

THE HON'BLE SRI JUSTICE M.S.K.JAI SWAL

C.C.C.A.No.43 of 2011

JUDGMENT:

This appeal is filed questioning the judgment dated 05.08.2010, passed in O.S.No.347 of 2008, on the file of the III Additional Chief Judge, City Civil Court, Hyderabad, by and under which, the learned Chief Judge dismissed the suit of the plaintiff filed for injunction.

2. For convenience, the parties are referred to as 'plaintiff' and 'defendants'.

3. The brief facts of the case are as under:

The plaintiff is a firm represented by its proprietor Sri Karshan Ladda, and he was doing business in timber in the schedule premises bearing Nos.15-4-115, 15-4-116 and 15-4-117, situated at Osmanshahi, Hyderabad over an extent of 675 square yards. It is stated that the plaintiff was in possession of the schedule premises since 1965. Earlier, the plaintiff filed a suit on the file of the IV Additional Judge, City Civil Court, Hyderabad claiming adverse possession over the schedule property. During pendency of the said suit, on the advise of the elders, the 1st defendant executed Ex.A1 agreement of sale on 03.06.1992 in favour of the plaintiff in respect of the schedule property for a consideration of Rs.8,77,500/- and received the said amount from the plaintiff and for which, the 1st defendant acknowledged the same. A condition was imposed in the said agreement that if the suit filed by the plaintiff was dismissed, the 1st defendant shall execute a sale deed in favour of plaintiff, and in case, the suit filed by the plaintiff was decreed, the agreement shall become unenforceable.

4. It is further case of the plaintiff that the Endowments Department claimed right over the property of an extent of 15,146 square yards, which includes the schedule property and the said litigation was still pending. As the said dispute was not resolved, the 1st defendant did not execute the sale deed in favour of the plaintiff in respect of the schedule property.

5. It is further case of the plaintiff that the 1st defendant filed L.G.C.No.41/2008 on the file of the Special Court under A.P.Land Grabbing (Prohibition) Act, 1982 against the plaintiff and others in respect of the property including the schedule property.

6. While the matters stood thus, in the month of June, 2008 the defendants tried to interfere with the peaceful possession and enjoyment of the plaintiff over the schedule property and hence, the plaintiff filed the suit for injunction.

7. The contention of the defendants is that the suit is not maintainable. As per Section 41(h) of the Specific Relief Act, when there is more efficacious remedy available, the simple suit for injunction is not maintainable. The plaintiff has to file a comprehensive suit for enforcement of the agreement of sale dated 03.06.1992. Under Section 35 of the Stamp Act, Ex.A1 document cannot be looked into. Ex.A1 is not a registered instrument. The suit is barred under Order 2 Rule 2 C.P.C, as the plaintiff has not taken any permission reserving his right to file a suit for specific performance.

8. On the basis of pleadings of both sides, the Court below framed following issues.

1. Whether the suit is maintainable in view of Sec.41(h) of the Specific Relief Act?

2. Whether the plaintiff is entitled for permanent injunction as prayed for?
3. To what relief?

9. On behalf of plaintiff, the plaintiff is examined as PW 1 and examined PW 2 on his behalf and marked Exs.A1 to A13. On behalf of defendants, no oral or documentary evidence was adduced.

10. After considering the oral and documentary evidence let in on behalf of the plaintiff, the Court below dismissed the suit, observing that the suit for bare injunction is not maintainable without seeking relief of specific performance. Feeling aggrieved, the plaintiff filed the present appeal.

11. The contention of the appellant/plaintiff is that the learned trial Court has erred in dismissing the suit filed for injunction simpliciter on the ground that the plaintiff is entitled to avail more efficacious remedy which he has not availed and that the plaintiff has not reserved his right to sue for specific performance and hence the suit is not maintainable in view of the provisions under Order 2 Rule-2 C.P.C. The learned counsel further submitted that the cause of action to file the suit is not the date of Ex.A1-agreement of sale, but the date on which the defendants tried to interfere with the peaceful possession and enjoyment of the plaintiff over the schedule property, as the plaintiff was in possession thereof since more than 40 years. It is further submitted that the defendants have not entered the witness box to deny the claim of the plaintiff and hence the dismissal of the suit is erroneous and the plaintiff is entitled to grant injunction restraining the defendants from interfering with his peaceful possession over the schedule property.

12. On the other hand, the learned counsel for the respondents/defendants submitted that the plaintiff is entitled to file the suit if he is having any right to claim specific performance of contract dated 03.06.1992, but without claiming the same, he filed the suit for injunction simpliciter, restraining the defendants, who are admittedly the owners of the schedule property. It is submitted that there cannot be any injunction against the true owners though the plaintiff is entitled to injunction in respect of any person other than the true owner. The learned counsel further submitted that the Court below has relied upon the decisions of this Court, which clearly lay down that an agreement holder cannot seek injunction simpliciter without seeking relief of specific performance of contract and hence the Court below is justified in rejecting the relief of injunction and therefore, the appeal is liable to be dismissed.

13. The points that arise for consideration are as to whether the appellant/plaintiff is entitled to injunction restraining the respondents/defendants from interfering with his peaceful possession over the schedule property, and whether the suit for injunction simpliciter is not maintainable in view of the plaintiff having more efficacious remedy under Section 41(h) of the Specific Relief Act.

Points:

14. In the locality, known as Osman Shahi, Hyderabad, there was vast extent of land belonging to one Fauzdar Khan, who was said to have gifted 5 bighas of land there at to one Gunnaji for construction of temple and the said Gunnaji is the ancestor of the respondents/defendants. It appears that there exists a temple of Sri Jangli Vithobha and also another temple in that area. The total extent is about 15,146 square yards. The

father of the defendants, by name, Manik Rao succeeded to the property. This fact has been confirmed after long litigation commencing from 1971 which ultimately culminated in the Supreme Court, vide decision in Civil Appeal No.6246/1998, dated 25.11.2004 {the judgment is reported in *Commissioner of Endowments v. Vittal Rao* (reported in AIR 2005 Supreme Court 454)}. The said Vittal Rao is the 1st defendant in the present suit whereas the other defendants are his own brothers. The Endowments Department has set up a claim over 15,146 square yards of land and therefore, the father of the defendants filed O.S.No.509/1971 in the City Civil Court, Hyderabad and that litigation went up to the Supreme Court in Civil Appeal Nos.702/1980 and 703/1980, which were disposed of on 12.08.1987. By virtue of the said judgment, the title of the property in favour of Manik Rao was upheld and it became final.

15. When the above litigation was pending in between the 1st defendant and the Endowments Department, the plaintiff who was in possession of 675 square yards, on which there are three premises bearing Door Nos.15-4-115, 15-4-116 and 15-4-117 and he was running timber business over the said extent of 675 square yards from about 1965. Since this extent of land and surrounding land was the property of the ancestors of the defendants, the plaintiff filed a suit on the file of the IV Additional City Civil Court, Hyderabad against the 1st defendant herein, claiming ownership over 675 square yards by virtue of adverse possession. When the said suit was pending, according to the plaintiff, on the advice of the elders, there was an agreement entered into between the plaintiff and the 1st defendant, which was reduced into writing on 03.06.1992 under Ex.A1. Since the suit filed by the plaintiff against the 1st

defendant by then was pending, it clearly recited in Ex.A1 agreement of sale that the agreement of sale is subject to the result of the civil suit pending on the file of the IV Additional Judge, City Civil Court, Hyderabad. It was also agreed that the first party i.e. the 1st defendant herein shall register the entire land in favour of the second party i.e., the plaintiff, in case the suit filed by the plaintiff was dismissed. It was also mentioned in the agreement that if the said suit of the plaintiff is decreed in his favour, the agreement of sale in favour of the plaintiff will become unenforceable and infructuous. Apparently, it was a contingent contract. It was further recited in Ex.A1-agreement of sale that the plaintiff paid total consideration of Rs.8,77,500/- to the 1st defendant @Rs.1300/- per square yard. In Clause-3 of the agreement, it was recited that since the plaintiff has been in physical possession of the schedule land by making construction of sheds and by running timber business for more than 25 years, the question of handing over the physical possession of the schedule property to the plaintiff does not arise. In Clause-4 of the agreement, it was also recited that the defendant or any others claiming through him will not interfere with the peaceful possession of the plaintiff over the schedule property and that the plaintiff is the absolute possessor of the schedule property and he is entitled to continue his possession over the schedule property without any disturbance or interference by any others.

16. A perusal of Ex.A1 agreement of sale establishes that for about 25 years prior to 03.06.1992 the plaintiff had been in possession of the schedule property by constructing sheds and doing business therein, that the plaintiff filed a suit for declaring his ownership over the schedule

property by virtue of adverse possession and that suit was pending, and therefore, in Ex.A1 agreement of sale, it was clearly mentioned that the agreement of sale is subject to the result of the suit filed by the plaintiff. The possession of the plaintiff over the schedule property is admitted and the 1st defendant also assured that the plaintiff shall continue to be in possession of the schedule property without there being any disturbance or interference by others.

17. When the matter stood thus, it is alleged that on 25.06.2008 the defendants who are own brothers, being sons of Manik Rao, interfered with the possession of the plaintiff over the schedule property and hence on 27.06.2008 the plaintiff filed the suit for injunction. In the plaint, after referring to the above facts and also the litigation between the defendants and the Endowments Department and also referring to the recitals of Ex.A1 agreement of sale, referred to supra, the plaintiff at para-III(d) averred as under:

“It is humbly submit that as the matter stood thus the endowments department claimed rights over the property for an extent of land of 15,146 Sq.yards accordingly the father of the defendant No.1 late Sri Manik Rao and after his demise followed by his son Vithal Rao who is defendant No.1 herein. As the said litigation has been continued the defendant No.1 did not proceed for registration of the suit schedule premises by executing a Regular Sale Deed by him to the plaintiff. The defendant No.1, in spite of repeated requests by the plaintiff postponed the registration and execution of sale deed by saying that he will execute the regular sale deed and will be registered the schedule property on concluding of the litigation with the endowments department. **The plaintiff reserves his right to seek relief of specific performance against the defendant No.1 in a separate comprehensive suit.** The plaintiff crave leave of this Hon’ble Court to that extent.”

18. The defendants filed written statement denying the plaint averments. The main defence of the defendants is that the suit for injunction simpliciter is liable to be dismissed, in view of the provisions of Section 41(h) of the Specific Relief Act, since the plaintiff is having more efficacious remedy. It was also contended that the said agreement of sale is improperly stamped, the suit is barred by Order 2 Rule-2 CPC, that the 1st defendant alone is not competent to enter into the agreement of sale, that the said agreement of sale is fabricated and forged and hence the suit be dismissed.

19. In support of the plaintiff case, PWs 1 and 2 were examined. They spoke about the facts mentioned above. PW 2 is said to be a person who has witnessed the interference made by the defendants on 25.06.2008. Both the witnesses were cross-examined and what is suggested to the plaintiff-PW 1 is that the defendants never came to the suit schedule property on 25.06.2008, that they did not interfere with the possession of the plaintiff and that therefore, no police complaint was made by PW 1. The other aspects spoken to by the plaintiff's witnesses were not seriously challenged by way of cross-examination, excepting for making suggestions which cannot be taken as negating the case of the plaintiff, as spoken to by PWs 1 and 2 or supporting the case of the defendants, more particularly, in view of the fact that in order to substantiate the suggestions made to PWs 1 and 2, the defendants did not enter into the witness box. Absolutely, no oral or documentary evidence is produced by the defendants, even though opportunity was afforded to them. On the other hand, on 19.07.2010 a memo was filed in the trial court on behalf of the defendants stating that they do not intend

to adduce any oral or documentary evidence. On behalf of the plaintiff, not only oral evidence, but Exs.A1 to A.13 are also produced which clearly show that it is the plaintiff who had been in possession of the schedule property from or about 1965, since the Ex.A1 agreement of sale, dated 03.06.1992, clearly acknowledges that the plaintiff is in possession of the suit schedule property for 25 years prior thereto.

20. The learned trial Court without adverting to any of these aspects has dismissed the suit on the ground that the plaintiff has not availed the more efficacious remedy of seeking specific performance of contract and filed the suit for injunction only, instead of filing a comprehensive suit for specific performance of enforcement of the alleged agreement of sale dated 03.06.1992. This finding of the learned trial Court is seriously challenged.

21. It is no doubt true that the trial court has relied upon the decisions of this court in *Chellingi Narayanamurthy S/o. China Venkanna Vs. Chillingi Satyanarayana and Ors.*¹, *K. Venkata Rao and Ors. Vs. Sunkara Venkata Rao*² and in *Mohd. Jahangir Vs. Mallikharjuna Co-op. Housing Society Ltd. rep. by its Secretary, G. Sambasiva Rao*³ which clearly say that a bare suit for injunction is not maintainable when the plaintiff has not sought for the relief of specific performance of agreement of sale, and that a person in possession of the property can protect his possession as a shield but not as a sword under Section 53-A of the Transfer of Property Act.

¹ 2009(4) ALT 379

² 1998 (6) ALD 278

³ 1991 (1) ALT 575

22. The above principle is the general rule to be followed, but in exceptional cases and in a given set of facts, the court cannot deny the relief of injunction simpliciter to the person in possession of the property, which is the subject matter of the agreement of sale. The facts of each case have to be carefully perused. In the instant case, it is not as though that the plaintiff was put in possession of the schedule property in pursuance to the agreement of sale. As a matter of fact, the plaintiff had been in possession of the schedule property which is the subject matter of the agreement of sale for about 25 years prior thereto. The plaintiff has also filed a suit on the file of the IV Additional Judge, City Civil Court, Hyderabad claiming title over the schedule property by virtue of adverse possession, and that suit was pending in between the plaintiff and the 1st defendant. When the said suit was pending, Ex.A1 agreement of sale came to be entered into with clear and categorical recitals that the said agreement of sale is subject to the result of the suit filed by the plaintiff and that result of that suit will validate or invalidate the agreement of sale. Therefore, the plaintiff cannot be said to be a person having come in possession of the property by virtue of the agreement of sale. His possession over the schedule property is thereon from 1965 onwards and if his possession is interfered with by the executants of the agreement of sale, viz., the owners of the property, there can be an injunction restraining them and the person in possession is entitled to protection till he is evicted in due process of law.

23. The possession of the plaintiff over the schedule property dates back to 1965 when the ancestors of the defendants were alive. The disputes over the schedule property and the neighbouring land went on till

about 2004 when the Supreme Court decided that the Endowments Department have no right over the schedule property and the ancestors of the defendants have succeeded thereto.

24. When Ex.A1 agreement of sale was entered into on 03.06.1992, the litigation over the schedule property was pending in the Courts. The Supreme Court has decided the matter on 25.11.2004 in *Commissioner of Endowments v. Vittal Rao* {reported in AIR 2005 SC 454}. That litigation was effectively contested by the 1st defendant herein and the Endowments Department. Till that litigation was pending and the title of the defendants was not established, there could not be any sale transaction in respect of the schedule property. Therefore, according to the plaintiff, the suit for specific performance has not been filed, since the 1st defendant had assured the plaintiff that the sale deed will be executed once the dispute with the Endowments Department is settled.

25. The cause of action to file the present suit is neither the agreement of sale-Ex.A1 nor the date of its execution, i.e. 03.06.1992. The specific case of the plaintiff is that on 25.06.2008 the defendants tried to interfere with the possession of the plaintiff and hence the suit. The plaint also refers to the litigation pending and also at para-III(d) of the plaint, the plaintiff has specifically averred that "*the plaintiff reserves his right to seek relief of specific performance against the defendant No.1 in a separate comprehensive suit*", and that the plaintiff crave leave of the court to that extent.

26. On the question as to whether there can be an injunction by an agreement holder against a true owner, there are catena of judgments by different high courts, including this court. However, the Supreme

Court in the following decisions held that in a given set of circumstances and facts of the case, there can be an injunction against true owner, who cannot be allowed to take the law into his hands to evict a person who was in possession of the property by virtue of an agreement of sale.

27. In *Gunwantbhai Mulchand Shah v Anton Elis Farel*⁴ at para-9 the Supreme Court held as under:

“9. It is seen that the suit was dismissed by the trial court on the finding that the claim for the relief of specific performance was barred by limitation. The plaint contains not only a prayer for specific performance but also a prayer for perpetual injunction restraining the defendants from interfering with the possession of the plaintiffs and from creating any documents or entering into any transaction in respect of the suit property. Of course, the latter part of that prayer is directly linked to the claim for specific performance, but the suit as regards the prayer for perpetual injunction to protect the possession of the plaintiff over the suit property on the claim that the predecessor of the plaintiffs was put in possession of the property pursuant to the agreement for sale, on a subsequent date, could not have been held to be not maintainable on any ground. Of course, the grant of the relief of injunction in a sense is discretionary and the court ultimately might or might not have granted the relief to the plaintiffs. The defendants could have also shown that the relief of injunction claimed is merely consequential to the relief of specific performance and was not an independent relief. But that is different from saying that the suit could be dismissed merely on a finding that the prayer for specific performance of the agreement was barred by limitation. In any event, therefore, the dismissal of the suit as a whole as not maintainable, could not be justified or said to be correct.”

28. In *Ramesh chand Ardawatiya v. Anil Panjwani*⁵ at paras-34 and 36 the Supreme Court held as under:

“34. A contract for sale does not confer title in immovable property. Section [54](#) of the Transfer of Property Act provides that a contract for the

⁴ (2006) 3 SCC 634

⁵ (2003) 7 SCC 350

sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties; it does not of itself, create any interest in or charge on such immovable property. However still, **if a person has entered into possession over immovable property under a contract for sale and is in peaceful and settled possession of the property with the consent of the person in whom the title vests, he is entitled to protect his possession against the whole world, excepting a person having a title better than what he or his vendor possesses.** If he is in possession of the property in part performance of contract for sale and the requirements of Section [53A](#) of the Transfer of Property Act are satisfied, he may protect his possession even against the true owner.”

“36. So, the person in possession may not have title to the property yet if he has been inducted into possession by the rightful owner and is in peaceful and settled possession of such property he is entitled in law to protect the possession until dispossessed by due process of law by a person having a title better than what he has. **A person in possession of the property cannot be forcibly dispossessed by another rank trespasser and even if the latter does so, the former may be entitled to restoration of possession, because the law respects peaceful possession and frowns upon the person who takes the law in his own hands.**”

29. In *Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi*⁶ the Supreme Court held as under:

“Section [6](#) of the Specific Relief Act, 1963, provides for any person dispossessed without his consent of immovable property otherwise than in due course of law being entitled to claim and successfully sue for recovery of possession thereof, notwithstanding any other title that may be set up in such suit if the suit is brought before the expiry of six months from the date of dispossession except against the Government. Article 64 of Limitation Act 1963 contemplates a suit for possession of immovable property based on previous possession, and not on title, being brought within twelve years from the date of dispossession. Such a suit is

⁶ (2002) 3 SCC 676

known in law as a suit based on possessory title as distinguished from proprietary title.”

30. In *Ramdaan v. Urban Improvement Trust*⁷ at paras-13, 14, 17 the Supreme Court held as under:

“13. We have carefully scanned through the written statement. There is no assertion that the Respondent is the real owner of the property though it is very boldly submitted before us that the State of Rajasthan is the owner of the property. However, the Respondent is not the State of Rajasthan. What exactly is the legal character of the Respondent is not known? Assuming that the State of Rajasthan is the real owner of the property in question, whether the Respondent is legally authorized by the State of Rajasthan to recover possession of the suit scheduled property is not clear from the record.

14. Assuming for the sake of argument that the Respondent has some authority to evict the Appellant, the eviction must be by a process known to law, i.e., either by filing a suit to evict the Appellant or by resorting to some other procedure duly authorized by law. In this regard, learned Counsel for the Respondent placed reliance on Section [91](#) of the Rajasthan Land Revenue Act which, no doubt, authorises the summary eviction of encroachers of the government property by following the procedure prescribed therein. However, from the written statement it does not appear that the Respondent² took any steps contemplated Under Section [91](#) of the said Act. It appears that the Respondent is under the belief that once Section [91](#) was invoked (in 1965), such an invocation for evicting the Appellant summarily can eternally be relied upon by anybody for evicting the Appellant.

17. In the light of the above principle of law laid down by this Court and in view of the fact that there is no clear pleading in the case on hand as to who is the real owner of the suit schedule property and absence of any assertion that the Respondent is the owner of the property, we are of the opinion that the Appellant is entitled for an injunction, as prayed, subject, of course, to the right of the true owner of the property (whoever it is) to evict the Appellant in accordance with law.”

⁷ (2014) 8 SCC 902

31. Applying the principles enunciated by the Supreme Court, it can be said that a person who is in possession of the property long prior to the agreement of sale can sustain a suit for injunction simpliciter restraining the owner of the property from interfering with his possession, without following due process of law. If a person claims to have come in possession of the property only in pursuance of and subsequent to the agreement of sale, his right of possession is depending upon the agreement of sale, but that is not the case on hand. The facts of each case have to be carefully analyzed.

32. In the instant case, even at the cost of repetition, it may be stated that the fact that is proved is that the plaintiff had been in possession of the schedule property admeasuring 675 square yards from 1965 by erecting sheds and doing business. On 03.06.1992 an agreement of sale was entered into between the plaintiff and the 1st defendant which acknowledges the possession of the plaintiff. The plaintiff had been claiming the title over the schedule property by virtue of adverse possession and when that litigation was pending, the agreement was entered into with specific clauses, referred to above. The parties could not have to perform the covenants of contract in view of the litigation pending in between the 1st defendant and the Endowments Department and also the plaintiff and the matter went up to the Supreme Court on as many as three occasions. If the possession of a person such as the plaintiff is tried to be interfered with or an attempt is made to dispossess him, the court has to come to rescue and protect his possession and the defendants if entitled to as owners are at liberty to avail appropriate legal remedies if they intend to take back the schedule property from the

possession of the plaintiff, but they cannot be allowed to take the law into their hands by interfering with the long possession of the plaintiff which in fact dates back to 1965.

33. With regard to other objection that the suit is not maintainable in view of the provisions of Order 2 Rule-2 CPC, I am to state that the same is ill-founded. Order 2 Rule-2 CPC reads as under:

“2. Suit to include the whole claim.- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

34. The plain reading of the above provisions shows that if a plaintiff omits to sue or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished, except with the leave of the Court to sue for all such reliefs so omitted.

35. In the instant case, the present suit cannot be said to be barred in view of Order 2 Rule-2 CPC, as has been held by the court below. If the plaintiff filed the suit without claiming specific performance to which he is entitled to on the date when the suit is filed, his subsequent suit may be hit by the provisions of Order 2 Rule-2 CPC, but not the present suit.

That apart, in the present suit, the plaintiff, as referred to supra, has clearly mentioned in the plaint that he reserves his right to seek relief of specific performance against the defendant No.1 in a separate comprehensive suit. Therefore, I am of the opinion that the learned trial court has erred in holding that the present suit is not maintainable in view of the provisions of Order 2 Rule -2 C.P.C.

36. The cumulative effect of the foregoing discussion is that the plaintiff has established his case by adducing oral and documentary evidence that he had been in possession of the schedule property from 1965. As against the oral and documentary evidence, adduced by the plaintiff, the defendants have not adduced any iota of evidence to rebut the claim of the plaintiff or prove their case as set out in their written statement. The learned trial court has not appreciated the legal aspects in right perspective and erroneously without going into the main controversy, dismissed the suit. Therefore, the said judgment cannot be sustained and the same is liable to be set aside.

37. In the result, the appeal is allowed, the impugned judgment of the trial court is set aside. The suit filed by the plaintiff is decreed and there shall be injunction restraining the defendants from interfering with the plaintiff's possession over the schedule property till he is evicted in due process of law. No order as to costs.

Pending miscellaneous applications, if any, shall stand closed in consequence.

M.S.K.JAI SWAL,J

Date: 03.03.2017
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