

THE HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

C.M.A No.513 of 2016

and

C.R.P.No.1810 of 2016

COMMON ORDER :

The newly impleaded defendants 5 and 6 in O.S.No.506 of 2010 on the file of the learned III Additional District Judge, Ranga Reddy district, at L.B.Nagar, preferred these two cases impugning the separate orders, dt.26.10.2015 in I.A.Nos.102 and 103 of 2015.

2. Heard the learned counsel for the petitioners/ D.5 and D.6 and also the learned counsel for the 3rd defendant-1st respondent apart from taken as heard of those served failed to attend and perused the material on record.

3. The suit supra was filed by the 2nd respondent to the revision as sole plaintiff. The 1st respondent to the present two cases CMA and CRP is the 3rd defendant in the suit. The respondents 3 to 5 in both the cases, being the brothers of D.3, are the other defendants D.1, D.2 and D.4.

4. It is pending the suit of sole plaintiff filed against the four defendants for the reliefs of declaration of title with permanent prohibitory injunction, the D.3 filed two applications viz; I.A.Nos.102 of 2015 and 103 of 2015 of which I.A.No.103 of 2015 is to implead the petitioners herein as D.5 and D.6 and the other I.A.No.102 of 2015 to grant interim injunction against the proposed defendants 5 and 6 by restraining them from alienating the plaint schedule property in any manner as vendees from the plaintiff, since the mother of the D.1 to D.4 was the agreement holder of the self-same property; leave about another G.P.A. executed in favour of Sri K.Samba Siva Rao by the plaintiff's vendor, though said G.P.A. ceased its force, from the death of K.Samba Siva Rao, and leave about the subsequent alleged cancellation

is of no consequences from its ceasing apart from the fact that pursuant to the sale agreement, they already filed a suit for specific performance of contract for the same as legal representatives of their late mother as plaintiffs in O.S.No.308 of 2016 which is pending on the file of the self-same III Addl.District Judge, Panga Reddy, L.B.Nagar. Needless for purpose of the CMA and CRP to go into the merits of that specific performance suit on the genuineness and enforceability of said agreement and any entitlement of reliefs therein but for only concerned with whether the defendants can seek the relief of injunction for not to alienate and not to construct by the D.5 and D.6 by impleadment of them as such co-defendants to the suit of the plaintiff on the application of the D.3 as petitioner.

5. Coming to the sustainability of the order impleading them as D.5 and D.6, since impugned in the revision, leave about who filed the application, from the perusal of the Order I Rule (10)(2) of CPC, the Court also got power even *suo-moto* to implead any party who is not a party to the suit as a co-defendant apart from the other provisions of transposition under the CPC. Here once the trial Court exercised the discretion that too when there is an agreement executed for which specific performance suit was filed by the Defendants 1 to 4 herein against the plaintiff herein, though by the time of passing the impugned orders by the lower Court dt. 26.10.2016, the suit for specific performance was not filed as on today it is when pending and even the revision petitioners D.5 and D.6 herein are also co-defendants therein, there is nothing to interfere with their impleadment in this suit as defendant Nos.5 and 6. Thus the revision petition against such impleadment order is liable to be dismissed.

6. Coming to the relief of granting of injunction on the application of D.3 to the suit against D.5 and D.6(newly added) of the suit, the Single Judge expression of Javvaji Sambamurthy Vs. Cherukumalli Srinivasa Rao¹ referring to Order XXXIX Rule 1 CPC says even without counter claim to the extent of not to alienate or damage or cause acts of waste or to prevent wrongful sale by auction even a defendant to a suit can seek injunction and not otherwise. For more clarity, Order XXXIX Rule(1) CPC reads:-

1. Cases in which temporary injunction may be granted.-

Where in any Suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may by Order grant a temporary injunction to restrain such act, or make such other Order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the court thinks fit, until the disposal of the suit or until further orders.

Thereby and from the above, even a defendant can seek against alienation or damage or wastage of the property or for wrongful sale by auction of the property without even a counter claim, for a temporary injunction.

7. Now the moot question to answer in the C.M.A.No.513 of 2016 from the above concerned is whether the direction of the Court on the application of the D.3 in I.A.No.103 of 2015 besides not to alienate in granting injunction not to construct is within the purview of (a) or Order 39 Rule 1. In the wording of the Order 39 Rule 1(a), there is nothing of

¹ (1987) 2 ALT 630

specific wording of not to construct. What is the further wording against the alienation is wasting and damaging. Whether any construction tantamounts is waste or damage is the issue.

8. As per the submission of the learned counsel for the appellant in the absence of any wording, construction cannot be considered as waste or damage, whereas it is the submission of the learned counsel for the R.1-D.3 that it is a waste and damage. In this regard, the expression of the Apex Court in *Maharwal Khewaji Trust(Regd) Vs. Baldev Dass*² confining to the facts says undertaking given in permitting to construct could not have been allowed by the High Court.

9. Now thereby, it is necessary to reproduce from the expression of the Apex Court in *Maharwal Khewaji Trust supra* particularly paras-3 to 11, which read as follows:-

“3. The appellant had filed Civil Suit No.541 of 2000 for possession of the suit scheduled property with an application under Order 39 Rules 1 and 2 CPC, seeking injunction restraining the respondent herein from alienating the suit property and putting up any construction thereon. The trial court on the interim application filed by the appellant granted an order of temporary injunction, as prayed for.

4. The appeal filed by the respondent herein before the learned District Judge came to be allowed holding that alienation made, if any, will be subject to the law of *lis pendens* and constructions, if any, put by the respondent will have to be removed at his own risk and cost in the event of the suit being decreed.

5. A revision filed against the said order to the High Court came to be dismissed by the impugned order wherein the High Court recorded an oral undertaking given by the learned counsel which is as follows :

"Learned counsel for the respondent, on instruction from Rajinder Dass son of Baldev Dass, on the other hand, has stated that the respondent has no

² (2004) 8 SCC 488

intention of alienating any part of the property and further that the defendant shall raise construction if any at his own risk costs without claiming any compensation. It is further stated that if the defendant inducts any tenant in any such premises so constructed, the person inducted would be made aware of the pendency of the litigation and would be bound by the judgment and decree passed in the suit."

6. It is in view of the above statement made by the learned counsel for the respondent that the High Court without considering the grounds raised in the revision petition proceeded to dismiss the petition.

7. Mr. R.S. Sachhar, learned senior counsel appearing for the appellant, contended that generally during the pendency of litigation courts protect the status quo existing on the date of the suit and it is only in exceptional circumstances where irreparable damage is feared, the courts permit change of status quo. His further contention was that in the present case no such case is made out by the respondent and the trial court was justified in protecting the status quo as on the date of the suit.

8. Mr. A.V. Palli, learned counsel for the respondent, contended that both the lower appellate court and the High Court were justified in making the impugned order because the appellant has not established any prima facie case and if the suit property is to be allowed to remain in the present condition, the respondent will be put to great hardship and an irreparable loss.

9. While it is true that the lower appellate court did go into the question of prima facie case and held that the appellant had not made out any such case, the High Court did not go into that question at all.

10. Be that as it may, Mr. Sachhar is right in contending that unless and until a case of irreparable loss or damage is made out by a party to the suit, the court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings. In the instant case no such case of irreparable loss is made out except contending that the legal proceedings are likely to take a long time, therefore, the respondent should be permitted to put the scheduled property to better use. We do not think in the facts and

circumstances of this case, the lower appellate court and the High Court were justified in permitting the respondent to change the nature of property by putting up construction as also by permitting the alienation of the property, whatever may be the condition on which the same is done. In the event of the appellant's claim being found baseless ultimately, it is always open to the respondent to claim damages or, in an appropriate case, the court may itself award damages for the loss suffered, if any, in this regard. Since the facts of this case do not make out any extraordinary ground for permitting the respondent to put up construction and alienate the same, we think both the courts below, namely, the lower appellate court and the High Court erred in making the impugned orders. The said orders are set aside and the order of the trial court is restored.

11. The appeal is allowed.”

10. The issue before the Apex Court therein against the concurrent findings of the trial Court and the High Court in permitting construction on recording the undertaking of construction at the risk of the party is silent as to plaintiff was the injunction petitioner or defendant was the injunction petitioner. What the Apex Court in the particular facts with reference to the contention having reproduced the dismissal revision order of the High Court from paras-5 and 6 by reproducing the rival contentions in paras-7 and 8 supra particularly at para-9 supra is that the lower appellate Court(High Court) did not go into the questions of prima facie case and held that appellant had not made out any such case but the High Court did not go into that questions at all. In fact it is therefrom in para-10 having reproduced the contention of the learned counsel for the appellant-unsuccessful party before the Courts below that unless and until of case of irreparable loss or damage is made out by a party to the suit, the Court should not permit the nature of the property being changed which also includes alienation and transfer of the property which may lead to loss or damage and may further lead to multiplicity of the proceedings. Thereby it is

only the contention with regard to alienation or transfer may cause damage or loss. It is not discussed the construction by the party who obtained a regular sale deed.

11. Undisputedly even from the very case of the petitioner before the lower Court as D.3 to the suit, the D.5 and D.6 are the alienees by virtue of the regular sale deed. The suit for specific performance of the so called agreement in favour of the mother of the D.1 to 4 is of the year 1981 and even sought for in the year 2016 from the undisputed facts for specific performance of the same, passing of such decree is a discretionary one and for such an agreement transaction of 35years old, a decree for specific performance will be entitled or not is a hundred dollars question. Thereby, suffice to say there is no prima facie case even in favour of the D.3 to prevent the construction by the D.5 and D.6 who are the alienees by registered sale deed and that was not considered by the lower Court in granting injunction.

12. Having regard to the above, from such granting of temporary injunction without making out any of the three pre-requisites of prima facie case, balance of convenience and irreparable loss and without considering balance of convenience and irreparable injury to be caused to the D.5 and D.6 who are the alienees no way sustains.

13. In view of the above discussion and in the result,

i) The Civil Miscellaneous Appeal is allowed. The injunction order is vacated. The defendants 5 and 6 are at liberty to proceed with construction subject to undertaking of they cannot claim any equities in the event of ultimately succeeding in the suit for specific performance by the plaintiff therein, who is the R.2 herein.

ii) The Revision is dismissed.

iii) Consequently, the miscellaneous petitions, if any, pending in these two cases shall stand closed.

Date:31.10.2017
Vvr

Dr. B.SIVA SANKARA RAO J,

