

# RAJASTHAN HIGH COURT

Naresh Jain

Vs.

Rama

S.B. Civil Misc. Appeal Nos. 898 and 899, 900, 411-413 of 2001  
(H.R. Panwar, J.)

31.07.2002

## ORDER

**H. R. Panwar, J.**

1. These six appeals raise common questions of law and facts, parties to which are common and, therefore, for convenience, they are heard together and are being disposed of by this common judgment. For convenience, facts of S.B. Civil Misc. Appeals No. 411/2001 and 898/2001 are taken as leading case.

2. Three separate suits for specific performance of contract and permanent injunction were filed by plaintiff-appellants namely *Rama v. Bhawani Singh and others*,<sup>1</sup> *Rama and others v. Bhawani Singh and others*,<sup>2</sup> and *Ganga and others v. Bhawani Singh and others*,<sup>3</sup> For convenience appellants Rama and others and Ganga and others shall be referred hereinafter as 'the plaintiffs' and Bhawani Singh and others shall be referred as 'the defendants'. Along with the suits, plaintiffs filed three separate applications under Order 39, Rules 1 and 2 read with 151, C.P.C. against the defendants seeking temporary injunction during the pendency of the suit.

3. Facts of the case as set up by the plaintiffs are that agricultural lands description whereof is given in the plaint, was agreed to be sold to the plaintiffs by defendant Smt. Bhawani Singh son of late Sri Onkar Singh by three separate unregistered documents agreement to sale dated 29-10-1990. Defendants filed reply to the application, inter alia, stating therein that original the land in dispute was owned by Onkar Singh son of Nathu Singh of Udaipr. There was a partition suit between legal representatives of Shiv Singh, who was one of the sons of late Onkar Singh and Dalpat Singh son of Onkar Singh as plaintiff and against Smt. Vijay Kanwar wife of Onkar Singh and

Bhawani Singh son of Onkar Singh in the Court of learned Additional District Judge No. 3, Udaipur, which came to be decreed vide judgment and decree dated 29-5-2000. It was further averred that the land in dispute came in the share of defendant Smt. Vijay Kanwar by the judgment and decree in the partition suit and accordingly, Smt. Vijay Kanwar became owner of the land in dispute. Smt. Vijay Kanwar sold the land in favor of defendants Naresh Jain, Ashok Jain, Anil Singhvi and Ashok Jain (hereinafter referred to as 'the purchasers') by a registered sale deed. It was averred that the defendant Bhawani Singh has to no right to enter into any agreement for sale of the land in dispute as the disputed land after having been partitioned by the learned Additional District Judge No. 3, Udaipur, came in the share of defendant Smt. Vijay Kanwar wife of late Shri Onkar Singh. Thus, defendant Bhawani Singh was neither owner nor in possession of the land in dispute and as such he was not competent to sell the land by way of agreement to sale or in the alternative if any agreement has been entered into by defendant Bhawani Singh, then it is void *ab initio* as Bhawani Singh has no right or title over the land in dispute. Therefore, the suit filed against Bhawani Singh seeking specific performance of the contract is without any basis. From the record, it appears that there arose a dispute between Smt. Vijay Kumar wife of Onkar Singh and the sons of late Shri Onkar Singh namely Shiv Singh (dead through L.Rs.), Dalpat Singh and Bhawani Singh, which ultimately, resulted in a suit for partition of the properties including disputed land owned by late Onkar Singh. Defendant Naresh Jain and others claimed title of the land through defendant Smt. Vijay Kanwar, whereas the claim of the plaintiff is through Bhawani Singh son of Onkar Singh by way of agreement to sale. The trial Court after having considered the affidavits of the parties as also the documents filed by respective parties before it, reached to the conclusion that plaintiffs failed to establish *prima facie* case in their favor as also the point of balance of convenience and irreparable injury were also not found in favor of the plaintiffs. On the contrary, the trial Court found these two points namely balance of convenience and irreparable injury in favor of the defendants on the ground that purchaser defendants Naresh Jain and others have purchased the disputed land for consideration by a registered sale deed and on the basis of registered sale deed, disputed land has been mutated in favor of the purchaser defendants Naresh Jain and others. The trial Court also found possession of the disputed land with the purchasers. Thus, all the three essential ingredients namely *prima facie* case, balance of convenience and irreparable injury were not found in favor of the plaintiffs. The trial Court also noticed that the decree passed by learned Additional District Judge No. 3, Udaipur in a partition suit has been challenged before High Court by way of appeal

being S.B. Civil Regular First Appeal No. 156/2000. This Court by an interim order, stayed the effect and operation of the partition decree dated 29-5-2000. In order to avoid multiplicity of proceedings, the trial Court considered it expedient to grant temporary injunction to the extent that till the decision of the original suit, the defendants shall not transfer or alienate the disputed land. The defendants were further restrained not to raise any additional construction and alter the subject -matter of the suit by three separate impugned orders date 31-3-2001. Against the orders impugned, the plaintiffs as well as defendants have preferred aforesaid appeals before this Court.

4. By order dated 26-9-2001, record of the trial Court was requisitioned and the same has been received.

5. I have carefully gone through the orders impugned as also the record of the trial Court.

6. Suits filed by the plaintiffs for specific performance of contract on the basis of document agreement to sale dated 29-10-1990 which indisputedly is unregistered document, contains recital of delivery of possession of immovable property which requires compulsory registration under Section 17(f) of the Indian Registration Act and is made enforceable by Rajasthan Amendment Act No. 18 of 1989 which came into force from 18-9-1989. Defendants Bhawani Singh, Smt. Vijay Kanwar and the purchasers Naresh Kumar Jain and others filed separate replies to the application under Order 39, Rules 1 and 2, C.P.C. filed by the plaintiffs. Plaintiffs sought specific performance of the contract on the basis of the alleged unregistered agreement to sale dated 29- 10-1990 alleged to have been executed by defendant Bhawani Singh. In the reply filed by defendant Bhawani Singh, the case as set up by the plaintiffs was specifically denied. It was specifically denied that the defendant Bhawani Singh ever entered into any contract by agreement to sale dated 29-10-1990. He has denied receipt of any amount as consideration for the alleged sale.

7. I have carefully gone through the reply filed by Bhawani Singh supported by an affidavit wherein the case as set up by the plaintiffs was specifically denied including execution of the alleged document agreement to sale. Respondent Smt. Vijay Kanwar in the reply affidavit specifically averred that Bhawani Singh had never been in possession of the land in dispute. He had no title to the said land, therefore, firstly he has not entered into an agreement to sale in favor of the plaintiffs and if any alleged agreement is executed, then it is void *ab initio* as defendant Bhawani Singh has no

right, title and possession of the land in dispute and, therefore, Bhawani Singh is not competent to enter into agreement for sale. She claimed to be in possession in the capacity of owner. She further averred that in the partition suit, which was pending between the parties, came to be decided in her favor and by judgment and decree dated 29-5-2000 the land in dispute came in the share of Smt. Vijay Kanwar.

8. Purchasers Naresh Kumar Jain and others also filed reply to the application under Order 39, Rules 1 and 2, C.P.C., wherein it was specifically denied that the land in dispute was ever in possession of Bhawani Singh. It was stated that Bhawani Singh was neither in possession of the land in dispute nor had any right or title to the land. It was further pleaded that the said land stand in the name of Smt. Vijay Kanwar, who was in possession of the land as an owner and for a valuable consideration, the purchasers purchased the land by a registered sale deed dated 29-11-2000. The purchasers also filed affidavits of Prabhu Lal, Mana Rama Kailash, Ram Lal, Harak Lal, Nana and Danga etc. wherein it is deposed that the disputed land in the share of Smt. Vijay Kanwar and after having sold the land in favor of the purchasers Naresh Kumar Jain and others, these purchasers came in possession of the land and since the date of purchase, the purchasers are in possession of the land as also some constructions have been raised by the purchasers. Some photographs are placed on record by the purchasers showing the construction on the land in dispute. In the revenue record, the land has been mutated in favor of the purchasers vide mutation dated 1-3-2002, though prior to this mutation, a mutation proceeding was taken on 13-12-2000, wherein, Patwari of the area mentioned that the purchasers are not in physical possession of the land for which the mutation is sought but thereafter, the matter was properly investigated by the Sarpanch and other members of the Gram Panchayat and ultimately, the mutation was entered in the names of the purchasers. By order dated 16-1-2001, a Commissioner was appointed to inspect the site of the disputed land and submit report to this effect. Commissioner's report dated 16-1-2001 is on record. The report does not show which of the parties is in possession of the land in dispute.

9. The trial Court while considering the question of *prima facie* case, came to the conclusion that the plaintiffs *prima facie* failed to establish their possession over the land as also failed to show any title to the land. Revenue Record as available on the file of trial Court nowhere suggests that the defendant Bhawani Singh was ever owner

of the land or was in possession of the land. The trial Court came to the conclusion that Bhawani Singh has no title in the land in question and, therefore, even if any agreement to sale is entered into by him, though it was denied by Bhawani Singh, is of no avail and does not confer any right or title. The plaintiffs came with the case that prior to the execution of the alleged agreement to sale, they were in possession of the land. They have not disclosed as to how and when they came in possession or as to how they were dispossessed by the true owner of the land. Prima facie the true owner of the land is shown to be defendant Smt. Vijay Kanwar. From the material, *prima facie* it appears that the land in dispute was recorded in the name of defendant Smt. Vijay Kanwar. During the course of arguments, counsel appearing for the plaintiffs admitted that construction has been raised on the land in dispute by the purchasers while the plaintiffs were out of station. This contention was not accepted by the trial Court for the reason that had the plaintiffs been in possession, they would not have allowed the purchasers to raise the construction and the construction raised cannot be said to have been done in a day or so, it must have consumed number of days for raising such a big construction. The trial Court also *prima facie* opined that crop standing on the land in dispute was taken by the purchasers. That shows that the crop was also of purchasers. On consideration of the material on record, the trial Court reached to the conclusion that the plaintiffs failed to establish *prima facie* case in their favor.

10. While deciding the question of balance of convenience and irreparable injury, the trial Court was satisfied that by virtue of registered sale deed, the purchasers are in possession of the land the land also stands mutated in favor of the purchasers, which was evident from the documents of the mutation placed on record. Therefore, the trial Court held that on refusal to grant temporary injunction, inconvenience would not be caused to the plaintiffs as also the plaintiffs would not sustain or suffer any irreparable injury. Thus, all the three essential ingredients for grant of temporary injunction namely *prima facie* case, balance of convenience and irreparable injury were found against the plaintiffs. However, in order to avoid multiplicity of suit, the trial Court granted injunction in favor of the plaintiffs restraining the defendant and purchasers from alienating or transferring the land or raising further construction on the land in dispute during the pendency of the suit. It is settled law that for grant of temporary injunction, all the three essential ingredients namely, *prima facie* case, balance of convenience and point of irreparable injury must be found in favor of the plaintiffs. Unless the plaintiffs *prima facie* establish all these three ingredients in their favor no

temporary injunction can be granted. The plaintiffs claim to be in possession as part performance. It is settled law that statutory protection envisaged under Section 53A of the Transfer of Property Act can be used as a shield.

11. In *Ranchhor Dass Chhagan Lal v. Devaji*, <sup>4</sup> Hon'ble Supreme Court while considering the doctrine of part performance, held that it is a right to protect possession against any challenge to it by transfer or any person claiming through him contrary to the terms of contracts as envisaged under Section 53-A of the Transfer of Property Act can be used as a ground of defense and not as a ground of attack.

12. It is settled law that once a discretion is exercised by the trial Court in granting temporary injunction or refusing to grant temporary injunction, such discretion cannot be interfered in appeal, unless some compelling reasons are demonstrated before the appellate Court, which may justify that if temporary injunction is not granted, it would occasion failure of justice.

13. In *Shri Kihota Hollohon v. Mr. -achilhu*, <sup>5</sup> the Hon'ble Supreme Court held that the rightful owner of the property cannot be deprived from enjoyment of its property as the right to enjoy the property is valuable right of the party.

14. In *Premji Ratansey Shah and others v. Union of India and others* Hon'ble Supreme Court has held that it is equally a settled law that injunction would not be issued against the true owner.

15. A Division Bench of this Court in *Hira and others v. Board of Revenue*, <sup>7</sup> has held as under :-

"It may be observed that in a suit for permanent injunction, a temporary injunction against the defendant directing him not to interfere with the property in dispute, can be passed only if the Court comes to the conclusion that the property in dispute is in possession of the plaintiff. If the defendant is already in possession of the disputed property, a temporary injunction cannot be passed against him, because that would amount to depriving him of possession of the property. In other words, a defendant in possession of the property cannot be deprived thereof, by a temporary injunction."

16. It is settled law that for grant of temporary injunction, the plaintiff is to satisfy the

Court that he was at any point of time in lawful possession of the property in dispute. In the instant case, the plaintiffs have failed to *prima facie* show their lawful possession over the land in dispute. On the contrary, the defendant could succeed in *prima facie* establishing that the land in dispute came in the share of defendant Smt. Vijay Kanwar and she for a valuable consideration, transferred the land in favor of purchasers Naresh Kumar Jain and others and since then the purchasers are in lawful possession of the land in dispute. Grant or refusal of temporary injunction is absolutely discretionary and equitable and the appellate Court will not interfere with the discretion exercised by the trial Court, unless it is *prima facie* established that the discretion exercised by the trial Court is arbitrary, capricious and perverse.

17. In *Wander Ltd. v. Antox India Pvt. Ltd.* <sup>8</sup> the Hon'ble Supreme Court held that the appellate Court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify interference with the trial Court's exercise of discretion.

18. Having considered the entire material on record and keeping in view the law propounded by the Hon'ble Supreme Court and by this Court, I am of the considered opinion that the plaintiffs failed to establish three essential ingredients pre requisite for grant of temporary injunction namely *prima facie* case, balance of convenience and irreparable injury. Learned trial Court having *prima facie* reached to this conclusion, was not justified in granting temporary injunction in favor of plaintiffs. Hence, the order of trial Court to this effect is arbitrary, capricious, perverse and against the settled law regulating grant of temporary injunction and, therefore, cannot sustain. In this view fo the matter the order, of the trial Court granting temporary injunction in favor of the plaintiffs cannot be sustained and is required to be set aside.

19. In view of the aforesaid discussion, appeals filed by Naresh Kumar Jain and others

being S.B. Civil Misc. Appeals No. 898/2001, 899/2001 and 900/2001 are allowed. The order dated 31-3-2001 granting temporary injunction in all these three cases are hereby set aside. S.B. Civil Misc. Appeals No. 411/2001, 412/2001 and 413/2001 are devoid of any merit and accordingly, they are dismissed. However, it is made clear that any observation made either by the trial Court or by this Court should not be taken to be relevant at the trial of suit on merit. No order as to costs.

Appeals allowed.

#### Cases Referred

.

1. Civil Original Suit No. 8/2001
2. Civil Original Suit No. 9/2001
3. Civil Original Suit No. 10/2001
4. AIR 1977 SC 1517
5. AIR 1993 SC 412,
6. 1994 (6) JT SC 585: 1995 AIR SCW 2425
7. ILR (1966)16 Raj 756
- 8 1990 (Supp) SCC 727