defendants, instead

of taking steps for perfecting their title by registering the said decree as per law, cancelled the said agreement for sale by notice. Under such circumstances, the plaintiff filed the aforesaid suit against the defendants seeking the aforesaid reliefs. The plaintiff also claimed temporary injunction in the said suit so that the status quo with regard to the transfer of the suit property till the disposal of the suit is maintained.

8. The defendants contested the plaintiff's application for temporary injunction by filing objection. Execution of the said agreement for sale by the parties was not disputed by the defendants. Receipt of a sum of Rs.40,000,00/- by the defendants from the plaintiff towards earnest money was also not disputed by the defendants. The defendants contended that even before execution of the said agreement for sale, the defendants disclosed the history of their title in the suit property to the plaintiff. The plaintiff was intimated that the defendants became the owner of the suit property by virtue of the said decree passed by the Hon'ble High Court in the aforesaid appeal. Xerox copies of the documents relating to the title of the defendants in the suit property were all given to the plaintiff. The plaintiff, after being satisfied with regard to the defendants' title in the suit property executed the said agreement for sale for purchasing the suit property on 'as is where is and whatever there is' basis within a stipulated period and the time fixed for completion of the said transaction was the essence of the contract. It was further stated by the defendants that after execution of the said agreement for sale, the defendants started writing letters repeatedly demanding various documents such as sanctioned plan etc. though the defendants never agreed to supply those documents to the plaintiff in the said agreement. The plaintiff also requested the defendants to register the said compromise decree as a precondition for completion of the said transaction.

9. Since such demand was made beyond the agreed terms of this contract, the defendants thought that the plaintiff was not willing to purchase the said property and since the plaintiff failed to complete the said transaction within the stipulated period, the defendants ultimately cancelled the said agreement by notice by forfeiting half of the earnest money paid by the plaintiff to the defendants at the time of execution of the said agreement for sale. The defendants thus contended that since the plaintiff failed to purchase the said property within the stipulated period though the defendants were ready and willing to execute proper deed of convenience in favour of the plaintiff, the plaintiff, cannot get any interim relief by way of injunction in the said suit.

10. Considering the aforesaid pleadings of the parties, the Learned Trial Judge held that when the dispute between the parties relates to the agreement for sale dated 26th February, 2007 and when the defendants admittedly received a sum of Rs.40,000,00/- towards the earnest money for the said transaction from the plaintiff and since the said money is still lying with the defendants and further since the defendants expressed their intention to return half of the earnest money to the plaintiff by forfeiting the remaining half thereof, it is a fit case for passing a temporary injunction in favour of the plaintiff as the cardinal principles of law regarding grant of injunction, are all in favour of the plaintiff. Accordingly the learned Trial Judge passed an order of temporary injunction by restraining the defendants' men and agents from relying on or acting upon or giving effect to the letter dated 30th July, 2007 and also by restraining the defendants their men and agents from transferring, alienating, encumbering and/or disposing of the suit property to any third party till the disposal of the suit.

11. Being aggrieved and dissatisfied with the said order of injunction, the defendants preferred an appeal being Misc. Appeal No. 472 of 2007 before the Learned Additional District Judge, 13th Court at Alipore. The Learned Appeal Court, was pleased to allow the said appeal by setting aside the impugned order. The Learned Appeal Court held that the plaintiff has not acquired any right, title and interest in the said property by the said unregistered deed of agreement specially when the possession was not handed over to the plaintiff. Learned Appeal Court further held that an agreement for sale is always determinable in nature and if such an agreement is determined, the performance of the said agreement specifically under Section 14(1)(c) of the Specific Relief Act, 1963 cannot be enforced. The Learned Appeal Court thus held that the plaintiff has failed to establish a prima facie case in the said application for injunction. The Learned Appeal Court however held that the dispute as to whether the compromise decree is required to be registered compulsorily for perfecting the title of the defendants or not is a matter which is required to be considered at the time of hearing of the suit upon trial on evidence and thus such dispute cannot be resolved at the interlocutory stage. Holding as such, the Learned Appeal Court set aside the temporary order of injunction passed by the learned Trial Judge.

12. Plaintiff is aggrieved by the said order. Hence the plaintiffs has come before this Court with this application under Article 227 of the Constitution of India.

13. Mr. Ray Chowdhury, learned Senior Counsel, appearing for the petitioner, placed the entire agreement for sale before this Court to establish that the plaintiff executed the said agreement for sale for purchase of the suit property from the defendants only after being satisfied prima facie with

regard to the title of the defendants therein. He contended that the expression 'as is where is basis' which was referred to in the said agreement was really inserted therein to indicate that the plaintiff intended to purchase the suit property in its existing condition. He thus contended that the expression 'as is where is basis' was never used in the said agreement to indicate that the plaintiff agreed to purchase the defective title of the defendants in the suit property. He further contended that had it been a case that the plaintiff really intended to purchase whatever interest the defendants had therein, then the agreement would not have provided any further clause regarding further investigation on title of the plaintiffs in the suit property. He thus contended that if the entire agreement is read as a whole, it will be made clear that the plaintiff intended to purchase the perfect title of the defendants in the suit property and the defendants' title in the suit property, according to him, can only be perfected on registration of the compromise decree passed by this Hon'ble Court in the aforesaid suit as per Section 17(e) of the Registration Act, 1908. Mr. Ray Chowdhury thus contended that since his client paid substantial amount towards the earnest money for purchase of the suit property and the said money is still withheld by the defendants, the defendants can neither cancel the said agreement nor can they transfer the suit property to any third party during the pendency of the suit to frustrate the reliefs claimed by the plaintiff in the said suit.

14. In support of his submission that the title of the defendants cannot be perfected without registration of the compromise decree, Mr. Ray Chowdhury relied upon the following decisions of the Hon'ble Supreme Court:-

i) In the case of Bhoop Singh vs. Ram Sing Major & Ors. reported in AIR 1996 Supreme Court 196;

ii) In the case of Som Dev & Ors. vs. Rati Ram & Anr. reported in AIR 2006 Supreme Court page 3297.

15. Mr. Ray Chowdhury contended that not only a strong prima facie case has been made out by his client in the said application for injunction but the balance of convenience and inconvenience is also in his client's favour and if the injunction as prayed for is not granted, the irreparable loss injury which will be suffered by the plaintiff, cannot be compensated by money value. He thus invited this Court to interfere with the impugned order so that the ultimate relief which the plaintiff has claimed in the said suit is not frustrated. He thus contended that the defendants should not be permitted to create a third party interest and/or transfer and/or encumber the said property in favour of any third party during the pendency of the suit.

16. Mr. Mitra, learned Senior Counsel, appearing for the opposite parties, refuted such submission of Mr. Ray Chowdhury by contending that in a suit where the plaintiff himself has contended that the agreement was created by fraud and misrepresentation by the defendants, the plaintiff cannot seek enforcement of the said agreement and if the enforcement of such agreement cannot be made by suit, the plaintiff cannot claim any interim relief in such declaratory suit which is not even a suit for specific performance of contract. Mr. Mitra pointed out from the said agreement for sale that the plaintiff entered into the said agreement after being satisfied with regard to the defendants' title in the suit property. He further contended that the defendants never suppressed anything about their title in the suit property to the plaintiff. Xerox copies through which the defendants were claiming title in the suit property were also handed over to the plaintiff and the plaintiff, after having been satisfied with regard to the defendants' title in the suit property, executed the said agreement; as such the plaintiff cannot

compel the defendant to do something which was not agreed upon by them as per the said agreement. Mr. Mitra further contended that it is not possible for his clients to register such compromise decree as demanded by the plaintiff. He however submitted that even if the plaintiff still wants to purchase the suit property on 'as is where is basis' as per the said agreement without insisting upon the defendant to register the said compromise decree, then his clients are ready and willing to transfer the suit property on 'as is where is basis' to the plaintiff. Mr. Mitra further contended that if the plaintiff wants to get back the entire earnest money by accepting cancellation of said agreement, then his clients are also agreeable to refund the entire earnest money to the plaintiffs/petitioner without forfeiting any part of the earnest money though the agreement provides for such forfeiture. Mr. Mitra thus supported the judgment and the order of the Learned Appeal Court and prayed for dismissal of the revisional application in the facts of the instant case.

17. Let me now consider the submission of the Counsel of the respective parties in the facts of the instant case. The execution of the agreement for sale by the parties is not disputed. The defendants wanted to sell the suit property to the plaintiff for the consideration mentioned in the said agreement. The plaintiff is also agreeable to purchase the said property on payment of the balance consideration money to the defendants. Thus apparently there is no dispute between the parties as such, for completion of such transaction, but still then the transaction could not be completed because of a dispute between the parties.

18. The dispute between the parties relates to a very short campus. The plaintiff contended that the title of the defendants in the suit property cannot be perfected without registering the compromise decree passed by this

Hon'ble Court through which the defendants are claiming title in the suit property as the right, title and interest in the suit property was conferred upon the defendants for the first time by the said compromise decree and such conferment was made in respect of this property which was a non-suit property in the suit wherein the compromise decree was passed.

19. On the other hand, the defendants contended that since the plaintiff agreed to purchase the suit property on 'as is where is basis' and since such agreement was entered into between the parties after disclosure of the history of the title of the defendants in the suit property and further since the plaintiff executed the said agreement after being satisfied with regard to the title of the defendants in the suit property, the plaintiff cannot compel the defendants to register the said compromise decree, as the defendants never agreed to do so in the said agreement. The defendants however were not specific in their stand as to whether the registration of such a compromise decree is necessary for perfecting their title in the suit property.

20. Be that as it may, the dispute as to whether the compromise decree is required to be registered compulsorily to perfect the defendants' title in the suit property or not, cannot be decided at this stage without trial on evidence, as the decision on such issue depends upon various factors as such:

- (i) whether the suit property was a subject matter of dispute in the suit in which the compromise decree was passed or not?
- (ii) whether the title in the suit property was conferred upon the defendants for the first time by the compromise decree or not?
- (iii) whether past family settlement arrived at between the parties, were simply recorded in the compromise decree or not? So on an so forth.

21. Of course, it is true that prima facie case does not mean a full proof case. Prima facie case means an arguable case i.e. whether a triabal issue is

raised in the suit or not? Let me now test as to whether a triable issue is raised in the suit or not?

22. Reliefs claimed in the said suit clearly demonstrate that the plaintiff has not filed the said suit seeking specific performance of the contract. He has simply prayed for a declaration that the notice of cancellation of the agreement for sale is not effective and for injunction so that the defendants cannot deal with the said property during the pendency of the suit. The plaintiff also prayed for temporary mandatory injunction so that the defendants register the compromise decree for perfecting their title in the suit property.

23. When the plaintiff has not prayed for a decree for specific performance of the said contract in the said suit, the suit as it is framed, in my prima facie view, is barred under Section 34 of the Specific Relief Act. If that be so, then can the plaintiff get any interim relief by way of an injunction for restraining the defendants in dealing with the suit property during the pendency of the suit? In my view, the answer is no.

24. That apart when the plaintiff himself has stated in his pleading that the said agreement for sale was created by fraud and misrepresentation and the terms of agreement which were agreed upon between the parties, were not included in the said agreement and even the sale price was also fixed by the defendants unilaterally, then can it be said that such an agreement is at all enforceable? In my prima facie view, such an agreement which, according to the plaintiff, is not a lawful agreement, is not enforceable in law. Again when the plaintiff himself claims that the consideration of such sale was not fixed bilaterally, there is no conclusion in the contract between the parties. Such a contract, in my prima facie view, is not enforceable in law. If a contract is not enforceable in law, then this court holds that the

plaintiff has failed to make out any triable issue in the said suit. The balance of convenience and inconvenience is also against the grant of injunction, as the plaintiff cannot seek enforcement of the contract when he himself disputes the title of the defendants in the said property. That apart when the defendants contended clearly that they are unable to give a better title to the plaintiff than what they have in it presently and further since the defendants are willing to refund the entire earnest money to the plaintiff, without forfeiting any part thereof though forfeiture of half of the earnest money was provided in the said agreement, this court holds that the plaintiff will not suffer any loss and/or injury even if the injunction as prayed for herein is not granted.

25. Under these circumstances, this Court holds that the Learned Appeal Court did not commit any illegality in allowing the said appeal by setting aside the temporary injunction passed by the learned Trial Judge.

26. The revisional application thus stands rejected.

27. There will be however no order as to costs.

28. Urgent xerox certified copy of this order, if applied for, be given to the parties as expeditiously as possible.

(Jyotirmay Bhattacharya, J.)

