

## RAJASTHAN HIGH COURT

Safi Khan

Vs.

Ibrahim Khan

S. B. C. M. A. No. 1976 of 2007

(Govind Mathur, JJ.)

05.02.2008

### JUDGEMENT

#### **Govind Mathur, JJ.**

1. This is an appeal against the order of learned Additional District Judge No. 1, Jodhpur dated 12-7-2007 granting temporary injunction in favor of plaintiff respondents Ibrahim Khan and Anwar Khan.

2. Brief facts necessary for present purpose are that appellant defendant Safi Khan, respondent defendant Ratan Khan, Jakir, Adil and respondent plaintiffs Ibrahim Khan and Anwar Khan are descendants of Late Shri Rehmat Khan and his wife Smt. Amna. The pedigree of the family is :-

3. Plaintiffs Ibrahim Khan and Anwar Khan preferred a suit for partition and injunction and so also preferred an application seeking temporary injunction. As per the averments contained in the application, late Shri Rehmat Khan and Smt. Amna were having immovable property i.e. plot No. 162, (LIG), Kamla Nehru Nagar Scheme, Jodhpur with the measurements 120' x 80'. The plot aforesaid was purchased by Rehmat Khan from Urban Improvement Trust, Jodhpur and to get the sale registered he submitted an application along with typed proposed sale deed on a non-judicial stamp having value of Rs. 51/-. After death of Shri Rehmat Khan on 13-7-1973 a patta of the plot aforesaid was issued by Urban Improvement Trust, Jodhpur on 4-1-1978 in favour of Smt. Amna.

4. With the factual background as above, plaintiffs being descendants of Late Shri Rehmat Khan and Smt. Amna while claiming their share in the immovable property also sought a temporary injunction to restrain defendants from making any change

with the property in question and also from its transfer to anyone else.

5. On the other hand, specific stand of the appellant defendant is that Late Smt. Amna who died on 10-5-1996 was the absolute owner of the property in question being earned by her "stridhan" and she sold the same to the appellant through a registered sale deed on 10-10-1990. It is also asserted that a part of the land was rented by the appellant to the IDBI Bank Ltd. on 1-10-2001 and since then the bank is operating its Automatic Teller Machine there. The appellant defendant denied any *prima facie* case in favor of the plaintiff respondents and, thus, prayed for rejection of application seeking temporary injunction.

6. In rejoinder, the plaintiff applicant while reiterating their claim, stated that the immovable property in question was purchased by Late Shri Rehmat Khan by making payment of consideration on 20-2-1956 and 25-2-1959. Smt. Amna was a "pardanashin" lady and was having no "stridhan", thus, she was not in position to purchase the land. As a matter of fact after death of Shri Rehmat Khan all his sons were having cordial relations, therefore, they thought it proper to have patta of land in name of their mother, accordingly, Urban Improvement Trust, Jodhpur issued that in name of Smt. Amna. The sale deed said to be executed by Smt. Amna is alleged to be a forged one and, thus, void ab-initio.

7. The defendants No.3 and 4 supported claim of the plaintiff by filing separate reply to the applications.

8. Learned trial Court by order impugned found *prima facie* case in favour of the applicants and also the balance of convenience in granting temporary injunction as prayed. The trial Court by holding that if the temporary injunction prayed for is not granted, it shall cause irreparable injury to the applicants and, thus, restrained the appellant defendant not to make any change with the property in dispute and also from transferring the same to anybody.

9. While assailing validity of the order impugned, the contention of counsel for the appellant is that no *prima facie* case exists in favors of the plaintiff respondents and, therefore, the trial Court erred while accepting the application preferred under order 39 Rule 1 and 2 Civil Procedure Code. According to counsel for the appellant the land in dispute was under the absolute ownership of Smt. Amna who by a registered sale deed transferred the same to the appellant and, thus, the appellant became sole owner of the property aforesaid. The plaintiff respondent, therefore, is having no share in the property in question. As per counsel for the appellant the suit for partition of the

property in any event is having no consequence without getting the registered sale deed executed by Late Smt. Amna in favors of the appellant set aside. It is also asserted that a part of the land was rented out by the appellant to the IDBI bank in the year 2001 and this fact is within knowledge of the plaintiff respondents but they never objected for that and as such that proves it well that the plaintiff respondents are having no claim /right over the land in dispute. Learned counsel for the appellant also emphasised that, if any *prima facie* case is found, then too the appropriate course before the trial Court was to permit the appellant by raising the construction on the land in dispute with adequate conditions protecting the rights of the plaintiff respondents, if any.

10. The contention advanced by counsel for the respondent applicants is that the trial Court exercised its discretion judiciously to protect rights of the parties to the suit till adjudication of their claim and such judicious discretion is not required to be interfered by this Court in its appellate jurisdiction. As per counsel for the plaintiff respondents the sale deed said to be executed by Smt. Amna in favour of the appellant is forged one and, thus, is void ab initio. It is pointed out that Smt. Amna was a "pardanashin" lady and in the year 1990 she was not at all in position even to move. To substantiate this fact learned counsel has pointed out certain averments made by the appellant himself in an application preferred under Order 9 Rule 13 Civil Procedure Code before learned District Judge, Jodhpur and those reads as follows :-

(Vernacular matter omitted)

11. It is further pointed out by counsel for the plaintiff respondents that consideration said to be paid to mother Smt. Amna by the appellant is nothing but the expenses occurred in her treatment.

12. Heard counsel for the parties.

13. It is well settled that issuance of temporary injunction is a discretion vested with adjudicating Court and in its most basic sense the decision to grant or deny a temporary injunction is an attempt to promote substantial justice with a view to strike balance of equities between the parties. Substantial Justice requires that all circumstances be considered before a temporary injunction is issued, and a determination be made that injunction is reasonably necessary to protect legitimate rights of the parties during the course of adjudication of the principal dispute. Specific criteria in reaching a decision for grant or deny temporary injunctions includes the real likelihood of irreparable injury, beside the degrees relating to likelihood of success of

the dispute on the merits.

14. The appellate Court is having quite a limited jurisdiction while interfering with the discretion exercised by the trial Court in granting a temporary injunction. The appellate Court must be slow in interfering with the orders passed by the trial Court. It is only if the trial Court acted arbitrarily, capriciously or passed an order perverse or if the order is contrary to the settled preposition of law, the appellate Court may de-settle the order granting or denying temporary injunction to a party. In other words, it can be said that the first appellate Court only in event of excess or abuse of discretion by the trial Court while granting temporary injunction may interfere with such order. Excess or abuse of discretion may be inferred if:-

- (a) The trial Court possess no power to grant such order;
- (b) The trial Court exceeded jurisdiction vested with it;
- (c) The temporary injunction granted or denied is based on totally irrelevant considerations;
- (d) The trial Court has left out relevant considerations;
- (e) The trial Court acted mala fidely;
- (f) The discretion exercised for improper or collateral purposes;
- (g) The discretion has been exercised colourably;
- (h) The discretion has been exercised without adhering principles of natural justice; and
- (i) The order granting or denying temporary injunction is highly unreasonable.

15. The principal contention of counsel for the appellant is that there is no prima case in favors of the plaintiff respondents as no decree for partition or injunction could have been claimed without getting the sale deed made in favors of the appellant defendant by Smt. Amna relating to immovable property in question. To substantiate the contention, reliance is also placed by counsel for the appellant upon a single Bench judgment of this Court in the case of *Kamruddin v. Biharilal and Anr., reported* <sup>1</sup> in In the aforesaid case this Court held that a suit for possession against the defendant was not maintainable without prayer for cancellation of sale deed made in favors of the defendant. In the case of Kamruddin (supra) the consideration was entirely different as there was no objection about genuineness of the transfer made. In the instant matter the plaintiffs *prima facie* satisfied the trial Court that the land in dispute was purchased by Shri Rehmat Khan and after his death a patta was issued in favors of Smt. Amna. Smt. Amna suffered with paralysis in the year 1988 and she was not even in a position to move at the time the sale deed was said to be executed. The issue as to

whether the sale deed itself is void, is required to be examined by the trial Court while adjudicating the suit itself. In these circumstances, while examining *prima facie* case. It cannot be said that the suit for partition is not maintainable in view of alleged sale.

16. The Court below also found that if the plaintiffs be permitted to raise construction on the land in dispute, that will cause irreparable injury to the appellant. While challenging the same, it is contended by counsel for the appellant that an Automatic Teller Machine is already operating at the disputed site from last number of years and if on other part also raising of construction be allowed subject to reasonable conditions that will not affect rights of the plaintiffs adversely. I do not find any merit in this contention also. The trial Court has taken into consideration all the material available on record and reached at the conclusion that in event the defendant be permitted to raise construction, that will cause irreparable injury to the plaintiffs.

17. Considering this aspect of the matter, I found that permission sought for raising construction with the conditions, in peculiar facts of this case, shall complicate the matter. The constructed area may be used for commercial purpose, for letting out or for any other purpose and that will create rights of number of other persons. To avoid such complications, the trial Court rightly restrained the parties from making any change with present position of the immovable property. The discretion exercised by the trial Court, in totality of the facts and circumstances of this case is with a view to strike the balance between the parties.

18. In view of whatever discussed above, I do not find any abuse or excess in exercise of discretion by the trial Court, thus, the appeal is having no merit, there for, the same is dismissed. However, it is desirable that the trial Court may proceed with the original suit with all diligence for its expeditious disposal.

Appeal dismissed.

Cases Referred.

1. 2007 (1) DNJ (Raj) 20