

(2012) 02 BOM CK 0210

Bombay High Court

Case No: Appeal From Order No. 616 of 2010 in Notice of Motion No. Ex. 2 of 2008 from B.C.C.C. Suit No. 1602 of 2008 with Civil Application No. 193 of 2012

Mr. Abdul Wahid

APPELLANT

Vs

Shri. Manish Hansraj Chandaria

RESPONDENT

Date of Decision: Feb. 17, 2012

Acts Referred:

- Specific Relief Act, 1963 - Section 10, 15, 41
- Transfer of Property Act, 1882 - Section 53A

Citation: (2012) 3 ALLMR 21 : (2012) 4 BomCR 799 : (2012) 3 MhLj 937

Hon'ble Judges: J.H. Bhatia, J

Bench: Single Bench

Advocate: Jagdish N. Jayale, for the Appellant; Amod S. Tilak, for the Respondent

Final Decision: Allowed

Judgement

J.H. Bhatia, J.

Rule. Rule made returnable forthwith. With the consent of the learned counsel for both the parties, the appeal is heard forthwith.

2. The appeal is preferred by the original defendants challenging the order dated 21.04.2010 passed by the learned Judge, City Civil Court in Notice of Motion whereby the defendants are restrained from dispossessing the plaintiff from the suit flat.

3. The plaintiff-respondent No. 1 contended that the defendant No. 1. appellant is the owner of the suit flat. On 6th June, 2008 the defendant No. 1 agreed to sell the suit flat to the plaintiff for consideration of Rs. 40 lac. Out of the consideration amount, a sum of Rs. 1 lac was paid by cheque on the said date and amount of Rs. 15 lac was paid in cash on that day. Balance amount was to be paid on or before September 2008 before registration of the agreement. According to the plaintiff, subsequent to the contract with the plaintiff, defendant No. 1 agreed to sell the property to defendant No. 2. Therefore, the plaintiff filed suit the for permanent

injunction restraining the defendants from dispossessing the plaintiff from the suit flat without following due process of law. The plaintiff also took out Notice of Motion for temporary injunction of the same nature. Defendant No. 1, contested the Notice of Motion denying that there was any agreement for sale between him and the plaintiff. He also denied to have received any amount of consideration from the plaintiff. According to him, the agreement is a forged document. After hearing parties, learned trial Court allowed the Notice of Motion and granted temporary injunction against defendant No. 1.

4. Learned counsel for the defendant/appellant vehemently contended that when the plaintiff claims possession of the suit property on the basis of the agreement for sale, he could not have filed suit for injunction simplicitor because equally, rather more, efficacious relief of specific performance of contract is available to him. He contends that had the plaintiff filed the suit for specific performance of the contract he could have claimed the relief of injunction and also temporary injunction pending the suit, but when he has not filed suit for specific performance of the contract, in view of Section 41(h) of the Specific Relief Act, the injunction cannot be granted and therefore in such a suit temporary injunction also cannot be granted. In support of his contention learned counsel placed reliance upon *Mathurabai Kadu Koli and Ors v/s Roopchand Lalji Koli and Anr* 2000 (I) Bom.C. R. 133. On the other hand the learned counsel for the plaintiff contended that agreement for sale between the plaintiff and defendant No. 1 was subject to realization of certain cheques and consent terms to be filed in earlier suit No. 509 of 2008 filed by defendant No. 1 against his vendor Zia Safruddin Ali and as per the consent terms, the defendant No. 1 was entitled to retain as well as to dispose of the suit premises. The deal between the plaintiff and defendant No. 1 would be subject to realization of the cheque and consent terms of suit No. 509 of 2008. From the said agreement, it is clear that defendant No. 1 was entitled to retain the suit property and also to dispose of the same. In such circumstances, the plaintiff claims have entered into contract to purchase the suit property from defendant No. 1 for consideration of Rs. 40 lac. Out of which, an amount of Rs. 16 lac was allegedly paid by him. Defendant No. 1 denies receipt of money as well as execution of the agreement. That defence need not be taken into consideration at this stage. According to the plaintiff, the balance of amount Rs. 24 lac was to be paid on or before September, 2008 at the time of registration of the agreement for sale. According to him, as per clause "h" of the terms of the said agreement defendant No. 1 had handed over possession of the suit flat to the plaintiff, and on that basis he is in possession. He contends that after he had entered into an agreement, defendant No. 1 was trying to sell the property to defendant No. 2 and therefore he filed the suit. According to him, in view of these circumstances, he was not in a position to file suit for specific performance of the contract and therefore was required to file the suit for perpetual injunction simplicitor to protect his possession till sale deed is actually executed and registered.

5. From the pleadings and contention of the plaintiff, it is clear that the plaintiff claims to have received possession of the suit premises in part performance of the contract between the parties. According to him, the balance amount of Rs. 24 lac was to be paid by September 2008 at the time of execution and registration of agreement for sale, infact the sale deed and not agreement for sale. However, even before that defendant No. 1 had repudiated the contract with the plaintiff and was trying to sell the property to third person. That shows that cause of action for filing the suit for specific performance had accrued to the plaintiff.

6. The contract for sale of the property is specifically enforceable u/s 10 of the Specific Relief Act and the plaintiff who claims to have agreed to purchase the property was entitled to seek such specific performance u/s 15 of the Specific Relief Act. He could file the suit for specific performance of the contract and in such suit he could also claim permanent injunction as well as temporary injunction pending the suit. Section 41(h) provides that an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding. The relief of specific performance is equally efficacious, rather more efficacious, remedy than the suit for injunction simplicitor.

7. It is settled position of law that where the plaintiff claims the possession on the basis of part performance of the agreement for sale, his remedy is to file the suit for specific performance and suit for injunction simplicitor is not tenable. This position was clarified by the learned single Judge of this Court in Mathurabai Kadu Koli (supra).

8. Learned Judge referred to [Yeshwantrao Martandrao Mukane since deceased through his legal representatives and Another Vs. Khushal K. Bhatia](#), in which the Division Bench of this Court had observed thus:-

Clause (e) of section 41 of the Specific Relief Act is relevant to the extent and in the context of the provisions of section 53-A of the Transfer of Property Act, which requires the plaintiff to satisfy that he was ready and willing to perform his part of the contract. It is only when such readiness and willingness is there that the contract of agreement for sale can be specifically enforced. If this basic readiness and willingness is not established, then the performance could not be specifically enforced. It follows, therefore, that by reason of the principle underlying section 41(e) of the Specific Relief Act, when the plaintiff seeks injunction so as to prevent breach of a contract whose performance cannot be specifically enforced, such an injunction has to be refused. Similarly, when a suitor of such a type would have equally efficacious relief available so as to enforce the contracts by taking appropriate remedy, without recourse to it, it would be indeed difficult to extend the discretionary relief of permanent injunction. Clause (h) of section 41 of the Specific Relief Act would require the Court to refuse such a type of prayer for injunction. It is not as if that in a suit to enforce the agreement itself, such a relief is sought. On the other hand, although the plaintiff came to the Court with the allegation that the

other party has repudiated the agreement for sale, he has omitted to seek its enforcement and is trying to hold the property obviously without seeking to complete his title by enforcing the agreement for sale. To such a case, the principles underlying Clause (h) of section 41 of the Specific Relief Act can be extended so as to refuse such an ancillary relief

9. Thus the legal position is well settled by this Court that when remedy of a suit for specific performance is available to the plaintiff, he cannot file a suit for injunction simplicitor nor he can claim temporary injunction in pending suit for injunction simplicitor.

10. In the present case the plaintiff could have filed suit for specific performance of the contract as soon as he found that defendant No. 1 had repudiated contract and was trying to dispose of the property to somebody else. The plaintiff filed the suit on the basis of the agreement allegedly executed by defendant No. 1 in his favour and that agreement shows that consent terms in the earlier suit were accepted and defendant No. 1 was entitled to retain and dispose of the premises. The defendant No. 1 denies execution of this agreement. When pleadings of the plaintiffs show that there was no impediment in filing suit for specific performance, now he cannot say that because of the earlier suit he could not file suit for specific performance. These aspects were not considered by the trial court while granting temporary injunction in favour of the plaintiff.

11. In view of the above circumstances, as the suit for injunction simplicitor itself is not tenable in view of Section 41(h) of the Specific Relief Act, the plaintiff is also not entitled to temporary injunction pending the suit. Therefore the appeal is allowed and impugned order stands set aside. Notice of Motion stands dismissed.