

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on: 03.04.2023
Pronounced on: 20 .04.2023

CM(M) No. 50/2023
(O&M)

Surinder Partap Singh and another

...Appellant/Petitioner(s)

Through :-

Mrs. Monika Kohli, Advocate

v/s

Vijay Kumar and others

.....Respondent (s)

Through :-

Mr. Jagpaul Singh, Advocate

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1. The petitioners have filed the instant petition under Article 227 of the Constitution of India, thereby challenging the order dated 07.12.2022 passed by the Learned Principal District Judge, Samba (hereinafter referred to be as '**the appellate Court**'), whereby Civil Miscellaneous appeal titled, '**Vijay Kumar and Anr. vs. Surinder Partap and Anr.**' was allowed and the order dated 24.11.2020 passed by the Learned Additional Munsiff, Samba (hereinafter referred to be as '**the trial Court**') in an application under Order 39 Rule 1 & 2, read with section 151 CPC, was set aside.
2. The petitioners had filed the suit for permanent prohibitory injunction against the respondents in respect of the land measuring 24 kanals 5 marlas comprising Khasra Nos. 136, 247, 248 min 249, 250, 204 situated at village Kathlai, District Samba on the ground

that respondent No. 3 being the attorney holder of other respondents had entered into an agreement to sell with them on 17.10.2018. Further, an amount of Rs. 3.00 lacs was paid to respondent No. 3 by the petitioners and accordingly, the possession of the land was also delivered to them. As the respondents tried to occupy the suit property forcibly, the petitioners filed the suit for injunction against them and also filed an application for grant of interim relief under Order 39 Rule 1 & 2 CPC. The learned trial court, vide its order dated 01.05.2019 passed an *ex parte* interim order directing the parties to the suit to maintain the status quo with regard to the suit property.

3. Thereafter, respondent Nos. 1 & 2 filed their written statement, wherein they stated that they had never executed any power of attorney exclusively in favour of respondent No. 3. Rather, they had executed power of attorney in favour of one Raman Sambyal S/o Satya Pal R/o Bagla Mohra Suchani and defendant No. 3 in respect of the suit land, which was registered on 19.09.2015, but the same was cancelled on 24.10. 2018, as such, respondent No. 3 alone at all was not competent to execute any document. It was also pleaded that respondent No. 3 himself filed a suit against respondent Nos. 1 & 2 and other persons, titled, Bodh Raj vs. Vijay Kumar and others, which was pending before the learned Munsiff, Samba and subsequently the said suit was withdrawn by the respondent No. 3 by virtue of a compromise deed dated 21.09.2019. It was also pleaded that once the respondent No.3 claimed to be in possession of the suit

land on 13.02.2018, then how the petitioners could claim to be in possession of the suit land on 17.10.2018.

4. The learned trial court after considering the pleadings and arguments of the parties vide its order dated 24.11.2020 modified the order dated 01.05.2019 (wrongly mentioned as order dated 22.02.2017 by the trial court) and restrained the respondents from alienating and creating any further charge during the pendency of the suit and from dispossessing the respondents from the suit land till the disposal of the suit. The said order was impugned by respondent Nos. 1 & 2 through the medium of appeal and the learned Appellate Court vide its order dated 07.12.2022 set aside said order passed by the learned trial court.
5. The petitioners have impugned the order passed by the learned Appellate Court before this Court on the ground that appellate court should have confined its decision to the questions raised in the pleadings and further that the appellate Court has not decided the appeal on the basis of three essential requirements for issuance of interim injunction i.e. prima facie case, balance of convenience and irreparable loss.
6. Mrs. Monika Kohli, learned counsel for the petitioners submitted that the learned appellate Court has decided the appeal all together on new grounds, which were never raised before the learned trial court and further that the learned appellate Court has not followed the three essential and settled principles of law for issuance of interim injunction while deciding the appeal.

7. Mr. Jagpaul Singh, learned counsel for the respondents submitted that the learned appellate Court has rightly vacated the order dated 24.11.2020 passed by the learned trial court as the un-registered agreement to sell in respect of immovable property does not confer any right upon the vendee.
8. Heard and perused the record.
9. A perusal of the record reveals that agreement to sell dated 17.10.2018 relied upon by the petitioners executed between them and respondent Nos. 1 & 2 through respondent No. 3, is an un-registered and insufficiently stamped instrument. The learned appellate Court while passing the impugned order has held that an unregistered agreement to sell cannot be used by the petitioners to protect their possession. It will be relevant to take note of section 49 of the Registration Act, 1977 as was applicable in the erstwhile State of Jammu and Kashmir, when the suit for injunction was filed by the petitioners. Section 49 of the Act (supra) reads as under:
- “49. Effect of non-registration of documents required to be registered.—
No document required by section 17(2) [or by any provision of the Transfer of Property Act] to be registered shall—
(a) affect any immovable property comprised therein,
(b) confer any power to adopt, or
(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.”
10. Section 49 of the Registration Act, 1977 as was applicable in the erstwhile State of Jammu and Kashmir was different vis-a-vis section 49 of the Registration Act, 1908 as was applicable in rest of India but now applicable in Union Territory of J&K as well. Thus, a document that is required to be registered under section 17 of the Registration

Act but is not registered, cannot affect the immovable property that is the subject matter of that instrument. Thus when the petitioners had based their suit for injunction demonstrating their alleged possession in respect of suit land on the basis of unregistered and insufficiently stamped instrument, which under law does not affect such immovable property, the petitioners had no prima facie case in their favour. Once the petitioners had no prima facie case in their favour, then there was no need to consider the existence of other two trinity principles i.e. Balance of convenience and irreparable loss.

In **Kashi Math Samsthan v. Shrimad Sudhindra Thirtha Swamy**, 2010 AIR (SC) 296, the Hon'ble Apex Court has held as under:

16. It is well settled that in order to obtain an order of injunction, the party who seeks for grant of such injunction has to prove that he has made out a prima facie case to go for trial, the balance of convenience is also in his favour and he will suffer irreparable loss and injury if injunction is not granted. **But it is equally well settled that when a party fails to prove prima facie case to go for trial, question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the court to grant injunction in his favour even if, he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury if no injunction order is granted.** Therefore, keeping this principle in mind, let us now see whether the appellant has been able to prove prima facie case to get an order of injunction during the pendency of the two appeals in the High Court.

11. In view of this, this court is of the considered opinion that the learned appellate Court has not committed any jurisdictional error while accepting the appeal filed by respondent Nos. 1 & 2 and setting aside the order dated 24.11.2020 passed by leaned Additional Munsiff, Jammu.

12. For all what has been said and discussed above, the present petition is found to be without merit and the same is dismissed.

(RAJNESH OSWAL)
JUDGE

JAMMU
20.04.2023
Karam Chand/Secy.

Whether the order is speaking:	Yes/No
Whether the order is reportable:	Yes/No

