(2012) 06 GAU CK 0038

In the Gauhati High Court

Case No : FAO No. 2 of 2011

Abdul Rahman Seikh — APPELLANT

Vs

Sri Rajib Borah, Sri Mukut Bhattacharya and Md. Jainuddin Ansari — RESPONDENT

Date of Decision : 29-06-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1(r), 151
Partnership Act, 1932 — Section 69, 69(1)(2), 69(3)
Specific Relief Act, 1963 — Section 14(1)(c), 41(e)

Citation : (2013) 2 GLT 1123

Hon'ble Judges : Anima Hazarika, J;Amitava Roy, J

Bench : Division Bench

Advocate : TC Khatri, Mr. P Mahanta, Mr. SK Jain and Mr. B Pushilal, for the Appellant; N Dutta Senior Advocate, Ms. B Bhuyan, for the Respondent

Final Decision : Dismissed

Judgement

Mrs. Justice Anima Hazarika, J.—Challenge made in the instant appeal, preferred under Order 43 Rule 1 (r) of the CPC (Code, for short) is against the order dated 22.12.2010 passed in Misc. (J) Case No.161/2010 arising out of Title Suit No.73/2010 on the file of the learned District Judge, Sonitpur, at Tezpur whereby and whereunder the learned District Judge, issued an ad interim injunction order in a petition filed under order 39 Rule 1 and 2 of the Code against the appellant restraining and prohibiting him from obstructing the opposite parties herein from entering into the business premises of M/s. Purbanchal Brick Industry, situated at Morangaon (Borgang) and to take part in the said business as partners and from manufacturing and selling the bricks in the name of "IBI" or any other names except "PBI" and/or to change the existing name of brick industry to any other name. Admittedly, the appellate court hearing an appeal against such an order of injunction is required to confine itself to the legality and validity of the order and to see as to whether the learned trial Court has exercised its discretion reasonably and in a judicial manner or has ignored relevant facts as well as the following requirements before issuing an ad interim injunction in favour of the plaintiffs viz:

(i) There exists a prima facie case as pleaded, necessitating protection of the plaintiff''s rights by issuing an ad interim injunction;

(ii) When the need for protection of the plaintiff''s rights are compared with or weighed against the need for protection of the defendant''s rights or likely infringement of the defendant''s rights, the balance of convenience tilting in favour of the plaintiff, and;

(iii) There is clear possibility of irreparable injury being caused to the plaintiff if temporary injunction is not granted.

In addition to the above requirements, an ad interim injunction being an equitable relief, the Court while exercising the discretion, grant such relief only, when satisfied that the conduct of the plaintiffs are free from blame and has approached the Court with clean hands.

2. Now the question left to be answered as to whether the learned trial Court while exercising the discretion has acted arbitrarily, capriciously or perversely, meaning thereby that the material placed, taken as a whole is not reasonably capable of supporting the exercise of discretion. In order to answer the questions as stated hereinabove, the Court is to look back at the pleadings averred in the plaint along with the material documents placed before the Court which is summarized hereinbelow:

3. The opposite parties herein as plaintiffs have brought the suit being T.S. No.73/2010 against the defendant/appellant herein in the Court of learned District Judge, Sonitpur seeking the following reliefs:

(a) For declaration that the plaintiffs are the partners of M/s. Purbanchal Brick Industry situated at village Sukansuti alongwith the defendants and each of the plaintiffs have 1/4th share in the said partnership business.

(b) For the rendition of accounts of the said partnership business M/s. Purbanchal Brick Industry for the year 2007-2008, 2008-2009, 2009-2010 till now and for recovery of Rs.38, 00, 000/- (Rupees thirty eight lakhs) only as share of the plaintiffs from the defendant for those period and for rendition of accounts for further period.

(c) For permanent injunction restraining and prohibiting the defendants from selling and manufacturing bricks in the name of "IBI" or any other name except "PBI" and from obstructing and interfering the plaintiffs to take part in the business of the said firm as partners and also from changing the name of the brick industry without the consent of the plaintiffs.

(d) For all cost of the suit

(e) For all other relief or reliefs as the Court may deem fit and proper.

4. Alongwith the plaint, an application under Order 39 Rule 1 and 2 and Section 151 of the Code has also been filed for granting temporary injunction against the defendant. In the said application it has been averred that both the plaintiffs and the defendant have started a business of brick manufacturing and sale of brick and accordingly they have entered into a partnership firm in the name and style of M/s. Purbanchal Brick Industry ("PBI" for short) by a registered partnership agreement dated 08.09.2004 but the said firm was not registered under the Partnership Act. Accordingly they took land on lease from the defendant by an unregistered lease deed dated Nil 2005 and the total yearly rent was fixed @ Rs.25, 075/- (Rupees twenty five thousand and seventy five) only. Though the lease was initially for a period of three years but the said lease is still continuing w.e.f. 09.09.2004. During the year 2004-05, the said brick industry was looked after and managed by one of the plaintiff partner Sri Mukut Bhattacharjee as per mutual decision of the partners. Similarly during the year 2005-2006, the said brick industry was managed by the defendant Md. Abdul Rahman Seikh and thereafter Sri Rajib Borah managed the affairs of the industry during the year 2006-2007. Subsequently with the mutual consent of all the partners the defendant Md. Abdul Rahman Seikh was asked to look after the management of the brick industry and to keep proper accounts from the year 2007-2008 onwards but he did not furnish any account to the other partner plaintiffs which resulted in issuing a notice on 23.10.2009. However, he failed to give accounts of the industry. The defendant on the other hand, submitted an application on 07.09.2010 before the President/Secretary, Brick Owners'' Association, Borgang against the plaintiff''s partners alleging illegal entrance to the industry thereby claiming the brick industry as his own industry on and from 09.09.2010 and has taken all steps to change the name of the bricks from existing "PBI'' to "IMRANA'' which caused prejudice to the other partners plaintiffs resulting in filing the suit alongwith the application seeking temporary injunction.

5. The application filed by the plaintiff under Order 39 Rule 1 and 2 of the Code in the Misc. Case arising out of T.S. No.73/2010 came up for consideration before the learned trial Court on 22.12.2010 on a petition No.1329/2010 because of transfer of Civil Judge and the learned trial Court after going through the date of partnership alongwith the other documents and on consideration of the averments made in the petition which disclosed that both the parties to the suit are partners of M/s. "PBI'' whereof on 14.12.2010 the defendant opposite party resisted the petitioners/plaintiffs from entering into the business premises asking them not to visit the industry or else to face dire consequences, more so, the opposite party/defendant is going to change the name of the bricks from "PBI'' to "IBI'' without their consent and failed to render the accounts from the income of the above industry, the Court held that there exists three ingredients for granting injunction and accordingly exercised the discretion restraining the opposite party from obstructing the petitioner''s/plaintiffs to enter into the brick industry allowing them to take part in the said business directing the opposite party not to

manufacture and or sell the bricks in the name of "IBI" or any other name except "PBI" with a show cause notice as to why the ad interim injunction shall not be made absolute fixing 06.01.2011 for reply which is under challenge before this Court.

6. We have heard Mr. TC Khatri, learned Senior counsel, assisted by Mr. B Pushilal, Advocate appearing for the appellant and Mr. N Dutta, learned Senior counsel, assisted by Ms. B Bhuyan, Advocate for the respondents. Also perused the materials available on records.

7. Criticizing the discretion exercised by the learned trial Court in granting the ad interim injunction in favour of the opposite parties/plaintiffs, Mr. Khatri, learned Senior counsel would contend that there is a missing link between the discretion exercised and the ingredients of temporary injunction in view of Section 69(1) (2) of the Indian Partnership Act, 1932 which bars the trial of the suit and, therefore, the exercise of discretion where the materials taken as a whole is not reasonably capable of supporting the exercise of discretion; thus require interference under appellate jurisdiction.

8. Mr. Khatri, learned Senior counsel would further contend that a reading of partnership deed along with lease agreement would disclose that the lease agreement was for the period commencing from 09.09.2004 to 08.09.2007 and the lessee was allowed to use the land only upto 08.09.2007 unless otherwise agreed and consented, therefore, the partnership rests on "at will" and the appellant having not consented to permit the use of his land by any partners, meaning thereby the partnership automatically determined and stood dissolved after 08.09.2007 and the appellant having been entrusted with the task of payment of liabilities of the firm only for the purpose of winding up the business, the appellant thereafter started his own business in the name of M/s. IMRANA Brick Industry after completion of the process of winding up and therefore, the learned trial Court acted perversely in the exercise of discretion which require interference by the appellate court.

9. In support of his submission, Mr. Khatri the learned Senior ounsel has placed reliance on the following decisions:

(a). In Re: Abani Kanta Pal,

(b). 2003 (1) GLR 619 Star India Ltd., Vs. Arup Borah and Others.

10. Refuting the arguments as advanced by Mr. Khatri, learned Senior counsel, Mr. N Dutta, learned Senior counsel assisted by Ms. B Bhuyan, Advocate, appearing for the opposite parties would contend that the jurisdiction of the appellate court in the matter of granting injunction revolves on a narrow compass. Even if the suit is barred u/s 69(1) (2) of the Partnership Act as argued, the appellate court is to confine itself to the legality and validity of the injunction order alone and test its validity on the touchstone of basic principles for passing an order of injunction, such as, prima facie case, balance of

convenience, irreparable loss and public interest. The appellate court is not entitled either to give finding on merit of the suit or touch the merit of the suit which is the function of the trial Court. However, the appellate court is empowered to interfere with the discretion exercised by the learned trial Court if the trial Court has acted arbitrarily, ignoring the material facts in issuing ad interim injunction.

11. Mr. Dutta, learned Senior counsel would further contend that a reading of the reliefs sought for in the suit coupled with the provisions of the Specific Relief Act, 1963, vis-a-vis, Section 69(3) of the Partnership Act would amply demonstrate that the provision of Specific Relief Act would not be applicable as argued by the learned counsel for the appellant herein and the Appellate court is to decide the injunction matter only and not the merit of the case.

12. In support of his submissions the learned counsel has referred to and relied upon the following decisions:

(i). AIR 1976 Gau 12 Budheswar Barua Vs. Jatindranath Barua.

(ii). Bindeshwar Narayan Singh and Others Vs. Managing Committee, Shri Sundarmal Hindi High School and Others, , Sri Sundarmal High School and Others.

(iii). The State of Assam and Another Vs. Shri B.D. Patowari,

(iv). 2008 (3) GLT 655 Babulal Sarma Vs. Santh Kumar Bajoria.

13. Considered the arguments advanced by the contesting parties. Perused the pleadings including the order under challenge. The grant of injunction by the learned trial Court and the discretion exercised must have three essential ingredients and the plaintiffs must prove a prima facie case, balance of convenience in their favour and their suffering an irreparable injury in the absence of grant of injunction. On a reading of the plaint alongwith the injunction petition, it would reveal that the appellant was about to commence his manufacturing business relating to bricks by changing the earlier name into "IBI" and the intention of the appellant to make his business diverting the name of "PBI" is apparent. A glance of deed of partnership alongwith the lease agreement makes it abundantly clear that there is likelihood of injury to the plaintiffs if the appellant is allowed to start his business in the same place where the partners agreed to start their business and in fact, they continued with their business without any determination of partnership deed and/or agreement lapse by efflux of time. Considering the ingredients available in favour of the plaintiffs the learned trial Court exercised the discretion and the discretion so exercised cannot be termed as arbitrary and or capricious and, therefore, this Court do not incline to interfere with the discretion exercised by the learned trial Court.

14. To consider the tenability of the arguments advanced on turn to the respective case laws relied upon by the learned counsel appearing for the parties in support of the arguments made.

15. In the case of Abani Kanta Pal (supra), it has been observed that if plaint filed is in violation of Sub-Sections (1) and (2) of Section 69 of the Indian Partnership Act, 1932, then it would be a void plaint and then there is no question of bringing the same under Sub-Section (3) of Section 69 by way of amendment of the plaint and therefore, the Court set aside the amendment of the plaint. The case cited has no bearing at this stage of the instant case because the issue in this case relates to discretion exercised by the learned trial Court in granting ad interim injunction and the scope for interference of the appellate court against the order of granting ad interim injunction. The appellate court is to look only as to whether the action of the trial Court is arbitrary or not while granting/non-granting of the injunction. This Court after going through the averments made in the appeal petition along with the grounds taken as a whole is of the view that, interference with the order under challenge would amount to decide the case on merit for which the Court is refrained from deciding the issue as raised or else, it would amount to prejudge the issue in merit.

16. Star India Ltd., (supra) relied upon by Mr. Khatri relates to granting of ex parte order of mandatory injunction, wherein this Court has held that when contract between the parties is determinable in nature on the happening of certain contingencies by giving notice by other side and when bar u/s 14(1)(c) and 41(e) of the Specific Relief Act, 1963 would come into play, contract is not specifically enforceable. Therefore, no injunction could be granted to enforce the same. The question of determination of lease agreement and the deed of partnership is a matter to be decided in the trial on merit and the Court is confined only to the matter relating to grant of injunction and the said exercise of discretion has been made within the parameters of the ingredients available under Order 39 Rule 1 and 2 of the Code and nothing more and hence the decision cited would not be applicable in the instant case.

17. In the case of Budheswar Barua (supra), this Court has held that a suit for rendition of account of a dissolved firm is competent under clause (a) of Sub Section (3) to which Sub Sections (1) and (2) of Section 69 of Partnership Act are not applicable. In the instant case, the suit of the opposite party/plaintiff for rendition of account of the firm, thus is not barred u/s 69.

18. The case of Bindeswar Narayan Singh (supra), BD Patowary (supra) and Babulal Sharma (supra) relates to grant of injunction and the powers of the appellate court. In all the decisions so cited would make it clear that the appellate court would be slow to interfere with the discretion exercised by the trial court, if it is found that the said discretion has been exercised reasonably and in a judicial manner and not acted unreasonably or capriciously or has ignored relevant facts. In the instant case, the trial Court exercised the discretion reasonably in a judicial manner and within the parameters of three ingredients of Order 39 Rule 1 and 2 of the Code and, therefore, this Court do not incline to interfere with the discretion exercised by the trial Court while passing the order dated 22.12.2010 in Misc. (J) Case No.161/2010 arising out of T.S. No.73/2010

in granting ad interim injunction. For the foregoing reasons, the appeal fails and is accordingly dismissed. The learned trial Court is directed to proceed with the suit and to decide the same as expeditiously as possible in accordance with law. Interim order passed earlier stands vacated. The parties are left to bear their own costs.

