

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) 1432/2004

Judgment reserved on 1st November, 2011

Judgment decided on 9th January, 2012

COL. KALYAN SINGH (RETIRED) Plaintiff

Through: Mr. M.M. Kalra and
Mr. Kunal Kalra, Advs.

versus

M/S WIMPY INTERNATIONAL

LTD. ORS.

..... Defendants

Through: Mr. Maninder Singh, Sr.
Adv. with Mr. Sandeep
Mittal, Ms. Deepali Sharma,
Mr. Akhil Sachar and Mr.
Manav Gupta, Advs.
Mr. Subhash Oberoi, Adv.
for Defendants.
Applicant in I.A. No.
3457/2008

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.

I.A. No. 8456/2004 (u/O 39 R 1 & 2 r/w Sec. 151 CPC), I.A. No. 1121/2005 (u/O 39 R 4 r/w Sec. 151 CPC by Defendant nos. 1 & 2) and I.A. No. 2963/2005 (u/O 39 R 4 r/w Sec. 151 CPC by Defendant no. 5)

1. Plaintiff (since deceased and now being represented through his Legal Representatives) has filed this suit for declaration and injunction praying therein that the agreement dated 1st December, 1988 executed between the plaintiff, Captain H.S. Bajaj, Shri N.K.

Duggal and M/s Goodwill Foods (P) Ltd. as also the dissolution deed, partnership deed, power of attorney and other documents be declared as null and void; that the defendant nos. 1 to 3 and 5 be restrained from selling, alienating, parting with possession or creating any third party interest in respect of property bearing no. 245, Udyog Vihar,Dhoondahera, Gurgaon, Haryana (hereinafter referred to as the “suit property”). It has been further prayed that the defendant no. 4 be restrained from giving permission for transfer/sale of the suit property to a third person through defendant nos. 1, 2 and 3.

2. Along with the suit, I.A. No. 8456/2004 under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure (CPC) has been filed praying therein that the defendants be restrained from alienating, parting with possession or creating any third party interest or causing any loss to the plaintiff in respect of the suit property till disposal of the suit. Vide order dated 15th December, 2004 defendants were restrained from creating any third party interest in respect of the suit property.

3. Defendant nos. 1 and 2 have filed I.A. No. 1121/2005 for vacation of the ad interim injunction order. Defendant no. 5 has also filed an application under Order 39 Rule 4 CPC being I.A. No.

2963/2005 seeking vacation of the injunction order qua the defendant no. 5 on the ground that it has no interest in the suit property.

4. By this order I shall dispose of all the above referred applications.

5. Case of the plaintiff, as set out in the plaint, in brief, is that the plaintiff along with Capt. H.S. Bajaj (retd.) and Shri. N.K. Duggal, was carrying on partnership business under the name and style of M/s Freezo Freezing Complex in terms of partnership deed dated 28th August 1979. Plaintiff and Capt. H.S.Bajaj being retired Army officers had applied for allotment of an industrial plot at Dhoondahera under the scheme of Haryana State Industrial Development Corporation (defendant no. 4). Vide allotment letter dated 12th December, 1979, defendant no. 4 allotted the suit property in the name of plaintiff and Capt. H.S.Bajaj. Sale deed was executed by defendant no. 4 in favour of the plaintiff and Capt. H.S. Bajaj. Stamp duty of ₹ 66,750/- was paid by the plaintiff and certificate in this regard was issued by the Registrar's Office. Plaintiff and his partners took medium term loan facility from defendant no. 5 in the name of the partnership firm for raising construction on the suit property as also for purchasing and

installing plant and machinery. Suit property was mortgaged with the defendant no.5 to secure the loan. After completion of construction, plaintiff let out the suit property to M/s I. Ahmad & Company. During the 1984 riots, suit property was badly damaged as a consequence whereof, tenant fled away. Plaintiff was unable to repay the loan due to the losses suffered by the firm.

6. Plaintiff was also working as Chief Executive of M/s Wimpy India Ltd., M/s Wimpy Fast Foods Pvt. Ltd and M/s Wimpy Foods Pvt. Ltd, which companies were later on sold to defendant no.2 and one Mr. Keval Singh Sandhu. M/s Goodwill Foods (P) Ltd. was incorporated in the year 1985, of which plaintiff became the Executive Director. Thereafter, plaintiff entered into a partnership business with defendant no.3 for carrying on the said business from the suit property on the assurance of M/s Goodwill Foods (P) Ltd. that it will clear the dues of the plaintiff firm. Accordingly, plaintiff, Capt. H.S.Bajaj and Shri. N.K. Duggal executed a dissolution deed along with a partnership deed as well as certain other documents in the year 1988 including agreement dated 1st December, 1988 executed between M/s Goodwill Foods (P) Ltd., plaintiff and his partners, whereby suit property along with the super structures standing therein was transferred in favour of M/s

Goodwill Foods (P) Ltd against consideration to the effect that the said company will clear all the liabilities of the partnership firm. However, defendant nos.1 to 3 failed to honour its obligation as contained in the agreement. No amount was paid to defendant no.5 to clear the dues of the plaintiff's firm. Later on, defendant no.3, on behalf of M/s Goodwill Foods (P) Ltd., executed a rent agreement dated 7th September, 1989 in favour of the plaintiff whereby it agreed to pay rent of ₹1,50,000/- pm to plaintiff from the date of initial agreement i.e. 1st December 1988. Even the rent was not paid. In the meanwhile, M/s Goodwill Foods (P) Ltd. was merged with Defendant no.1, of which defendant no.2 became Chairman and Managing Director while plaintiff was one of its Directors. Subsequently, plaintiff was illegally removed from the post of Director General of defendant no.1. In this background, it has been alleged that agreement dated 1st December, 1988, partnership deed, dissolution deed and other documents were void ab initio since the same were got executed from the plaintiff and his partners fraudulently, inasmuch as, no sale consideration as contained in the agreement had been paid. Plaintiff has alleged that he and Capt. H.S. Bajaj were owners of the suit property and the defendant nos.1 to 3 had no right to deal with the same in any manner whatsoever.

7. Case of the defendant no. 1, as set out in the written statement, is that the suit was hopelessly barred by time since agreements and other documents as alleged in the plaint were executed in the year 1988; whereas suit has been filed in the year 2004, that is, after about 16 years. It is alleged that the plaintiff was not the owner of the suit property, thus, had no locus standi to file the suit. The suit property belonged to the partnership firm M/s Freezo Freezing Complex and since other partners of the firm had not been impleaded, suit is bad for non-joinder of necessary parties. Capt. H.S. Bajaj and Shri N.K. Duggal, ex-partners of M/s Freezo Freezing Complex, were also signatories to the agreement dated 1st December, 1988 and had not approached the court. Rent agreement dated 7th September, 1989 was disputed on the ground that it was forged and manufactured document. As per the defendant no.1, assets and liabilities of M/s Freezo Freezing Complex were taken over by defendant no. 1 pursuant to the agreement dated 1st December, 1988. Defendant no. 1 had cleared the dues of defendant no. 5 in terms of the agreement. After the dues of defendant no. 5 had been cleared by defendant no. 1, original title deeds have been released to defendant no.1 long ago. Suit property has even been mutated in the name of defendant no. 1 in the records of defendant no.4. Balance sheets of the defendant no. 1 are signed

by the plaintiff as one of the Directors of the defendant no. 1, wherein suit property has been shown as the asset of the defendant no.1. Case of the defendant no.1 is that it had cleared the dues of the other creditors of M/s Freezo Freezing Complex also to the extent it was limited in the agreement dated 1st December, 1988 by making such payments to the plaintiff and other partners through cheques. In nutshell, case of the defendant no.1 is that it is the lawful owner of the suit property.

8. From the facts narrated above, it is clear that the whole dispute between the parties revolves around the suit property i.e. No. 245, Udyog Vihar, Dhoondahera, Gurgaon, Haryana. Plaintiff is asserting his rights as an owner of the suit property. It is his case that the suit property had been allotted to him and Capt. H.S. Bajaj in their personal names and not to the partnership firm i.e. M/s Freezo Freezing Complex. As against this, case of the defendant no. 1 is that the suit property was allotted to M/s Freezo Freezing Complex, a partnership firm. Suit property was mortgaged with the defendant no. 5 to secure the loan which defendant no. 5 had extended to the said partnership firm. M/s Goodwill Foods (P) Ltd., predecessor-in-interest of defendant no. 1 had taken over the assets and liabilities of M/s Freezo Freezing Complex vide

agreement dated 1st December, 1988, which was duly signed by the plaintiff, Capt. Bajaj, Shri N.K. Duggal and M/s Goodwill Foods (P) Ltd. In terms of the agreement, dues of defendant no. 5 were cleared by the defendant no. 1. Plaintiff and other partners were also paid ₹ 6 Lacs through cheque and ₹ 1 Lac through demand draft to clear their liabilities towards Bombay Mercantile Cooperative Bank, National Small Scale Industries Development Cooperation and M/s. Prag Ice & Oil Mills, Aligarh. Plaintiff was one of the Directors in M/s Goodwill Foods (P) Ltd. and subsequently, in the defendant no.1. Plaintiff had not only been corresponding with defendant no. 5 but other authorities also on behalf of defendant no.1. He had signed letters recognizing the defendant no.1 as the owner of the suit property. Plaintiff and the other partners of M/s Freezo Freezing Complex had given letters to the defendant no. 5 affirming the execution of agreement dated 1st December, 1988 and for release of the title deeds on clearance of the dues. Thus, in nutshell, case of the defendant no. 1 is that plaintiff is not the owner of the suit property. Partnership firm was the owner of the suit property. Assets and liabilities of the said partnership firm had been taken over by the predecessor-in-interest of defendant no.1. After clearing the dues of defendant no.5, mortgage was redeemed and title deeds were released in favour of the defendant no.1.

Thereafter, defendant no. 4 has re-allotted the suit property to defendant no.1 and the same has been registered in the name of defendant no.1 in the records of defendant no.4. Thus, defendant no.1 is the owner of the suit property in its own right.

9. The documents placed on record by the parties, prima facie, support the contentions of defendant no.1 that the suit property was allotted to M/s Freezo Freezing Complex and not to the plaintiff and Capt. H.S. Bajaj in their personal capacity. Plaintiff has failed to make out a, prima facie, case in his favour that he is the owner of the suit property along with Capt. H.S. Bajaj. Merely because allotment letter has been addressed to the plaintiff and Capt. H.S. Bajaj, as partners of M/s Freezo Freezing Complex, will not be sufficient to indicate that the suit property was allotted in their personal names. Allotment letter dated 12th December, 1979 has been addressed to Col. Kalyan Singh and Capt. H.S. Bajaj, C/o M/s Freezo Freezing Complex. Thereafter, agreement dated 5th December, 1979 was executed between defendant no. 4 and M/s Freezo Freezing Complex through Col. Kalyan Singh and Capt. H.S. Bajaj as its partners. This agreement has been signed by the plaintiff on behalf of the partnership firm. Recital portion of the

agreement clearly indicates this fact, which is reproduced herein under :-

“This agreement made this 5th day of December, 1979, between the Haryana State Industrial Development Corporation Limited, (hereinafter called the Corporation of the one part) and M/s Freezo Freezing Complex, E-28, Greater Kailash-1, New Delhi-110048. (hereinafter called “the allottee”) of the other part.

Whereas M/s Freezo Freezing has requested the Corporation for an Industrial Plot measuring 5 acres for the purpose of setting up an Industry (as per scheme submitted by the allottee). And whereas the Corporation has agreed to the request so made on the terms and conditions hereinafter mentioned in pursuance thereof has agreed to sell to M/s Freezo Freezing the Industrial plot measuring 5 acre (hereinafter called plot No.245) shown in red colour on the demarcation plan of the industrial Estate, Dundahera Complex (Gurgaon, Haryana)”

10. Subsequently, another agreement was executed between defendant no. 4 and M/s Freezo Freezing Complex which was registered with the Sub Registrar, Gurgaon and a perusal thereof makes it clear that the agreement was entered into between the defendant no. 4 and M/s Freezo Freezing Complex through its partners i.e. plaintiff and Capt. H.S. Bajaj. In this agreement,

rubber stamp of the partnership firm of M/s Freezo Freezing Complex has been affixed on each page on which plaintiff has appended his signatures as partner of the said firm. Perusal of the agreement dated 1st December, 1988 signed by the plaintiff, Capt. H.S. Bajaj, Shri N.K. Duggal and M/s Goodwill Foods (P) Ltd. also shows that the suit property belonged to M/s Freezo Freezing Complex. Relevant portion of the agreement is reproduced herein under:-

“Now, therefore, THIS AGREEMENT
WITNESSETH AS FOLLOWS:

1. The fourth party shall take over all the assets of the partnership firm comprising of :
 - i. Entire land measuring approx five acres 23,341 sq. Yds at plot no. 245, Udyog Vihar, Dundaheera, Gurgaon.
 - ii. Super structures built on the said land including factory and office blocks.
 - iii. Plant/machinery as detailed in SCHEDULE I to this Agreement.
2. The fourth party shall not be liable for any of the liabilities of 1st, 2nd and 3rd party towards statutory or non-statutory such as sales tax authorities or persons/banks or otherwise except the liabilities of the State Bank of Saurashtra as mentioned above.

3. The 1st, 2nd and 3rd party undertake that they are left with no other right, title, interest or claim in any manner in the Unit including the goodwill of M/s Freezo Freezing Complex and the same shall belong exclusively to the 4th party. The 4th party shall enjoy and own goodwill of M/s Freezo Freezing Complex and deal with the Unit in any manner it deems fit.

4. The 1st, 2nd and 3rd parties hereby represent, declare that there exists no lien, claim, charge or demand or mortgage or encumbrance or attachments or acquisition or requisition or notice thereof whatsoever in respect of premises no. 245, Udyog Vihar, Dundaheera, Gurgaon or the factory or any plant, equipment, machinery, installed thereon, except the liability of the State Bank of Saurashtra as aforesaid and that 1st, 2nd and 3rd party's right or hindrance whatsoever to sell and to enter into this Agreement in regard to their rights, interest and share whatsoever in the aforesaid property and business of the firm. On our aforesaid declaration, assurance and undertaking, 4th party having agreed to pay and in the event if it is found that there is defect in the title of the property and business or it is found that the property is in any manner encumbered, the 1st, 2nd and 3rd party undertake to remain liable and indemnify the 4th party any and every loss incurred by 4th party in this regard.

5. All original documents pertain to the title of property shall be handed over to the 4th party and on clearance of the liability,

State Bank of Saurashtra, Nehru Place, New Delhi, the 4th party is entitled to take the delivery of the original Tile Deeds of the property from the said bank. The sanctioned building plans and other relevant papers connected with the said property, the account books and other office records etc. of M/s Freezo Freezing Complex will be handed over to the 4th party for which a separate inventory would be prepared and signed by the parties.”

11. It may be noted here that fourth party is M/s Goodwill Foods (P) Ltd. and plaintiff, Captain H.S.Bajaj and N.K.Duggal are first, second and third party in the agreement. In the balance sheets of defendant no. 1, suit property has been shown as one of the asset of defendant no.1. The balance sheets placed on record have been signed by the plaintiff as one of the Directors of defendant no.1. Plaintiff had also signed a letter on behalf of defendant no. 1, which was written to M/s Tourism Finance Corporation of India in response to a letter dated 30th July, 1990 of the said Corporation, wherein it has been specifically stated that the industrial unit i.e. kitchen at Dhoondahera, Gurgaon was purchased by defendant no.1 from M/s Freezo Freezing Complex partnership firm which became sick due to its destruction in the riots followed by the assassination of Late Mrs. Indira Gandhi in the year 1984. It has been specifically mentioned in the letter that dues of M/s Freezo Freezing

Complex to State Bank of Saurashtra (defendant no.5) had been cleared by defendant no.1 except the interest component in respect whereof concession was sought, in terms of the judgment of the Supreme Court. It is, thus, clear that plaintiff had himself admitted that the suit property belonged to M/s Freezo Freezing Complex and thereafter assets and liabilities including the immovable property had been taken over by the defendant no.1. Be that as it may, from the agreements executed between defendant no. 4 and M/s Freezo Freezing Complex, it is clear that the plaintiff is not the owner of the suit property nor has got any right, title and interest therein.

12. Learned counsel for the plaintiff has vehemently contended that the right, title and interest in an immoveable property can be transferred in favour of the other only by means of a sale deed under Section 54 of the Transfer of Property Act. Nobody can claim any ownership right in a piece of land on the basis of an agreement to sell or power of attorney or any such document, which is neither executed nor registered as a sale deed. Reliance has been placed on **Imtiaz Ali Vs. Nasim Ahmed, AIR 1987 Delhi 36** and **Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana & Anr., 183 (2011), DLT 1 (SC)**. I do not find much force in this

contention of learned counsel for the plaintiff on two counts. Firstly, suit has not been filed on behalf of the partnership firm or by all the partners of M/s Freezo Freezing Complex challenging the right, title and interest of the defendant No.1 in the suit property. Admittedly, suit property has been duly re-allotted and/or transferred in the name of defendant No.1 by the defendant No.4. Such transfer has not been challenged in this suit. Plaintiff has filed this suit claiming himself to be the owner of the suit property. As already held above, M/s Freezo Freezing Complex was the owner of the suit property and later on, the defendant No.1 having taken over the assets and liabilities of M/s Freezo Freezing Complex became the owner of the suit property along with the super structures on it. Thus, plaintiff, acting as an individual, had no right to challenge the ownership rights of the defendant No.1. Secondly, in Suraj Lamp's case (supra), Supreme Court has observed that if the documents relating to 'SA/GPA/WILL transactions' has been accepted and acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they could not be disturbed, merely on account of the said decision. In this case, pursuant to the agreement dated 1st December, 1988, suit property has already been transferred in the name of defendant No.1. The other judgment titled **M/s. Malabar Fisheries Co. vs. The**

Commissioner of Income Tax, Kerala, AIR 1980 Supreme Court 176 relied upon by the counsel for the plaintiff is in the context of different facts. In the said case, while scrutinizing the provisions of Sections 34 (3) (b), 2 (47) and 155 (5) of the Income Tax Act, it has been held that distribution of assets of the firm on dissolution does not amount to transfer of assets within the meaning of Sections 34 (3) (b), 2 (47) and 155 (5) of the Income Tax Act.

13. Before granting ad interim injunction three essential ingredients have to be satisfied. Plaintiff is required to establish a, prima facie case; that grave and irreparable loss and damage would ensue to him in case interim protection was not granted and that balance of convenience, interests of justice and equity are in his favour. In *Dalpat Kumar and Another vs Prahlad Singh And Others AIR 1993 SC 276*, (1992), Supreme Court has held that the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a

substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction.

14. From the discussions made hereinabove, I am of the view that plaintiff has failed to disclose, a prima facie, case in his favour qua the suit property. Since the plaintiff is not the owner of the suit property it cannot be said that he shall suffer loss and injury in case any third party interest is created by the defendants. Balance of convenience is also not in favour of the plaintiff. Accordingly, IA No.8456/2004 is dismissed. Interim order dated 15th December, 2004 is vacated. In view of dismissal of IA No.8456/2004, IA

Nos.1121/2005 and 2963/2005 have become infructuous and are disposed of accordingly.

A.K. PATHAK,J.

JANUARY 09, 2012
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