

RSA No. 5341 of 2014(O&M)

In the High Court of Punjab and Haryana at Chandigarh

RSA No. 5341 of 2014(O&M)
Date of Decision: August 31st, 2016

M/s RMS Estate Private Limited

---Appellant

vs.

Hari Ram

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Ashok Aggarwal, Senior Advocate
with Mr. Alok Jain, Advocate
for the appellant

Mr. Akshay Bhan, Senior Advocate
with Mr. Aashish Chopra, Advocate
and Mr. Santosh Kumar, Advocate
for the respondent.

Rekha Mittal, J.

The present appeal has been directed against the judgment and
decree dated 21.8.2014 passed by the District Judge, Gurgaon whereby the

appeal preferred against the judgment and decree dated 5.12.2012 passed by the Civil Judge (Junior Division), Gurgaon (hereinafter to be referred as “the trial court”) dismissing suit of the appellant/plaintiff, has been dismissed.

The appellant/plaintiff filed a suit for injunction alongwith connected reliefs i.e. mandatory injunction, declaration etc. on the plea that the plaintiff is doing business of land development and respondent-defendant proposed to sell his property situated in village Dharampur District Gurgaon. An agreement for sale of land measuring 18 kanals 1 marla, detailed in para 4 of the plaint was executed on 6.7.2006. A part of sale consideration was paid to the defendant and he delivered physical possession of the suit land. Sale deed was agreed to be executed within two months after obtaining necessary permission from HUDA etc. The plaintiff came to know on 25.2.2010 that no such permission was pending with the authorities nor the defendant applied for the same. The plaintiff took up the matter with the defendant and came to know that defendant had been delaying the matter and wanted to increase the price. It is averred that the defendant wants to take possession of the suit property illegally and forcibly

and as such necessity arose to file the suit.

The defendant failed to put in appearance and was proceeded against ex parte. In ex parte evidence, plaintiff examined G.D.Sharma PW1, Ram Kumar Verma PW2 and tendered documents Ex. P1 to P3.

The trial court dismissed the suit by holding that the plaintiff has failed to prove ownership of defendant over the suit property as no documentary proof like jamabandi, sale deed etc. has been produced. So far as the original agreement is concerned, it is not proof of ownership of suit property by the defendant.

The appeal preferred against the judgment and decree passed by the trial court was dismissed primarily on two counts:

(1)As the plaintiff/appellant has filed suit for injunction asserting its claim that agreement dated 6.7.2006 (Ex. P2) was executed between the parties and possession was delivered to the plaintiff, the same being not a registered document is not admissible in evidence by applying the principles laid down by Hon'ble the Supreme Court of India in *Omprakash vs. Laxminarayan and others, 2013 (4) RCR*

(Civil) 747.

(2)The alleged agreement was executed on 6.7.2006 and sale deed was to be executed by 6.9.2006. After 6.9.2006, suit for specific performance can be filed by the plaintiff and suit for injunction is not maintainable. Such a law was laid down by our Hon'ble High Court in ***Teja Singh and others vs. Balwant Singh, 2011 (1)RCR (Civil) 9*** and ***S.K. Dhadwal vs. Prem Singh and another, 1989 Civil Court Cases 177.***

Counsel for the appellant has submitted that the Court of Appeal did not advert to the provisions of Section 53-A of the Transfer of Property Act, 1882 (in short “TP Act”) and judgment of Full Bench of Bombay High Court ***Sadashiv Chander Bhamgare vs. Eknath Pandharinath Nangude, 2004(4)R.C.R.(Civil) 441***, to decide the question of maintainability of the suit. In order to assail judgment of the Court of Appeal, it is argued with vehemence that the court misdirected itself by placing reliance upon judgment in ***Omprakash's case (Supra)*** to hold that the agreement to sell is not admissible in evidence for want of requisite stamp. It is argued that in ***Omprakash's case (Supra)***, the Court dealt with

the provisions of Indian Stamp Act as amended by the State of Madhya Pradesh vide Madhya Pradesh 2nd Amendment Act 1990 (Act No. 22 of 1990) but no such amendment was made by the State of Haryana in the Indian Stamp Act till the year 2013. It is further argued that as agreement of sale between the parties was executed in the year 2006, long before the amendment was made by the State of Haryana in the Indian Stamp Act similar to the amendment made by the Madhya Pradesh in the year 1990, the judgment in ***Omprakash's case (Supra)*** cannot apply to the facts of the case in hand.

With regard to finding that the suit for injunction is not maintainable as has been held in ***Teja Singh and others' case (supra)*** and ***S.K.Dhadwal's case (supra)***, it is vehemently argued that neither in ***Teja Singh and others' case (supra)*** nor in ***S.K.Dhadwal's case (supra)***, this Court dealt with the implications of Section 53-A of the TP Act. The court has committed a serious error rather illegality by holding that suit for injunction is not maintainable due to bar created under Section 41 (h) of the Specific Relief Act, 1963. In addition, it is submitted that in ***S.K.Dhadwal's case (supra)***, this Court was dealing with civil revision filed by an unsuccessful defendant as the application filed by the

respondent/plaintiff for interim injunction was allowed by the trial court and the order passed by the trial court was affirmed by the Additional District Judge, Faridabad. On the other hand, counsel for the appellant has placed heavy reliance upon Full Bench decision of Bombay High Court in *Sadashiv Chander Bhamgare's case (supra)* where the question formulated namely, “whether a suit simpliciter for injunction which is filed seeking protection under Section 53-A of the Transfer of Property Act is maintainable” was answered in positive after adverting to whether such a plea can be availed of as a shield to protect possession as a defendant only and further whether suit for perpetual injunction would be barred because of equally efficacious remedy of specific performance being available and thus, the suit is barred under Section 41(h) of the Specific Relief Act. It is further argued that the Court did not consider the aforesaid judgment of Bombay High Court despite the same having been brought to its notice.

Counsel for the appellant made a vain attempt to argue that plea with regard to bar of suit in view of Section 41 of the Specific Relief Act was otherwise not tenable as no such plea was raised by the respondent/defendant before the trial court when as a matter of fact, the

defendant did not appear before the trial court much less file a written statement raising any plea in defence. For this purpose, he has relied upon judgment of the Allahabad High Court ***UP State Electricity Board, Lucknow vs. Ram Barai Prasad and another 1985 AIR (Allahabad) 265.***

Another submission made by counsel is that as the respondent/defendant did not obtain necessary permission from HUDA etc. in compliance with the terms and conditions of the agreement, admittedly, executed between the parties, the findings by the Court that suit for injunction is not maintainable as equally efficacious remedy of specific performance was available, are erroneous and liable to be set aside. For this purpose, he has referred to judgment of this Court ***Dalip Singh vs. Mehar Singh and others 1998 (3) PLR 261.***

Counsel for the respondent, on the contrary, has supported the judgment passed by the Court of Appeal. Counsel has not made any submissions to support findings of the Court that agreement to sell is not admissible in evidence in the light of principles laid down in ***Omprakash's case (supra)***. It is not disputed that a similar amendment as was made by the State of Madhya Pradesh in the Indian Stamp Act in the year 1990 was

made by the State of Haryana only in the year 2013, therefore, the said provisions were not applicable to the agreement of sale executed in the year 2006. However, it has been urged that in view of averments raised in the plaint that the defendant did not take any steps for obtaining permission from HUDA etc. and the defendant having informed the plaintiff on 15.4.2010 that he was not in a position to deliver such NOC and the defendant did not pay any heed to request of the plaintiff to act in compliance with the agreement are sufficient to prove that at the time of filing simpliciter suit for injunction with other reliefs, the appellant knew it very well that the respondent/defendant allegedly refused to perform his part of the agreement, therefore, cause of action to file suit for specific performance has already matured and failure of the appellant to avail equally efficacious remedy of specific performance renders the suit for injunction non-maintainable as has been held by the Court by relying upon judgments of this Court.

To counter submissions with regard to entitlement of the respondent to raise question of non-maintainability, it is argued that a legal plea can be raised for the first time before the appellate court. Further

submitted that the appellant cannot derive any advantage to its contention from the judgment in *UP State Electricity Board, Lucknow's case (supra)* as in the said case, plea as to bar in view of Section 41 of the Specific Relief Act was raised in the second appeal and not in the first one.

I have heard counsel for the parties, perused the paper book, records of the courts below and the judgments cited at bar.

As has been noticed hereinbefore, the Court dismissed the appeal on two grounds. So far as the finding that the agreement to sell is not admissible in evidence, finding is erroneous and result of non application of mind that amendment in the Indian Stamp Act by the State of Madhya Pradesh has been applied to a case of Haryana without examining that no such amendment was made by the State of Haryana prior to 2013 and the agreement in question pertains to the year 2006. In this view of the matter, the findings that the agreement of sale is not admissible in evidence are patently erroneous and liable to be set aside.

This brings the Court as to whether the respondent was competent to raise a plea with regard to non-maintainability of the suit before the Court of Appeal. As has been rightly argued by counsel for the

respondent, the judgment in *UP State Electricity Board, Lucknow's case (supra)* cannot be attracted as in the said case, such a plea was sought to be raised in second appeal and not before the first appellate court. This apart, as the plea with regard to bar under Section 41 of the Specific Relief Act is a legal plea, the same was available to be raised by the respondent before the first appellate court. In this view of the matter, the appellant cannot seek any aid to its contention from the referred authority.

Coming to the question of maintainability or otherwise of the suit for injunction without seeking relief of specific performance in a suit filed in the year 2010 on the basis of agreement executed in the year 2006 whereby the sale deed was to be executed on expiry of two months from the date of agreement, the Court has relied upon judgments of this Court to say that the suit is not maintainable. It is undisputed position that the Court did not advert to Full Bench judgment of Bombay High Court *Sadashiv Chander Bhamgare's case (supra)* despite the said judgment having been relied upon by the appellant.

In *Teja Singh and others' case (supra)* decided by a Single Bench of this Court, the plaintiff filed a suit for permanent injunction to

restrain the defendants/appellants from alienating the suit land (subject matter of agreement of sale dated 26.12.1962) or from interfering in possession of the plaintiff/respondent. The question of maintainability of the suit due to bar created under Section 41(h) of the Specific Relief Act, 1963 was raised in a regular second appeal as suit filed by the plaintiff/respondent was decreed by the trial court and the findings of the trial court were affirmed in appeal by the Additional District Judge. This Court while dealing with contention of the appellant, referred to in para 16 of the judgment that suit for injunction was barred under Section 41(h) of the Specific Relief Act, 1963 when equally efficacious relief could be availed has answered in para 17, reads as follows:-

“.....On consideration, I find force in the contention raised by the learned counsel for the appellants.

Once under the agreement to sell possession was not handed over, and the entry of possession in the revenue record was not supported by any title or right. Furthermore, the land being Banjar, the possession was to go with title, which admittedly was with Barkat Singh, and not with the plaintiff/respondent. No reliance could be placed on Ex.P.5 to hold, that the

plaintiff/respondent, was in possession of the property in dispute, to grant injunction in his favour.”

A perusal of the aforesaid extract makes it evident that in the said case, possession was not handed over under the agreement to sell and land being banjar, possession was to go with title which admittedly, was with Barkat Singh and not with the plaintiff/respondent. As the Court refused to accept plea of the respondent/plaintiff that he was in possession of the suit land, there was no occasion to deal with the question whether the respondent/plaintiff can maintain a suit for injunction to protect his possession under the agreement by invoking the provisions of Section 53-A of the TP Act. This apart, the judgment in *Teja Singh and others' case (supra)* has not at all adverted to the provisions of Section 53-A of the TP Act, therefore, the said judgment cannot be applied in the circumstances of the present case. Similarly, in *S.K.Dhadwal's case (supra)*, this Court has not dealt with the provisions of Section 53-A of the Act when otherwise, the Court was dealing with a revision petition preferred against interim injunction granted by the trial court and affirmed in appeal. In this view of the matter, I find merit in contention of the appellant that the Court relied

upon the judgments of this Court without appreciating provisions of Section 53-A of the TP Act.

The Full Bench of Bombay High Court formulated a specific question with regard to maintainability of a suit for injunction by seeking protection under Section 53-A of the TP Act. In para 6 of the judgment, the Court has held that before the transferee becomes entitled to claim protection of provisions of Section 53-A of the TP Act, he has to satisfy certain conditions viz.(i) there must be a contract for transfer for consideration of any immovable property; (ii) the contract must be in writing, signed by the transferor, or by someone on his behalf; (iii) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained; (iv) the transferee must in part-performance of the contract take possession of the property, or of any part thereof; (v) the transferee must have done some act in furtherance of the contract; and (vi) the transferee must have performed or be willing to perform his part of the contract.

In para 9, it has been held that the purpose behind Section 53-A is thus to provide a shield of protection to the proposed transferee to

remain in possession against the original owner who has agreed to sell the land to the transferee if the proposed transferee satisfies other conditions of Section 53-A. That protection is available to the transferee as a shield against the transferor and would dis-entitle the transferor from disturbing possession of the proposed transferee who is put in possession pursuant to such agreement. After referring to the judgments *Pandit Ram Chander vs. Pandit Maharaj Kunwar and others*, AIR 1939 Allahabad 611, *Ram Gopal Reddy vs. Addl. Custodian Evacuee Property* 1966(30) S.C.R. 214, *Delhi Motor Co. vs. U.A. Basrurkar* AIR 1968 Supreme Court 794, *S.Govindrao Mahadik vs. Devi Sahai* AIR 1982 SC 989, *Maneklal Mansukhbhai vs. M/s Hormusji Jamshedji Ginwalla and Sons* AIR 1950 SC 1 (referred to in paras 10 and 11), the Court held in concluding part of para 11 that Section 53-A of the TP Act imposes a bar on the transferor to seek possession of the immovable property from the transferee in possession. Therefore, if the transferor, though he has been denied that right by Section 53-A of the TP Act, tries to take possession forcibly, the proposed transferee in possession would be entitled to institute a suit to enforce the bar of Section 53-A against the transferor. If the proposed

transferee in possession is denied right to institute a suit so as to protect his possession, then the proposed transferee in possession would be rendered remediless. Further held that it is clear that when it is said that the proposed transferee in possession can use Section 53-A as a shield but not as a sword, it means that he can use Section 53-A either as a plaintiff or as a defendant to protect his possession but he cannot use Section 53-A either for getting title or for getting possession if he is not actually in possession. To put it in other words, when the transferee in possession comes to the court as a plaintiff seeking a decree of perpetual injunction against the transferor, he is using Section 53-A as a shield to protect his possession.

In para 13, the court has adverted to the question of maintainability of the suit for injunction and to the provisions of Section 41 (h) of the Specific Relief Act. On a detailed consideration of the relevant provision and some of the judgments, it was held that even if it is assumed that the cause of action for instituting a suit for specific performance had accrued and the plaintiff in that case omitted to institute the suit for specific performance, then also by virtue of provisions of Order 2 Rule 2 CPC, suit of the plaintiff for a decree of specific performance would be

barred but his suit for decree of perpetual injunction for protecting his possession would not be barred. Insofar as the reference to the provisions of Section 41 of the Specific Relief Act is concerned, it does not operate on the jurisdiction of the Court to entertain a suit, but it relates to the exercise of that jurisdiction. Grant of leave of injunction is in the discretion of the Court and Section 41 lays down as to how that discretion is to be exercised. In the concluding part of para 13, it has been held that where a suit for specific performance is barred by the Law of Limitation, the prospective purchaser in possession would not be in a position to institute a suit for specific performance, but Section 53-A creates an equity in his favour as a result of which he is entitled to continue in possession. If it is held that though his possession is protected, he cannot institute a suit in case he finds that his possession has been threatened would amount to denying a remedy for enforcing the equity which is created in his favour by Section 53-A of the TP Act. In view of enunciation of law laid down in ***Sadashiv Chander Bhamgare's case (supra)***, and in absence of any judgment holding contrary to what has been laid down by the Bombay High Court, I find merit in contention of the appellant that the Court has committed a grave

error by holding that suit filed by the appellant/plaintiff is not maintainable in the light of judgments relied upon.

Counsel for the parties have made rival submissions if cause of action to file a suit for specific performance has already accrued to the appellant or otherwise, lest it may cause prejudice to either of the parties, the said matter has been left to be decided by the Court of appeal while the Court would be adjudicating upon the question whether the appellant is entitled to claim protection of Section 53-A of the TP Act as per the conditions incorporated therein.

The Court has not at all adverted to the provisions of Section 53-A of the TP Act and the conditions required to be satisfied by a transferee to claim protection of the said provision. All these questions being disputed questions of fact are required to be considered and decided by the Court of Appeal, therefore, the matter is liable to be remitted to the appellate court for decision afresh by taking into consideration the observations of the Bombay High Court, discussed hereinbefore.

In view of what has been discussed hereinabove, the appeal is partly allowed, the judgment and decree passed by the Court of Appeal is set

aside and the matter is remitted to the Court of Appeal for decision afresh, in accordance with law. The parties through their counsel are directed to appear before the Court of Appeal on 22.9.2016.

(Rekha Mittal)
Judge

August 31st, 2016
paramjit

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No