

PETITIONER:
ASHWIN KUMAR K. PATEL

Vs.

RESPONDENT:
UPENDRA J. PATEL & OTHERS

DATE OF JUDGMENT: 11/03/1999

BENCH:
M. Jagannadha Rao. & S. Saghir Ahmad.

JUDGMENT:

M. JAGANNADHA RAO, J.

Leave granted.

This is an appeal by the plaintiff in the suit and arises out of an application for grant of temporary injunction filed under Order 39 Rule 1 CPC by the plaintiff-appellant. The suit 337 of 1996 is now pending in the Court of the Civil Judge (S.D.), Baroda. The trial Court granted temporary injunction (wrongly described as permanent injunction) by order dated 2.8.1997 restraining interference with the appellant's possession in respect of 8138 sq.meters in Survey No.224 and 246 of Akota, Baroda District. On appeal by defendants 15 to 19, the High Court of Gujarat by orders dated 23.2.1998 in A.O. 409 of 1997, allowed the appeal and remitted the matter to the District Court and directed that meanwhile, the status quo on the spot be maintained. The defendants 1 to 14 support the plaintiff.

It appears that the defendants 1 to 14 are the legal heirs of the owner, one Gulam Husain Momin who died on 12.5.1971. The plaintiff claims that the said owners executed an (Unregistered) agreement of sale dated 14.10.1980 in his favour and received Rs.25,000 on that day and later received various amounts on various days totalling Rs.5,75,000 and the sale of the 8138 sq.meters was initially at the rate of Rs.1.85 per sq. meter. Later by a subsequent agreement dated 6.4.1996, the rate according to the plaintiff was changed to Rs.44.35 per sq. meter and a further sum of Rs. 1 lakh was paid. Plaintiff claimed to be in possession. The suit was filed on 15.6.1996 for perpetual injunction restraining the defendants 15 to 19 and 28 from entering into any sale transaction or agreement or transfer of the suit land and for not obstructing or interfering with plaintiff's possession of suit land.

The defendants 15 to 19 and 28 contested the suit claiming that under a registered agreement of sale dated 16.7.1991 entered into by defendants 15 and 28, as power of attorney holders under a registered power of attorney dated 16.7.1991, the abovesaid vendors agreed to sell the same property to whomsoever defendants 15 and 28 would sell and possession was also given by a receipt dated 16.7.1991 to defendants 15 and 28. Thereafter, it is said that the said

power of attorney holders sold this property to defendants 15 to 19 under five sale deeds dated 17.4.1996. Here it may be noted that it is the case of the owners that by a public notice dated 26.3.1996, the said owners (defendants 1 to 14) had cancelled the power of attorney dated 16.7.1991 and that even the agreement dated 16.7.1991 was not true. It is the case of the owners, defendants 1 to 14 that they had given possession to the plaintiff and even on date of suit, 15.6.96, the plaintiff was in possession. These were broadly, the rival contentions.

In the interlocutory application filed by the plaintiff, the trial Court held that the land being new tenure land, the agreements entered into by the owners in favour of the plaintiff on 14.10.1980 and 6.4.1996, even if true, were void as the requisite permission of the competent authority was not obtained. For the same reason, the agreement dated 16.7.1991 by defendants 15 and 28 in favour of defendants 15 to 20, even if true, and sale-deeds dated 17.4.1996 by defendants 15 and 28 in favour of defendants 15 to 19 were also void. However, on the question of possession, the trial Court relied upon the case of the owners (defendants 1 to 14) to the effect that they had put the plaintiff in possession. Hence, irrespective of title, the plaintiff had, at any rate, "permissive possession" and the defendants 15 to 19 and 28 were not in possession and the latter could not interfere with plaintiff's possession.

The High Court, while dealing with this appeal preferred by defendants 15 to 19, observed that the trial Court had mainly relied upon a compromise decree dated 14.8.1992 between the owners (defendants 1 to 14) and defendants 20 to 25 in an earlier suit, bearing Suit No.1384/88 filed by defendants 20 to 25 against the owners on the basis of an agreement dated 14.10.1980, allegedly executed by the same owners. According to the High Court, while it was true that the said defendants 20 to 25 accepted the possession of the owners defendants 1 to 14, the said admission related to the date of compromise dated 26.4.1990 and not to 14.8.1992 when the compromise was recorded and hence the trial Court was wrong in thinking that the present defendants 15 to 19 could not have come into possession on 16.7.1991 from the owners. According to the High Court, the Trial Court was wrong in thinking that there was an admission by defendants 20 to 25 of the possession of the owners, defendants 1 to 14 as on 14.8.92, the date when the compromise was recorded and also in thinking that defendants 15 to 19 could not have come into possession on 16.7.1991. The admission, if any, related to 26.4.90 the date of compromise and there was, according to the High Court, no inconsistency with the case of defendants 15 to 19 of possession being given to them under the agreement dated 16.7.1991. Further, the finding of the trial Court that the property was new tenure was challenged even by the plaintiff by filing A.O. 476 of 1997. The High Court said that 'this also makes the factual foundation of the trial Court's order erroneous'. For the above reasons, the High Court set aside the order of the trial Court and remitted the matter for fresh decision. It is against the above order that the plaintiff has preferred this appeal.

The point for consideration is whether the order of the High Court in remitting the matter to the trial Court was necessary? Question also is whether this court should

remand the case to the High Court in the event of this Court holding that the remand by the High Court was not called for? If not, whether the order of the trial Court is to be sustained?

In our view, the High Court should not ordinarily remand a case under Order 41 Rule 23 CPC to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima-facie case on the material available. In matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary.

We have also considered whether, on that account, we should send back the matter to the High Court for consideration of the appeal. We are of the view that, on the facts of this case, this Court can decide whether the temporary injunction granted by the trial Court should be confirmed or not. We are, therefore, not remitting the matter to the High Court because a further remand would lead to delay and perhaps one more special leave petition to this Court.

The facts set out earlier show that the plaintiff has relied upon an agreement of sale dated 14.10.1980 and according to the plaintiff the agreement of sale stipulated a rate of Rs.1.85 per sq.meter and the plaintiff has paid a sum of Rs.5,75,000 and the said agreement was modified on 6.4.1996 fixing the rate at Rs.44.85 per sq.meter and it is said one more lakh of rupees were paid thereafter, in all, Rs.7 lakhs and possession receipt was issued. The owners, defendants 1 to 14, supported the plaintiff's case and stated that they had put the plaintiff in possession.

The case of the owners further was that the agreement dated 16.7.1991 set up by defendants 15 to 19 was not true and valid and that the power of attorney dated 16.7.1991 in favour of defendants 15 and 28 stood revoked so far as the 11th defendant was concerned, as the 11th defendant died on 25.2.1994. The trial Court also held that the power of attorney was prima facie not an irrevocable one. It also held that the agreement entered into by the owners in favour of the plaintiff on 14.10.1980 and 6.4.1996 and also the agreement by the power of attorney agents defendants 15 and 18 dated 16.7.1991 in favour of defendants 15 to 19 was invalid for breach of the provisions of the Tenancy Act. The Court Commissioner in the special suit 293 of 1996 filed by the plaintiff earlier on 25.2.1996 got a panchnama done and had stated that, on physical verification, the plaintiff was found to be in possession (vide para 45 of the judgment of the trial Court). The trial Court also observed that the mere fact that the defendants 15 to 19 and 28 produced some bills, receipts, cash memos - xerox copies as evidence of

purchase of construction material did not establish the possession of the said defendants 15 to 19. It held that the original owners' possession as per the compromise dated 26.4.80 in Suit No.1384 of 1988 between defendants 1 to 14 and defendants 20 to 25, must be treated as subsisting inspite of the agreement between the owners and the defendants 15 to 19 dated 16.7.1991 and inspite of the possession receipt in favour of defendants 15 and 28. There is some force in the contention of the appellant before us that even if the Compromise in Suit 1384/88 dated 26.4.1990 was recorded on 14.8.92, the defendants 20 to 25, who accepted plaintiff's possession on 26.4.90 would not have failed to bring it to the notice of the Court on 14.8.1992 when the compromise was recorded, if the plaintiff was not in possession. The High Court did not even refer to the case of the plaintiff regarding the agreement dated 14.10.1980 said to have been executed by the defendants 1 to 14 in favour of the plaintiff initially and the various payments upto Rs.5,75 lakhs made thereunder, and to Rs. 1 lakh paid under the modified agreement dated 6.4.1996. In their written statement, the owners supported the plaintiff's possession even as on date of suit. The FIR filed by the plaintiff is also some evidence of a claim to possession of plaintiff and the attempt of defendants 15 to 19 to dispossess the plaintiff. Above all, the finding of the Court Commissioner in special suit No.293 of 1996 that plaintiff was in possession is of considerable importance. Further, several of defendants 1 to 14 filed affidavits in the trial Court stating that they have not entered into any agreement with defendants 15 to 19 and that they did not receive any cheques from defendants 15 to 19 and from defendants 20 to 27 and that plaintiff was in possession.

A reading of the judgment of the trial Court shows that though the agreement of sale executed in favour of the plaintiff was, according to the said Court, invalid because of its being in breach of the Tenancy Act still, in view of the compromise decree and the subsequent admission of the defendants 1 to 14 and report of the Court Commissioner in special suit No.293 of 1996, the trial Court held that plaintiff was in "permissive possession" as this was accepted by the owners. It held that a possessory right was sufficient to permit the plaintiff to have an order of temporary injunction in his favour.

Therefore, without going into the validity of the agreements executed by the owners in favour of the plaintiff or defendants 15 and 28, or the validity of the sale deed executed by defendants 15 and 28, we are of the view that the trial Court was right in coming to the conclusion that the plaintiff has made out a prima facie case. The trial Court has given several reasons for the grant of temporary injunction and, in our view, the two reasons given by the High Court were, on the facts, not sufficient to warrant a remand.

It is, however, made clear that the findings relating to the rights of the parties, the title to the property or as to possession as given by the trial Court and as accepted by us are all tentative and will be subject to findings that may be arrived at by the trial Court in the suit after the evidence is led. In addition to the injunction granted by the trial Court, we direct the plaintiff to maintain status quo on spot and not to create 3rd party rights or make

constructions on the property nor alter the nature of the property pending disposal of the suit.

Subject to the above, the appeal is allowed and the order of the High Court is set aside and the order of the trial Court is restored. There will be no order as to costs.

JUDIS