

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1921 of 2018

Afshan Rahman D/o of Late Kalimur Rahman, Resident of Mohalla - Dr. Wazir Ali Road, Police Station - Kotwali, Town and District - Gaya at present resident of L-302, Jai Puria Society Indra Puram, Ghaziabad U.P

... .. Petitioner/s

Versus

1. Md. Ehtesham Son of Late Abul Lateef, Resident of Mohalla - Aliganj, Police Station - Chandauti, Town and District - Gaya at present residing at Mohalla - Dr. Wazir Ali Road, Police Station - Kotwali, Town and District - Gaya.
2. Haider Imam, Son of Ashique Imam, Resident of Village -Belhari, Post Office - Belhari, Police Station - Belaganj, District - Gaya at present Fashion Shoe, Nar Agrawal Store, G.B. Road, Gaya, Police Station - Kotwali, District - Gaya
3. Anwar Imam, Son of Ashique Imam, Resident of Village -Belhari, Post Office - Belhari, Police Station - Belaganj, District - Gaya at present Fashion Shoe, Nar Agrawal Store, G.B. Road, Gaya, Police Station - Kotwali, District - Gaya
4. Naila Sumbule Wife of Syed Mohammad Shqrique Alam, Resident of Mohalla - Chuna Gali, Rai Baijnath Singh Lane, Police Station - Kotwali, Town and District - Gaya.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. J. S. Arora, Sr. Advocate Mr. Surendra Kumar Singh, Advocate
For the Respondent/s	:	Mr. Najeeb Ahmad, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date : 11-07-2024

The present Civil Miscellaneous petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 31.08.2018 passed by learned District Judge, Gaya in Miscellaneous Appeal No. 03 of 2018 and order dated 03.11.2017, passed by learned Subordinate Judge-VIII, Gaya in Title Suit No. 80 of 2017/754 of 201, affirming the injunction



granted to the plaintiff/respondent no. 1 by the learned trial court.

2. Briefly stated, the facts of the case, as it emerges from the record, are that the respondent no. 1 as plaintiff purchased of a portion of multi storied building through registered sale deed dated 26.05.2006 to the extent of 992.80 sq. feet up to the height of 14 feet from the then ground level of the road for valuable consideration, being part of Municipal Holding No. 49/52, standing on old Municipal Survey Plot No. 12136 corresponding to RMS Plot No. 536 under RMS Khata No. 154 situated at Dr. Wazir Ali Road, Wad No. 3/10/11, P.S. Kotwali, District – Gaya. The aforesaid property has built up area of 579.80 sq. feet and open land measuring 413 sq. feet having dimension of 7 ft width from north to south in east and west each, East to West in north and south each 59 feet. On the said land vendor has constructed shops at the extreme southern side of her land which is single storied RCC roof structure and height of the roof is 11 feet from the plinth of the market complex whereas the plinth was at a height 3 feet from the present level of the road. According to the sale deed the vendor sold and transferred all 992.80 sq. feet on the ground floor upto a height of 14 feet from the road level containing RCC roof



pucca structure for 579.80 sq. feet and 413 sq. feet open land together with road to commonly enjoy the passage contiguous north of the open land. The vendor has reserved a right to make any construction and erect any structure over the roof of the built up area with condition that vendee shall not make any objection in such construction. The vendee has further agreed that whenever he would make construction over the open land the height of the roof shall not exceed 11 feet from the ground level of the market complex and that the roof of the construction to be made over the open land shall be at the level of roof of the existing built up area. It has also been agreed between the parties that the vendee as absolute owner shall enjoy all peaceful occupation and shall be at liberty to make any alteration addition in the built up area according to his own choice and necessity. The vendor has further agreed that the vendee shall be at liberty to get ground floor mutated in his name after splitting of the holding. However, the vendor has reserved her right to make any construction & erect any structure over the roof of the built up area and the vendee agreed not to make any objection in such construction. The vendee has also agreed that whenever he would make construction over the open land, the height of the roof shall not exceed eleven feet from the ground level of the



market complex and that the roof of the construction to be made over the open land shall be in the level of the roof of the built up area existing. Later on, the plaintiff/respondent no. 1 filed Title Suit No. 80 of 2017/754 of 2017 contending that he has purchased the portion of 413 sq. feet on which he has made constructions and there should not be any further construction above that construction. Further, the construction of the 1st floor and 2nd floor made above that construction and sale of those premises by the defendant no.1/petitioner are illegal and unlawful and those sale deeds are void. The plaintiff further contended that there should not be any construction on the said built up premises and he has a right to keep the said shop free from any construction above his own. The plaintiff sought following reliefs in his plaint:-

“(i) For declaration that the defendant no. 1 had no right to make any construction over the roof of the plaintiff’s ground floor constructed on 413 Sq. ft. open land described in Schedule – I of the plaint.

(ii) For declaration that the construction made by the defendant



no. 1 over Schedule – I property as first floor and second floor is illegal and without any right that the registered sale deed no. 2649 dated 23.03.2009 executed by the defendant no. 1 in favour of the defendant no. 2 and 3 with respect of the said suit property being first floor and the registered sale deed no. 19959 dated 28.10.2018 (registered on 29.10.2013) executed by the defendant no. 1 in favour of the defendant no. 4 with respect to the said second floor being suit property are void ab-initio documents conferring no title on the said vendees and not binding on the plaintiff.

(iii) A decree of mandatory injunction directing the defendants to demolish the suit property described in Schedule – II of the plaint.

(iv) Plaintiff also prayed for



*permanent injunction against the
defendants from any further
construction over the suit property
and from alienating any floor over the
Schedule – I property etc.”*

During pendency of the suit, a petition for temporary injunction was filed by the plaintiff/respondent no. 1 for restraining the defendants from causing any interference in free access of the plaintiff, his staff and his A.C. mechanic to the roof of the second floor through the staircase of the market complex for the purpose of checking and repairing of the compressor machines of A.C. kept on the roof of the second floor directing the defendant no. 2 and 3 to handover a key of the lock of the gate of staircase of the ground floor to the plaintiff and from causing any damage to the three compressor machines of the plaintiff kept on the roof of the second floor and from making any further construction on the roof of the second floor over the Schedule-I property of the plaintiff and from transferring any portion of the first floor and second floor and roof of the second floor over the Schedule-I property of the plaintiff till disposal of the suit.

3. The learned trial court, vide order dated 03.11.2017,



while holding that it was not a fit case for grant of interim injunction without hearing the defendants to the suit and accordingly passed orders for issuance of notice but at the same time also ordered that no part of the property purchased by the plaintiff or over that part or further floors would be sold. It further ordered that physical feature of the plot purchased by the plaintiff over the same first floor or second floor or further floors should not be changed by any of the parties and it further passed the orders that there would be complete status quo including removal or fixation of compressor of A.C. on the roof of the second floor. This order was passed without going into the merits and purely on equitable ground as declared by the learned trial court. Thereafter, notices were issued to the defendants and defendant nos. 2 and 3 appeared but defendant nos. 1 and 4 did not appear. Thereafter, learned trial court passed final orders on injunction petition on 03.11.2017 in following terms:-

“(i) All the parties to the suit are directed to maintain status quo.

(ii) Defendants shall not cause any interference in the access of the petitioner-plaintiff or/and his staffs



from going to the roof of 2nd floor through the staircase of the market complex for the purpose of checking and repairing of compressor kept on the roof of the 2nd floor and no interference in free access of the petitioner-plaintiff or his staffs or his mechanics in repairing and maintenance of the AC compressors kept on the roof of 2nd floor, be caused in any manner whatsoever.

(iii) No construction hereafter shall be made on the roof of 2nd floor, over the Schedule-I, property in the plaint.

(iv) The defendant No. 2, 3 and 4 shall not transfer any part of their purchased portion of 1st and 2nd floor by sale or create any charge or encumbrance on it or mortgage it (the restriction is only with respect to the portion which is over Schedule-I property in the plaint).



(v) No portion above the Schedule-I property in the plaint shall be transferred by sale over the roof of 2nd floor or agreement to sale shall be entered into by the defendant No. 1.

(vi) The above direction, injunction, restriction [from sub para (i) to (v), of this para] shall remain till the disposal of the suit.”

The defendant no. 1 coming to know about the said order preferred appeal against the injunction order vide Misc. Appeal No. 03 of 2018 in the court of learned District Judge, Gaya who, vide order dated 31.08.2018, upheld and affirmed the order of injunction passed by the learned Subordinate Judge and dismissed the appeal. Against this order, the defendant no.1/petitioner has approached this Court.

4. Mr. J. S. Arora, learned senior counsel appearing on behalf of defendant no.1/petitioner assailed the impugned orders on a number of ground. He submitted that the order of dismissal of Misc. Appeal is illegal and against the provisions and principles of Order 39 Rule 1 and 2 and Order 43 Rule 1(r) of the Code of Civil Procedure (hereinafter as ‘the Code’).



Learned District Judge did not take into consider several aspects of law involved in this Misc. Appeal including the jurisdiction of the learned Subordinate Judge to pass the order of injunction against the case of plaintiff himself pleaded in the plaint and the plaint was filed without seeking any relief of temporary injunction. These points and questions of law remain unconsidered. Both the courts below committed jurisdictional error and has not appreciated that from the facts of the plaint as well as petition for injunction, no case whatsoever was made out for grant of interim injunction. The learned courts below further committed jurisdictional error in not appreciating the fact that in the plaint there has been no relief with regard to grant of interim injunction nor was there any valuation of the appeal or payment of court fee in that regard and for this reason the plaintiff had no right to make a prayer for grant of temporary injunction. Mr. Arora further submitted that the jurisdictional error of the courts below is apparent on the face of record that they did not appreciate the fact that the nature of injunction as has been sought by the plaintiff and which has been granted amounts to granting main relief by way of an interim order and such order is in teeth of catena of decisions of Hon'ble Supreme Court which has deprecated the tendency of granting injunction which



amounts to decreeing the suit before trial. Mr. Arora further submitted that the learned courts below did not appreciate the fact that the main relief of the suit is for declaring deeds of sale in regard to shops of the 1st floor and 2nd floor and above as void and the same has not been declared void till date, so any consequential relief in the form of temporary injunction cannot be granted. Mr. Arora further submitted that both the courts below discarded the settled law that there must be existence of all three ingredients, *prima facie* case, balance of convenience and irreparable loss, which must be present together and in absence of any one of it and even in spite of having *prima facie* case, no injunction can be granted unless there is balance of convenience or irreparable loss. Mr. Arora further submitted that the learned Subordinate Judge travelled beyond the scope of his jurisdiction and the learned District Judge also affirmed the said order without application of judicial mind in quite mechanical manner and therefore, both the orders are perverse and unsustainable in the eyes of law.

5. Mr. Arora further submitted that the plaintiff has filed the suit against the actual state of affairs and contrary to the recital of the sale deed. The contentions of the plaintiff are apparently misconceived and against the norms and practice of



sale in built up area in a multi storied building. The learned courts below completely lost sight of the fact that construction has already been made over the open area and there was no question of grant of injunction over the 2nd floor of open area as the said construction existed prior to filing of the suit and 3rd party interest have been created. Mr. Arora further submitted that the sale deed of the plaintiff has been executed on 26.05.2006 and its terms and conditions could have been challenged within three years. Further sale of 1st floor and 2nd floor have been made in the year 2009 and 2013 which was not objected and challenge to those sale deeds in the present suit is time barred as the suit has been filed after period of limitation. Since the constructions were made much earlier to the filing of the suit and no objections were raised by the plaintiff, it shows no *prima facie* was in favour of the plaintiff and similarly no balance of convenience lies in favour of the plaintiff. Mr. Arora further submitted that the mere recital of the sale deed goes on to show that what has been granted to the plaintiff was only an area of 992.80 sq. feet up to the height of 14 feet from the road and no further rights have been granted to the plaintiff and this fact has been completely missed by the learned courts below. The plaintiff also understood this fact and for this reason did not



raise any question till 2017. Now challenging the sale deeds or the act of the defendant no. 1 or her rights at the stage is not sustainable and even the suit is not maintainable on the ground of limitation. In these circumstances, granting the main relief by way of temporary injunction is simply impermissible and the impugned orders are completely perverse and show excess of jurisdiction. Thus, Mr. Arora submitted that the impugned orders be set aside and the instant petition be allowed.

6. The contention of Mr. Arora has been vehemently opposed by the learned counsel appearing on behalf of respondent no.1. Learned counsel submitted that in the sale deed two flats have been clearly demarcated. One plot having an area of 579.80 sq. feet was having a construction over it and the sale deed clearly defines the rights of the plaintiff as well as defendant no. 1 in this regard. On the other hand, in the open space having area of 413 sq. feet no right has been given to the defendant no. 1 to interfere in the peaceful possession of the plaintiff. Defendant no. 1 did not reserve any right for making any construction which was to be made by the plaintiff. Learned counsel further submitted that the learned Subordinate Judge as well as learned District Judge vide detailed orders have found the presence of *prima facie* case in favour of the plaintiff. At the



same time, it was also held that the other ingredients, like, balance of convenience and irreparable loss are also in favour of the plaintiff. Finding these three ingredients together, the learned trial court passed the impugned order which was affirmed by the Appellate Court. Learned counsel further submitted that it could not be said that main relief has been granted in the order granting temporary injunction. Learned counsel further submitted that when there is a concurrent finding of the two courts below on the point of injunction, unless there is manifest perversity, no interference could be made by this Court under Article 227 of the Constitution of India. Thus, learned counsel submitted that in view of the aforesaid facts and circumstances, it is clear that there has been no illegality and infirmity in the impugned orders and the same need to be sustained.

7. I have given my thoughtful consideration to the rival submission of the parties. The whole dispute of the parties is based on interpretation of the sale deed of the parties. Relevant extract of the sale deed reads as under:-

*“NOW THIS DEED OF ABSOLUTE
SALE WITNESSES that in lieu of
valuable consideration amounting to*



Rs.14,15,000/- (Rupees fourteen lacks fifteen thousand only) the receipt of which is hereby acknowledged by the vendor to have been received vide Two Bank Draft No. 0196681, 0196682 dated 25.05.2006 of Bank of India, Gaya Branch, the vendor does hereby sells, transfers and demises absolutely all that of 992.80 square feet land on the ground floor up to a height of 14 (fourteen) feet from road level containing single storeyed RCC roofed Pucca Structure over 579.80 Sq. ft land and 413 Sq. ft. Open land being part of Municipal Holding No. 49 Ward No. 3/10, 11 Dr. Wazir Ali Road, P.S. Kotwali Town and District Gaya standing over part of Municipal Plot No. 536 together with right to commonly enjoy passage contiguous north of the open land said above. The entire demised property has been



shown in the sketch map attached with the deed of absolute sale being its part and parcel and always to be treated as part and parcel of this deed of absolute sale wherein the built up area is shown in red colour, the open land is shown in green colour, and the passage in common between the vendor and the vendee is shown in yellow colour.

The vendor has reserved here right to make any construction & erect any structure over the roof of the built up area the vendee shall not make any objection in such construction. The vendee has agreed that whenever he would make construction over the open land the height of the roof shall not exceed eleven feet from the ground level of the market complex and that the roof of the construction to be made over the open land shall be in the level



of the roof of the built up are existing.

The vendee shall be responsible to maintain the structure on the ground floor purchased by him in such manner that no damage is caused to be construction made over the roof of the area sold to the vendee by the vendor, similarly the vendor has assured the vendee that she would not make such construction over the roof which may cause damage to the portion sold to the vendee and the vendor shall be responsible for the better up keep of the roof over the portion sold to the vendee in such manner that no water seepage or leakage is caused either in the roof or through the pipes and if there is any seepage in the roof or leakage in the down pipe then it shall be bounden obligation of the vendor to repair the same and in case it is not repaired by



the vendor then it shall be done by the vendee at the cost of the vendor. The vendor hereby agrees that the vendee as absolute owner, shall enjoy all peaceful occupation and shall be at liberty to make any alteration or addition in the built up area according to his own choice and necessity. The vendor has further agreed that the vendee shall be at liberty to get the ground floor mutated in his name after splitting of the holding. The Vendor has assured the vendee and has agreed that the space left for lawn contiguous north of the passage shall be always used as open lawn and no structure would be erected over the same anytime in future.

The vendee has been put in possession over the property demised as fully detailed above and the vendor acknowledges the exclusive right title



and interest in and possession over the property demised as absolute owner.

The vendor has assured the vendee that the property demised is free from all encumbrances and that the vendor has got good and valid saleable title and she has not entered into any contract either orally or in writing with any person with respect to the property under demise. The property under demise is neither pledged nor mortgaged nor is given in security.

IN WITNESS WHERE Of the vendor named above has put the signature on the deed after having fully understood and read the content of the deed on this the 26th day of May 2006 in presence of the witnesses.”

8. From the recital of the sale deed it is evident that though the vendor has reserved her right to make any construction and erect any construction over the roof of the built up area. With regard to the open space, the vendee has agreed



that whenever he would make construction over the open land, the height of roof shall not exceed 11 feet from the ground level of market complex and the roof of the construction be made over the open land shall be under the level of roof of the built up are existing. However, there is no specific averment with regard to further construction over the roof of the construction to be made by the plaintiff/vendee. Non-mentioning of this fact has allowed the dispute to simmer between the parties. At this stage to gather *prima facie* intention of the parties, the conduct of the parties is most significant. Admittedly, the vendor/defendant no. 1 (petitioner herein) after sale of the area of 992.80 sq. feet to the plaintiff has also sold right of 1st floor and 2nd floor over open area of 413 sq. feet of land sold to the plaintiff, to other persons, who are other defendants/respondents herein. Admittedly, there has been construction of 1st floor and 2nd floor on the ground floor constructed by the plaintiff on his plot of 413 sq. feet. No material has come up on record to show that the plaintiff raised objection at the first instance. So this acquiescence on the part of the plaintiff to the acts of defendant no. 1 to the subsequent events which took place in the year 2009 and 2013 as submitted, would make the later claim of the plaintiff for grant of temporary injunction suspect in the eyes of



law. Further, restricting the plaintiff not to raise construction over 11 feet from the ground level of the market complex and the roof of the construction to the level of roof of built up area existing when read with the rights the defendant no. 1 has reserved to make any construction and erect any structure over the roof of the built up area, *prima facie* leads to the inference that the defendant no. 1 might not have intended to surrender her rights and the plaintiff might not have acquired a clear right, title and interest upward from the roof of the ground floor on the construction made on erstwhile 413 sq. feet of open area. The inescapable conclusion is that plaintiff has not got any water tight case in his favour as claimed and there are triable issues between the parties. With the aforesaid premises the matter needs to be looked into for grant of injunction and the impugned orders would be reassessed in the said light.

9. There could be no quarrel with the fact of rights of the plaintiff on the open space till the roof for which height of 14 feet from the road and 11 feet from the level of built up area of already existing market complex. But at the same time it is also to be taken into consideration that the said built up area is a multi storied building. It is also a fact that when 1st and 2nd floor were constructed over the roof of 413 sq. feet of land,



there has been no objection by the plaintiff. This conduct would go against the interest of the plaintiff. Therefore, I am of the opinion that the learned trial court made an error with regard to *prima facie* case. I find it is strange that the learned trial court showed its surprise about defendant no. 1 reserving her right for something not in existence. Further surprise of the trial court about an open area being sold by measurement in height is also not understandable in the light of the fact the area which is the subject matter of dispute is part of a multi storied building where a market complex is in existence. The plain recital of sale deed is conspicuous by omission about further rights of the parties over and above roof area if constructed on open space of 413 sq. feet then, only a *prima facie*, although a very weak one, could be found in favour of the plaintiff. But even *prima facie* case could be only to the extent of rights granted to the plaintiff under the sale deed and in no case beyond the recital of the sale deed, i.e., till the construction to the height of 14 feet from the road and 11 feet from the ground level of the market complex. Moreover, by his conduct the plaintiff has effectively waived his rights over and above the ground floor.

10. So far as other two ingredients, the balance of convenience or irreparable loss, are concerned, I am not at all in



agreement with the view taken by the courts of either learned Subordinate Judge or the learned District Judge. 1st and 2nd floor are already built up on the roof of the plaintiff. So what balance of convenience remained in favour of the plaintiff or what further loss is going to be caused, is a moot question. If the plaintiff did not approach the court at the first instance when he felt his rights were infringed, he is estopped from raising this issue at a subsequent stage. Such claim is also hit by waiver of rights and acquiescence. Further, the plaintiff could not show what irreparable loss might occur in case injunction is not granted. The subsequent vendees are already parties and whatever decision is taken with regard to right of defendant no. 1 over construction on the roof constructed by the plaintiff on open space, the same would apply to other defendants who are subsequent purchasers. Therefore, there could not be any irreparable loss in the present circumstances. However, if further constructions are allowed over the 2nd floor, in that case nature of suit property would change and the plaintiff may claim some loss on this ground, though whether it would be irreparable or reparable loss is altogether different matter. Moreover, in absence of *prima facie* case and balance of convenience, such loss itself would not give rise to any right to claim injunction. I



also find it very surprising that the learned Subordinate Judge held that since serious and substantial question involving the bonafide and true intention of the parties can only be answered after trial, the same would result in *prima facie* case in favour of the plaintiff.

11. One of the striking aspects of the matter is that though permanent injunction was claimed by the plaintiff against making any further construction over the suit property and from alienating any floor over the Schedule – I property, no temporary injunction has been prayed for against defendants, from changing the physical feature and for causing any interference in using the roof of ground floor and keeping the compressor of A.C. over the roof of the Schedule – I and Schedule -II properties. If no prayer seeking temporary injunction for the aforesaid purpose has been made or no prayer with regard to inherent danger to the property and apprehensions of the plaintiff have been brought to fore, straightway moving an application for grant of interim injunction is not proper. Since an interim order can be passed by a court of law only in aid of final relief. Moreover, granting such reliefs claimed in the petition seeking interim injunction which are in the nature of granting main relief would always make



such orders improper. Therefore, granting the final relief as prayed in the plaint in the garb of temporary injunction is clearly impermissible. Final relief cannot be granted by way of interim relief. In this regard the decision of Hon'ble Supreme Court in the case of *State of U.P. & Ors. Vs. Ram Sukhi Devi* reported in *(2005) 9 SCC 733* can be advantageously referred. The reliefs granted by the learned Subordinate Judge on the petition for temporary injunction and affirmed by the learned District Judge in the Misc. Appeal tantamount to granting the final reliefs claimed in the plaint.

12. In the light of discussion made hereinafter, I am of the considered opinion that the impugned orders could not be sustained. However, I am also alive to the fact that there is concurrent findings of two Subordinate courts and the general rule is that the High Court will not interfere with such finding. But the same is not an absolute rule and there is some well recognized exception like drawing wrong inferences by applying law erroneously, non-consideration of material facts, perversity etc. In the present case when the orders have been passed without any basis and against the provisions of law, it becomes bounden duty of the court to interfere with such orders.

13. In the light of facts and circumstances and



discussion made above, I find and hold that the impugned orders of the learned District Judge as well as learned Subordinate Judge are not sustainable and hence set aside. However, to avoid further complexities and to preserve the suit property, it is directed that the parties would maintain status quo with regard to suit property and will not create any 3rd party interest or destruction of the suit property till disposal of the suit.

14. Since the suit is pending since 2017 and the issue involved is a minor one, it is imperative that the learned trial court should move expeditiously in the matter and dispose of the suit within six months from the date/receipt of a copy of this order and it is ordered accordingly.

15. With the aforesaid observation, the present petition stands allowed.

(Arun Kumar Jha, J)

DKS/-

AFR/NAFR	AFR
CAV DATE	24.06.2024
Uploading Date	12.07.2024
Transmission Date	NA

