

Ajay Mohan & Ors vs H.N. Rai & Ors on 12 December, 2007

Equivalent citations: AIR 2008 SUPREME COURT 804, 2008 (2) SCC 507, 2008 AIR SCW 42, 2008 (1) AIR BOM R 692, (2008) 1 LANDLR 484, (2008) 104 REVDEC 252, (2008) 1 ICC 385, (2007) 14 SCALE 287, (2008) 3 CGLJ 184, (2008) 61 ALLINDCAS 58 (SC), (2008) 70 ALL LR 162, (2008) 1 ALL RENTCAS 635, (2008) 1 ALL WC 68, (2008) 1 CAL HN 180, (2008) 1 BOM CR 535

Author: S.B. Sinha

Bench: S.B. Sinha, Harjit Singh Bedi

CASE NO.:

Appeal (civil) 5831 of 2007

PETITIONER:

Ajay Mohan & Ors

RESPONDENT:

H.N. Rai & Ors

DATE OF JUDGMENT: 12/12/2007

BENCH:

S.B. Sinha & Harjit Singh Bedi

JUDGMENT:

J U D G M E N T CIVIL APPEAL NO. 5831 OF 2007 (Arising out of SLP (C) No.13789 of 2007) S.B. Sinha, J.

1. Leave granted.

2. Appellants are aggrieved by and dissatisfied with the judgment and order dated 16.6.2007 passed in Appeal From Order No.320 of 2007 by a Division Bench of the Bombay High Court whereby and whereunder an appeal from an order dated 12.4.2007 passed by City Civil Court, Bombay in Notice of Motion No.944 of 2007 rejecting an application for injunction filed by them was dismissed.

3. Appellants are said to have become owners of the suit land by reason of a deed of gift, which is said to have been executed by Mrs. Tara Sarup on 30.3.1968 in favour of the first appellant. Indisputably, Respondents claim their right, title, interest and possession on or over the land in suit in terms of an agreement of sale purported to have been executed by the appellants herein in their favour on or about 23.10.1969.

4. Appellants' case in relation to the said agreement for sale are :

(a) It is a forged document.

(b) In any event, the plaintiff No.1 being minor on the date of execution of the agreement (his date of birth being 8.3.1952), the same is void in law.

5. The claim of the respondents, on the other hand, is that out of the amount of consideration mentioned in the said agreement, namely Rs.90,000/-, a sum of Rs.80,000/- has already been paid and they were put in possession thereover in part performance thereof, as envisaged under Section 53A of Transfer of Property Act.

6. Various proceedings appear to have initiated before the Revenue Courts in regard to inclusion of the name of the respondents in the Revenue Records. It is further accepted that the first appellant herein had executed three deeds of assignment in favour of the second appellant herein on or about 29.6.1991.

A suit was filed by the appellants before the City Civil Court, Bombay which was marked as Suit No. 4962 of 2006 claiming, inter alia, for a decree for permanent injunction restraining the respondents from creating any right in or over the suit land on the basis of revenue entries as also for a decree for permanent injunction restraining them from interfering with their possession and occupation thereupon.

In the said suit, the appellants took out a notice of motion marked as Notice of Motion No.3551 of 2006 and by order dated 13.10.2006, learned Judge, City Civil Court, Bombay refused to grant an order of injunction, inter alia, holding :

(i) The contentions advanced by the defendants are of much substance inasmuch as in view of the execution of the agreement for sale, the onus was upon the plaintiffs to get the said documents cancelled and treated as null and void. Such a prayer having not been made, mere relief for injunction prayed for by the plaintiffs cannot give rise to existence of prima facie case for grant of relief at the interlocutory stage.

(ii) The cardinal rule being that possession follows title, the plaintiff proceeded under the assumption that he had assigned the suit property to plaintiff No.2 who is a builder and developer and that plaintiff No.2 and plaintiff No.3 are said to be protecting the property.

(iii) The alleged threat of dispossession given by the defendants to the plaintiffs being towards the end of May 2006, no details thereabout had been stated in the plaint and in that view of the matter also the plaintiffs had failed to make out a prima facie case.

(iv) After a report was prepared by the Revenue Officer, allegedly the defendants were found to be in possession. As the plaintiffs had not challenged the agreement of sale dated 23.10.1969 whereunder only the defendants had been claiming their right, validity thereof or otherwise would be pre-judging the case at that stage.

It was also found that the plaintiffs had not approached the court with clean hands.

7. Appellants thereafter filed an application for amendment of plaint. They also preferred an appeal against the said order dated 13.10.2006 in the High Court of Judicature at Bombay. The said appeal, however, was withdrawn stating that they would move the trial court for amendment of the plaint. While allowing the said prayer, an observation was made that the trial court shall consider the question in regard to the amendment of plaint without in any way being influenced by the observations made by the learned trial Judge in the impugned order. Although, the High Court allowed the appellants to withdraw the appeal, it directed the parties to maintain status quo for a period of two weeks.

8. A chamber summons thereafter was taken by the appellants on or about 1.12.2006 wherein not only amendment of the plaint was prayed for but an interim order of injunction during the pendency of the said application was also prayed for. We may notice the amendments sought for by the appellants in the said Notice of Motion:

"(a)(i) That it may be declared that the Defendants or any of them have no right, title or interest of any nature in respect of the plots of land bearing at C.T.S. Nos.6A and 7/1A of village Powai, Taluka Kurla admeasuring about 37,673 sq. mtrs. and C.T.S. Nos.20 and 22 of village Tirandaz, Taluka Kurla admeasuring about 27,582 sq. mtrs. or any part/s thereof by virtue of the alleged Agreement for Sale dated 23rd October, 1969, being Exhibit "A10" hereto or otherwise or at all;

(a)(ii) that the Defendants, their servants and agents may be permanently restrained by an Order and injunction of this Hon'ble Court from claiming any right, title or interest of any nature in respect of the plots of land bearing at C.T.S. Nos.A and 7/1A of village Powai, Taluka Kurla admeasuring about of village Tirandaz, Taluka Kurla admeasuring about 27,582 sq. mtrs. or any part/s thereof by virtue of the said alleged Agreement for Sale dated 23rd October, 1969 being Exhibit "A-10" hereto or otherwise or at all.

11. Add in the prayer (a) in the Plaint after the words 'pass an order of injunction' add "permanently".

12. Add in prayer (a) after the words 'Taluka:

Kurla bearing ..' delete the words "CTS No.22 (Approx.) admeasuring 18,083 sq. mts.' And instead add the following :

"CTS Nos.20 and 22 admeasuring 27,582 sq. mts and at village Powai Taluka Kurla bearing CTS Nos.6A and 7-1A admeasuring 37,673 sq. mts. And".

13. Add in the prayer (b) in the Plaint after the words 'pass an order of injunction' add "permanently".

14. (i) Add in prayer (b) after the words 'Taluka : Kurla bearing ..' delete the words "CTS No.22 (Approx.) admeasuring 18,083 sq. mts.' And instead add the following :

"CTS Nos.20 and 22 admeasuring 27,582 sq. mts and at village Powai Taluka Kurla bearing CTS Nos.6A and 7-1A admeasuring 37,673 sq. mts. And".

(ii) Add in the Fourth line of prayer (b) after the words land occupation of the plaintiffs' the words "Nos.2 and 3".

15. In prayer clause (c) after the words prayer clauses add '(a(i)).'

9. Prayer for interim relief was rejected by the learned judge, City Civil Court opining that the earlier order dated 13.10.2006 became final.

10. Against the said order, the appellants again approached the High Court and by an order dated 10.1.2007, a learned Single Judge noticing that the proposed amendment fell short of relief of declaration that the suit agreement was null and void and to be set aside, came to the conclusion :

"This indicates that the Appellants were conscious that such relief will have to be pressed in respect of the suit documents. Obviously, that perception is on account of the fact that the said documents were made subject matter of proceedings before the Revenue Authorities indeed, the Respondents have stated on affidavit that the Original copy of the said document has been lost in respect of which police complaint is already instituted. In such a case, however, it is possible for the Respondents to establish the fact of existence of such Agreement by relying on secondary evidence on fulfilling the required norms in that behalf. Be that as it may, prima facie, it is seen from the record that the execution of the suit documents has been disputed by the Appellants as back as in 1984, which stand has been dealt with by the Authorities. Suffice it to observe that the Appellants would succeed only if they were to challenge the subject Agreement, inasmuch as the Defendants were asserting rights in respect of the suit land on the basis of the said Agreement. The fact that the Original copy of the said Agreement is not in existence does not alter the situation so as to absolve the Appellants from claiming relief that the said Agreement is null and void and to set it aside."

On the said findings, the judgment and order of the City Civil Court was upheld.

11. A Special Leave Application was filed before this Court against the said order which was marked as SLP (C) No.1218 of 2007. The same was disposed of by an order dated 2.2.2007, stating :

"Counsel for the respondent-defendants, on instructions, states that the defendants have no intention to create third party rights till the disposal of the amendment application filed by the petitioners before the concerned City Civil Court, which is coming up before the said Court for disposal on 7th February, 2007. We direct the

concerned Court to dispose of the Chamber Summons on 7th February, 2007 and till then, as stated on behalf of the counsel for the respondents- defendants, no third party interest shall be created. The Chamber Summons shall be decided uninfluenced by any observations made by the High Court in the impugned order.

Counsel for the Petitioners submits that the prayers made in the Chamber Summons are for amendment of the plaint as well as for interim reliefs.

The Court will consider all the reliefs prayed for in the Chamber Summons and pass appropriate orders.

The Special Leave Petition is disposed of accordingly."

12. By an order dated 28.2.2007, the application for amendment was allowed. Keeping in view the fact that the plaintiffs' prayer for grant of interim injunction was confined in the earlier notice of motion till the disposal thereof, the plaintiff did not press for the second prayer expressing his desire to take out a separate notice of motion.

A notice of motion for grant of injunction was again taken out which was dismissed by reason of an order dated 12.3.2007 by the learned Judge, City Civil Court. In regard to the order of this Court dated 2.2.2007, the learned Judge observed :

"I have read and reread the order of the Supreme Court. The Apex Court has said that this Court will consider all the reliefs prayed for in the Chamber Summons and pass appropriate order. The word "interim" is defined in Black's Law Dictionary as "in the meantime", "temporary" and "occurring in intervening time". The relevant meaning here appears to be "occurring in intervening time". Therefore, I am of the view that the Apex Court has referred to the period till the hearing and disposal of the Chamber Summons. Now the chamber summon, is disposed of. It is allowed and all amendments are incorporated in the plaint. Therefore, there is no stage, which is "occurring in intervening time". In this view of the matter, I do not find any substance in this notice of motion. I, therefore, pass the following order :

ORDER Notice of motion stands dismissed. No order as to cost.

The same may be registered for statistical purpose."

By reason of the impugned judgment, the High Court has upheld the said order.

13. Mr. R.F. Nariman, learned senior counsel appearing on behalf of the appellant, inter alia, would submit that the appellants have never been heard on merit of the matter. The learned counsel argued that keeping in view the nature and purport of the order of this Court dated 2.2.2007, the City Civil Court could not have relied upon its earlier order. Consequently, the High Court had also committed a manifest error in applying the principles of res judicata which have no application in

the instant case. It was contended that the purported finding of the learned Judge, City Civil Court to the effect that the defendants had been found to be in actual physical possession of the suit property on the date of institution of the suit was clearly erroneous inasmuch as no such finding had been arrived at by the said court while passing its order dated 13.10.2006. It was urged that the report of an officer appointed by the Revenue Minister found the appellant to be in possession of the property and in that view of the matter, it was not necessary for them to pray for a decree for cancellation and setting aside of the agreement for sale dated 23.10.1969. In any event, having regard to the observations made by the High Court, it was obligatory on the part of the courts below to consider the merit of the matter afresh.

14. Mr. Ashok Desai, learned senior counsel appearing on behalf of the respondents, on the other hand, contended that the learned City Civil Court rejected the application for grant of injunction in favour of the appellants, inter alia, holding that :

(a) Plaintiffs do not have any prima facie case;

(b) They had not approached the Court with clean hands;

(c) The delay in questioning the validity of the said agreement of sale disentitles the plaintiffs from obtaining the order of injunction and they had not challenged the validity of the said agreement in the suit.

It was contended that the very fact that the appellants had withdrawn the appeal without reserving their liberty to move the Trial Judge again for injunction would clearly attract the principles of res judicata, Mr. Desai would submit that although an opportunity had been granted to the appellants to pray for a relief of cancellation of the said deed of sale, the same was not prayed for which would demonstrate speculative nature of the litigation resorted to by the plaintiffs. A party to a suit, undoubtedly, may file an application for injunction if a change in the situation has been brought about but there being no said change, it was urged, the second application for injunction would not be maintainable.

15. It is a trite law that the principles of res judicata apply in different stages of the same proceedings. [See *Satyadhan Ghosal & Ors. v. Smt. Deorajin Debi & Anr.* [AIR 1960 SC 941] *Arjun Singh v. Mohindra Kumar & Ors.* [(AIR 1964 SC 993)]; and *C.V. Rajendran & Anr. v. N.M. Muhammed Kunhi* [(2002) 7 SCC 447] *Ishwar Dutt v. Land Acquisition Collector & Anr.* [(2005) 7 SCC 190] and *Bhanu Kumar Jain v. Archana Kumar & Anr.* [(2005) 1 SCC 787].

The entire claim of the plaintiff was based on their claim of possession of the lands in suit. Defendants, on the other hand, claimed their right, title, interest and possession on the basis of the purported agreement for sale. Whether possession had been delivered to them in part performance of agreement of sale or not is essentially a question of fact. Genuineness or otherwise of the said agreement also involves determination of a disputed question.

16. Plaintiffs, while praying for the relief of interim injunction, were bound to establish a prima facie case. They were also bound to show that the balance of convenience lay in their favour and unless the prayer is granted, they will suffer an irreparable injury.

The learned Judge, City Civil Court clearly found that prima facie, the plaintiffs' suit was not maintainable in absence of any prayer for cancellation and setting aside of the said agreement for sale having been made for in the suit.

Appellants although had been contending that such a relief was not necessary as it was merely a defence of the respondents, why they did not raise such a question in the original suit is a matter of guess. We do not know as to why the plaintiffs, despite opportunities having been given to them, failed to make such a prayer even while seeking the Court's 'leave' to amend the plaint.

17. The order of the City Civil Court dated 13.10.2006 may be bad but then it was required to be set aside by the Court of Appeal. An appeal had been preferred by the appellants thereagainst but the same had been withdrawn. The said order dated 13.10.2006, therefore, attained finality. The High Court, while allowing the appellant to withdraw the appeal, no doubt, passed an order of status quo for a period of two weeks in terms of its order dated 23.11.2006 but no reason therefor had been assigned. It ex facie had no jurisdiction to pass such an interim order. Once the appeal was permitted to be withdrawn, the Court became functus officio. It did not hear the parties on merit. It had not assigned any reason in support thereof. Ordinarily, a court, while allowing a party to withdraw an appeal, could not have granted a further relief. [See G.E. Power Controls India & Ors. v. S. Lakshmipathy & Ors. [(2005) 11 SCC 509].

18. Even then, the plaintiff preferred to file a fresh notice of motion. It did not file any application for grant of injunction till the disposal of the suit. It, principally, in the said notice of motion asked for amendment of the plaint. The second relief prayed for in the said notice of motion was again withdrawn with liberty to file a fresh notice of motion. Appellants, therefore, have been filing applications after applications without making proper prayer therein at all stages.

19. So far as the order of this Court dated 2.2.2007 is concerned at the first blush, it appears that this Court could not have granted any relief to reagitate the questions of hearing the parties and interim relief once over again. Even if that be so, the said interim relief having regard to the admitted facts was to be kept confined only for a short term, namely, till the application for amendment is considered. This Court, therefore, did not grant any liberty to the plaintiffs to file a fresh application for injunction. It could not comprehend thereabout at that time. The Notice of Motion taken out for grant of injunction was, therefore, required to be considered on its own merit. The plaintiffs had not brought out any new circumstances warranting grant of any injunction in their favour. Only because a further prayer had been made in the suit upon amending the plaint, the same by itself did not bring about a situational change warranting application of mind afresh by the learned Judge, City Civil Court. The only argument which is available to the appellants was that the suit, by reason of amendment made in the prayer, has become maintainable. Maintainability of the suit itself does not give rise to a triable issue. The issues which arose for consideration in the suit are the ones we would have noticed hereinbefore, namely, inter alia, the validity of the agreement for sale and/or grant of

possession in favour of the defendants/respondents. How, by sheer amendment of the plaint, the plaintiff could prove a prima facie case or show existence of a balance of convenience in their favour, has not been demonstrated.

20. We are, therefore, of the opinion that although learned Judge, High Court, while passing its order dated 13.10.2006 could have considered the merit of the application filed by the appellant in regard to the relief for injunction, the same by itself, in our opinion, did not warrant a direction to consider the matter afresh by the learned Judge, City Civil Court. We are, therefore, are of the opinion that the impugned judgment do not suffer from any infirmity. We would, however, having regard to the peculiar facts and circumstances of the case, request the learned Judge, City Civil Court to consider the desirability of disposing of the suit as expeditiously as possible preferably within a period of six weeks from the date of communication of this order. The parties are directed to render all cooperation to the learned Judge in early disposal of the suit. If it is convenient to the learned Judge, the hearing of the suit may be taken up on day to day basis.

21. This appeal is dismissed with costs. Counsel's fee quantified at Rs.25,000/- (Rupees twenty five thousand only).