

(1988) 09 MP CK 0026

Madhya Pradesh High Court

Case No: Miscellaneous (First) Appeal No. 23 of 1988

Sushila Singh

APPELLANT

Vs

Vijay Sanker Shukul

RESPONDENT

Date of Decision: Sept. 28, 1988

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2

Citation: (1991) ILR (MP) 115 : (1990) JLJ 496 : (1989) MPJR 331 : (1990) 35 MPLJ 607 : (1990) MPLJ 607

Hon'ble Judges: P.C. Pathak, J

Bench: Single Bench

Advocate: Ravish Agarwal, for the Appellant; R.P. Verma, for the Respondent

Final Decision: Allowed

Judgement

P.C. Pathak, J.

This appeal is by plaintiff under Order 43, Rule 1(r) of the Code of Civil Procedure, against an order dated 7-1-1988 granting temporary injunction in favour of respondent No. 1 (Defendant No. 1) restraining the appellant from interfering with his possession over the ground floor of the suit house, mentioned in the earlier order dated 22-9-1986 of temporary injunction issued against the appellant.

The plaintiffs suit is for specific performance of contract of sale dated 23-8-1980 and ancillary reliefs against the defendant in respect of suit house together with appurtenant land, 1496, Wright Town, Jabalpur called "Jai Niwas" (hereinafter called the suit property") on the allegations that the defendant agreed to sell it for a consideration of Rs. 2 lacs. After receiving part consideration of Rs. 50,000/- the defendant executed an agreement on the same date and in part performance of the contract, he delivered vacant possession of the ground floor marked by letters E F G H, in the plaint map to the plaintiff. The defendant also permitted the plaintiff to carry out repairs, colour-wash etc. of the remaining parts of the building. On

14-2-1981., the plaintiff paid further a sum of Rs. 32,000/- the receipt of which was duly acknowledged and vacant possession of the first floor delivered to the plaintiff. The plaintiff claims that in all she paid Rs. 1,95,000/- on different dates to the defendant.

During pendency of the suit, both parties made applications under Order 39, Rules 1 and 2, Civil Procedure Code, for grant of injunction against each other. One of such applications, dated 27-9-1984, I.A. No. 7 by the defendant was made for issue of temporary injunction to restrain the plaintiff from taking forcible possession of the ground floor.

The learned trial Court by his order dated 22-9-1986 (Annexure-A1) rejected the applications filed by the plaintiff but allowed the aforesaid application of the defendant restraining the plaintiff from interfering with the defendant's possession till the disposal of the suit. An appeal M. A. No. 244/88 filed by the plaintiff was summarily dismissed by order dated 27-9-1986 (Annexure-A2).

The plaintiff preferred L. P. A. No. 94/86 against the said order. The L. P. A. was dismissed as withdrawn by order dated 10-10-1986 (Ann. A-3) since the plaintiff alleged oral compromise dated 4-10-1986, whereunder on further payment of the alance of Rs. 5,000/- the defendant agreed not to enforce the aforesaid temporary injunction against the plaintiff.

On 14-11-1986, the defendant made another application I. A. No. 12 for temporary mandatory injunction, under Order 39, Rules 1 and 2 read with section 151, Civil Procedure Code, alleging that on or about 29/30th October, 1986, the plaintiff illegally took possession of the ground floor in spite of order of injunction in his favour. He prayed for an order of status quo by directing the plaintiff to restore its possession to him. The plaintiff opposed the application. The learned trial Court by his order under challenge allowed the application and directed the plaintiff to maintain status quo as on 22-9-1986. Aggrieved by the order, the plaintiff has filed this appeal.

Learned counsel for the applicant argued that the fresh application for grant of temporary injunction is not maintainable. He relied on Mohd. Hafiz Khan v. Smt. Naziban Bibi and Anr. 1973 MPLJ N 114 and Chhitto Hirajee and Ors. v. Sakharam Umdia and Ors. 1982 MPLJ 499. In paras 13 and 14 in the latter decision, it was held that "any party" under Order 39, Rule 1(a) is wide enough to cover the plaintiff as well as the defendant. But the defendant's right to maintain an application is confined to those cases where the property in dispute is in danger "of being wasted, damaged or alienated or wrongfully sold in execution of a decree". Rule 2 under Order 39 cannot be pressed into service since an injunction against interference with possession, can be claimed only by a plaintiff in the suit for restraining the defendant "from committing breach of contract or other injury of any kind".

The defendant prayed in his application I. A. No. 12 for issue of temporary mandatory injunction so as to restore possession of the ground floor part of the suit premises, after removing the plaintiff's locks. The defendant nowhere alleged that the property is "either being wasted, damaged, or alienated or wrongfully sold in execution of a decree". Therefore, the application in question could not be entertained either under Rule 1 or 2 of Order 39.

The counsel for the appellant submitted that during the pendency of the LPA, the parties came to a settlement with regard to possession of the portion of the suit house in dispute and in pursuance of that, the plaintiff paid a further sum of Rs. 5,000/- towards the balance of consideration. The learned trial Court rejected this part of the plaintiff's case solely on the ground that she failed to produce a written document to evidence the compromise. The defendant does not dispute that Rs. 5,000/- was deposited in his account on 4-10-1986 but he alleges that the deposit was unauthorisedly made by the plaintiff and not by him. If the defendant disowned that sum of Rs. 5,000/- he could take steps to return the same to the plaintiff after withdrawing it from his account which he failed to do. He also failed to send any notice to the plaintiff protesting against the deposit allegedly made by her in his account. In normal course I do not think, a stranger like the plaintiff could deposit the amount in his account without the authority of the defendant. Had it not been so, the defendant could well summon the deposit voucher to support his denial. That was also not done. Therefore the defence set up by the plaintiff that the parties entered into compromise and in consideration of further payment of Rs. 5,000/-, the defendant relinquished possession of the ground floor to the plaintiff, prima facie appears to be correct. The earlier injunction order stood superseded by act of parties and the defendant has no right to claim restoration of possession afresh to him.

Learned counsel for the respondent/defendant relying on Durg Transport Company (Private) Ltd., Durg v. Regional Transport Authority, Raipur and Ors. 1965 MPLJ 417 and Municipal Council, Mandleshwar v. Ramesh Mangilal Fagna 1984 MPLJ 633 supported the order under challenge u/s 151 under which the court can direct opposite party to restore status quo ante. I may also usefully add [Satish Chandra Maity Vs. Sm. Saila Bala Dassi and Others](#), in which it was held that the Court has the authority and duty to restore the possession of the plaintiff who had been dispossessed by evicting the defendant u/s 151. Yet in another case [Kanakku Kumara Pillai Thanu Pillai Vs. Mathevan Mathevan of Aravamkadu Karakkattu Madathu Veedu and Another](#), it was held that where, by contravening an injunction order, the party against whom the order is passed has done something for its own advantage to the prejudice of the other party, it is open to the Court under inherent jurisdiction to bring back the party to a position where it originally stood, before the injunction order was contravened. Similar view was taken in [Magna and Another Vs. Rustam and Another](#), and [The State of Bihar Vs. Usha Devi and Another](#), .

It is true that the plaintiff pleaded dispossession of the ground floor and it being leased out to defendant No. 2 on rent of Rs. 950/- P.M. The relief claimed in the suit is not only for possession but also for an order to refund the rent recovered. The learned trial Court relying on these, passed the order of temporary injunction on 22-9-1986 in favour of the defendant and against the plaintiff. The plaintiff unsuccessfully challenged the said order in appeal M. A. No. 244/86, dated 27-9-1986 before this Court. The L.P.A. against the appellate order was dismissed as withdrawn. Thus the earlier order of injunction became final.

The learned counsel for the appellant rightly submitted that before granting temporary injunction at the instance of the defendant by order dated 22-9-1986, the attention of the court was either not drawn or was inadvertently overlooked, to the tenability of the application in the light of Mohd. Hafiz Khan's and Chhitto Hirajee's cases (supra) else the temporary injunction could not have been issued at the instance of the defendant. However erroneous that order may be, cannot be set at naught now. It cannot be accepted that it was passed without jurisdiction.

In view of the conclusions reached above, the question whether the order should be upheld u/s 151, Civil Procedure Code, is academic. Had the occasion been there, I would decline to exercise powers u/s 151, Civil Procedure Code, since the defendant did not come to the court with clean hand. The plaintiff filed the agreement for sale executed by the defendant, which is not challenged in the written statement. In paragraph 6 of the said agreement, reproduced below, he clearly admitted delivery of vacant possession of the ground floor: -

"That the seller has delivered vacant possession of the ground floor flat adjacent to seller's residence to the purchaser. The seller has permitted purchaser to carry out colour wash and painting of the remaining three flats, possession of which would remain with the seller till registration of sale deed. Purchaser can carry out work of minor nature which would not require municipal sanction."

Further the plea with regard to delivery of possession of the ground floor is in para 3 of the plaint. In the written statement, the defendant did not specifically deny the contents of para 3 of the plaint. In 145 Criminal Procedure Code proceedings vide Misc. Criminal Case No. 219/83, dated 2-8-1983, the plaintiff was declared to be in possession of the ground floor of the suit house. Therefore plaintiff's allegations of dispossessing her fraudulently by deceitful means, prima facie appears to be correct. In such a case, even if the plaintiff took possession as alleged by the defendant, in my opinion this is not a fit case for invoking inherent powers to uphold the order of temporary injunction granted in his favour earlier. The plaintiff alleges that she has paid up the entire consideration while the defendant only admits receipt of part considerations but that too is substantial. In the circumstances, the inherent powers of this Court, cannot be invoked.

The appeal is allowed, the order under challenge passed by the learned trial Court is set aside. Costs to follow the event. Counsel"s fee Rs. 200/-, if certified.