

Civil Revision No.393 of 2017 (O&M)

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Sr. No.107

**Civil Revision No.393 of 2017 (O&M)
DECIDED ON: April 19, 2017**

SUNIL KUMAR

..PETITIONER

VERSUS

DEVENDER KUMAR AND OTHERS

...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE JASPAL SINGH

Present: Mr. Rakesh Nehra, Advocate,
for the petitioner.

JASPAL SINGH, J.

CM No.971-CII of 2017

Application is allowed as prayed for.

CR No.393 of 2017

By virtue of the instant revision petition preferred under Article 227 of the Constitution of India, petitioner has sought the setting aside of order dated November 10, 2016 passed by the learned Additional District

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Judge, Jhajjar as well as order dated September 25, 2015 passed by the learned Civil Judge (Jr. Divn.) Bahadurgarh vide which an application filed by the petitioner under Order XXXIX Rule 1 & 2 read with Section 151 CPC has been dismissed.

2. Briefly stated the facts giving rise to the instant petition are that the petitioner/plaintiff had filed a suit for declaration and permanent injunction against the present respondents/defendants alleging that he was tenant under respondent/defendant No.1 in the shop in question since July, 2004 and on ultimatum given by the respondent-defendant No.1 either to purchase the shop or vacate the same, the petitioner/plaintiff and respondent/defendant No.1 entered into an agreement to sell on January 27, 2009 regarding the shop in question and an amount of Rs.10 lacs was given as an earnest money out of total sale consideration of Rs.20 lacs. The sale deed was to be executed on or before April 27, 2010 but the respondent/defendant No.1 went abroad and therefore, the time of execution of sale deed was extended from April 28, 2010 to October 28, 2010. The sale deed No.55156 was got executed and registered in terms of the aforesaid agreement on October 20, 2010 and since then the petitioner is owner in possession of a shop measuring 43 Sq. Yds. Mutation No.24503 has also been incorporated and sanctioned on March 21, 2011 in the name of the petitioner/plaintiff and thus he became absolute owner in possession of the property in dispute.

3. It has further been alleged by the petitioner/plaintiff that respondent No.1 fraudulently mortgaged the property in question through equitable mortgage in favour of respondent No.2 i.e. Allahabad Bank in the

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month of June, 2009 approximately after six months of entering into the agreement to sell with him and without disclosing the factum of mortgage to the petitioner/plaintiff, the sale deed was executed and registered by him in his favour with a specific undertaking to the effect that land is free from all kind of encumbrances. It was only in the year 2012 when the respondent No.2 i.e. Allahabad Bank auctioned the property in dispute in connivance with respondent No.1 for the realization of the amount outstanding against respondent No.1. In fact, the petitioner is in continuous possession of the suit property i.e. shop since July 2004 without any interruption of any kind. An application moved under Order XXXIX Rule 1 & 2 read with Section 151 CPC seeking ad interim injunction during the pendency of the suit restraining the defendants from interfering into his peaceful possession over the disputed property and dispossessing the same, on the basis of alleged auction proceeding/sale and also from alienating the suit property in any manner till the final decision of the suit has been dismissed by the lower court without considering the fact that petitioner is in possession of the suit property since July 2004 as tenant and subsequently on the basis of sale deed No.55156 dated October 20, 2010 he has become an absolute owner of the disputed property. He is a bona fide purchaser for valuable consideration whereas the respondents are no concern, right, title or interest over the same in any manner. All these facts have been ignored by the learned lower court while dismissing the application vide order dated September 25, 2015.

4. Aggrieved against the aforesaid order dated September 25, 2015, petitioner/plaintiff preferred an appeal before the lower appellate

court but that was also dismissed without considering the evidence available on file vide order dated November 10, 2016.

5. The learned trial court has erred in holding that the mortgage in favour of bank by the respondent No.1 is earlier in time as it took place in the month of June, 2009 whereas, the sale deed in favour of the present petitioner/plaintiff was executed/registered on October 20, 2010. But the fact remains that the learned trial court has ignored the fact that agreement to sell in favour of the petitioner/plaintiff stands executed in the month of January, 2009 i.e. much prior to the equitable mortgage in favour of the bank/respondent No.2. Thus, the right of the petitioner/plaintiff came into existence at the time of execution of agreement to sell. Both the orders under challenge are absolutely illegal, void, unwarranted, unjust and against the principles governing the grant of injunction and the same are liable to be set aside by way of acceptance of instant petition.

6. After bestowing due consideration to the aforesaid submissions and scrutinizing the impugned orders, this court is of the considered view that submissions made by learned counsel for the petitioner do not carry any legal and factual weight. The impugned orders passed by both the courts below being absolutely in consonance with the principles governing the grant/decline of injunction do not call for any interference by this court.

7. Before proceeding to decide the matter in controversy on merits, it would be desirable to highlight the extent and scope of jurisdiction of the lower appellate court or the revisional court to interfere with the order passed by the trial court in exercise of its discretion under Order XXXIX Rules 1 & 2 CPC. The extent and scope of jurisdiction was discussed at

length by the Rajasthan High Court in Vimla Devi Vs. Jang Bahadur, AIR 1977 Rajasthan 196 wherein the legal proposition was summed up in the following words:-

“The order refusing temporary injunction of a discretionary character. Ordinarily Court of appeal will not interfere with the exercise of discretion by the trial Court and substitute for it its own discretion. The interference with the discretionary order, however, may be justified if the lower Court acts arbitrarily or perversely, capriciously or in disregard of sound legal principles or without considering all the relevant records. The mere possibility of the Appellate Court coming to a different conclusion on the same facts and evidence will also not justify interference.”

8. Similar has been expressed by this Court in Krishan Kumar v. The State of Haryana and another, 1992(1) RRR 433 (P&H) : 1992(1) Revenue Law Reporter 207, wherein this Court has observed as under:-

“A perusal of the Appellate Court’s order shows that it has not assigned any cogent reason to set aside the discretion exercised by the trial Court. The lower Appellate Court has not demonstrated as to how on admitted facts principles of law have been wrongly applied. I am, therefore, of the opinion that the lower Appellate Court was not justified in setting aside the order and interfering in the discretion exercised by the trial Court.”

9. Both the above referred judgments were further relied upon by this Court while rendering pronouncement in case Guru Nanak Education Trust v. Balbir Singh, 1995 AIR (Punjab) 290 : 1995(3) R.R.R. 721.

10. Now, in the light of the aforesaid limited jurisdiction, it is to be seen whether the impugned order and judgment being arbitrary, perverse, capricious or in disregard of sound legal principles or without considering all the relevant records, deserve any interference by this Court?

11. As per the claim of the petitioner/plaintiff, respondent No.1 has entered into an agreement to sell the shop in question with him on January 27, 2009 and a sum of Rs.10 lacs was paid out of total sale consideration of Rs.20 lacs. The sale deed was to be executed and registered on or before April 27, 2010. However, the period stipulated in the agreement to sell for the execution and registration of the sale deed was extended with the consent of the parties till October 28, 2010 but the sale deed was executed and registered in terms of the aforesaid agreement to sell on October 20, 2010 on payment of the balance sale consideration. But prior to the execution of sale deed dated October 20, 2010, respondent No.1 executed the equitable mortgage with respondent No.2-Allahabad Bank in consideration of financial assistance obtained by him from the bank to the tune of Rs.15 lacs and executed the equitable mortgage deed in the month of June 2009. At the time of the property in question was equitable mortgaged with the bank/respondent No.2, the respondent No.1 was the owner. Moreover, it is well settled proposition of law that an agreement to sell does not confer any right, title or interest. As far as the possession of property in suit is concerned though it has been alleged by the petitioner/plaintiff that he is in possession thereof since July 2004 as tenant but to the utter surprise there is nothing on record even prima facie to establish this aspect. Since the suit property was already encumbered by way of mortgage deed with the

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bank, as such, the respondent No.2-bank has prior right over the suit property regarding which auction has already taken place on account of non-payment of the loan amount. The mere fact that there is a recital in the sale deed that property in dispute is encumbered does not ipso facto mean that the right of the Bank has extinguished. Thus, this court is of the considered view that both the courts below have exercised their discretion judiciously while dealing with an application under Order XXXIX Rule 1 & 2 read with Section 151 CPC as well as an appeal in a judicious manner and the impugned orders do not call for any interference by this Court.

12. In the light of what has been discussed above, this court does not find any merit in the instant petition and same is dismissed, whereby the impugned orders passed by both the courts below are upheld.

13. No order as to costs.

April 19, 2017
Ankur

(JASPAL SINGH)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No