

(1980) 12 CAL CK 0001
In the Calcutta High Court
Case No : F.M.A.T. No. 2319 of 1980

Bepin Krishna Sur and Others

APPELLANT

Vs

Gautam Kumar Sur and Others

RESPONDENT

Date of Decision : 18-12-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, 151

Citation : 85 CWN 393

Hon'ble Judges : Ram Krishna Sharma, J;Chittatosh Mookherjee, J

Bench : Division Bench

Advocate : Prabir Kumar Samanta, for the Appellant;N.K. Mitra and N. Goswami, for the Respondent

Judgement

Chittatosh Mookherjee, J.—The appellants in this Miscellaneous Appeal as plaintiffs have instituted a title suit in the First Court of the Subordinate Judge, Alipore, 24 Parganas, against the defendant respondents, inter alia, for partition of their 8 annas interest in 6185 decimals of land situated in mouza Gabberia, P.S. Sandeshkhali and more fully described in "ka" schedule of the plaint, for directing the defendant No. 1 to tender accounts from 1376 to 1382 B.S. and for other consequential reliefs. The defendant-respondents are contesting the said suit. The plaintiff-appellants had filed in the trial court an application under Order 39, Rules 1 and 2 of the CPC for restraining the defendant respondents from selling, alienating, transferring and in any other way disposing of the suit property or any other portion thereto. In their said application the plaintiffs alleged that by mutual arrangement the defendant No. 1 had been put in charge and management of the suit property since the 1376 B.S. but the defendant No-1 had allegedly failed and neglected to pay or deliver to the plaintiffs their legal share pi the surplus income. The plaintiffs further alleged that the defendant No. 1 had been negotiating for selling the suit properties according to his sweet will and more than the legal share of the defendants. It has also transpired that he had already sold away some of the suit properties. The

defendants were bent upon creating chaos by random transfer of the suit properties and thereby put the plaintiffs to trouble, harassment and difficulty in possessing and/or realising their shares of the property. Therefore, according to the plaintiffs, it was necessary that the defendants should be restrained by an order of injunction in terms prayed for by them. The learned Subordinate Judge, 1st Court, Alipore had granted ad interim order restraining the defendants from transferring the suit properties and by his Order no. 24 dated 28th February, 1978 after hearing both parties allowed the plaintiffs' petition for temporary injunction and made the ad interim order dated 15th June, 1977 absolute.

2. On or about 14th December, 1978 the defendants in the said suit had filed in the trial court, an application under Order 39 Rule 4 read with Section 151 of the Code. The defendants alleged that the property of the defendants had been already partitioned, they were in actual khas possession of the properties allotted to them. They claimed that on account of their urgent need of money, the defendants may be allowed to sell their half share in the three plots of land mentioned in the schedule to their said application. The plaintiffs opposed the said application. The learned Subordinate Judge by his Order No. 44 dated 21st December, 1978 rejected the "defendants" said application under Order 39 Rule 4 of Code. He had also directed the defendants to disclose the names and the particulars of the persons who according to them, were necessary parties and also of the particulars of the lands already sold by them.

3. Subsequently, the trial court had allowed the plaintiffs' prayer for adding as defendants, the alleged transferees of the suit properties; the suit in question had been taken off the peremptory list. On 11th March, 1980 the defendants again made an application under Order 39 Rule 4 read with Section 151 of the Code stating that they were in urgent need of money for conducting the suit and they had taken loans from some persons and had agreed to sell their portion of the suit property. The defendants also averred that although their previous application under Order 39 Rule 4 of the Code had been rejected there was no bar to the present application. They pleaded that because of the order of temporary injunction they had been unable to pay off their loans and their creditors were threatening. They pleaded that due to the said circumstances the order of temporary injunction granted against them may be modified and they might be allowed to sell their interests in the property described in the schedule to the application. The plaintiffs opposed the said petition, inter alia, denying that the defendants had taken loans as alleged or that they were suffering any hardship on account of the order of temporary injunction against them.

4. The learned Subordinate Judge, 1st Court, Alipore by his Order No. 68 dated 20th June, 1980 had modified the previous order of temporary injunction by permitting the defendants to sell five acres of land in their possession. The plaintiffs being aggrieved by the said order dated 20th June, 1980 have preferred this miscellaneous appeal and have also applied for stay of the operation of the said order of the trial court. We have analogously heard the said appeal and the

said application.

5. Mr. Prabir Kumar Samanta, the learned advocate for the appellants has submitted that the learned Subordinate Judge has not acted in accordance with the provisions of Order 39 Rule 4 of the Code by modifying the earlier order for temporary injunction. According to Mr. Samanta, the power of the Court to discharged vary or set aside any order of injunction has been restricted by the two provisos to Rule 4 of Order 39 of the Code and in the instant case, the circumstances mentioned either in the 1st or 2nd proviso to the said Rule were absent, and therefore, the impugned order was clearly illegal and improper.

6. In the instant case, the previous order of temporary injunction in favour of the plaintiff-appellants dated 28th February, 1978 was passed by the trial court after giving the defendant respondents an opportunity of being heard. The defendants' previous application under order 39 Rule 4 of the Code has also failed. The defendants in their present application under Order 39 Rule 4 of the Code did not plead that the plaintiffs in the application for temporary injunction had knowingly made false and misleading statement in relation to all material particulars. Therefore, the defendants' application did not come within the ambit of the first proviso to Rule 4 of Order 39 of the Code which was added by CPC (Amendment) Act 104 of 1976. Even, in case an order of temporary injunction has been passed after giving to a party an opportunity of being heard under the second proviso to Rule 4 of Order 39, the Court may discharge, vary or modify such an order of temporary injunction on the application of a party when the same is necessitated by change in the circumstances or the Court is satisfied that the order has caused undue hardship to that party.

7. Undisputedly, the first proviso to the said Rule is inapplicable to the facts of the present case and, therefore, the point for consideration in this appeal is whether or not the order impugned is in compliance with the provisions of the said second proviso to Rule 4 of Order 39 of the Code. An order of temporary injunction is in the nature of a preventive relief ordinarily granted to preserve the status quo in respect of the subject matter of the suit. The Court under Rule 1 of Order 39 of the Code in its discretion may grant a temporary injunction for the staying and preventing the wasting, damaging, alienation, removal or disposition etc of the property or dispossession of the plaintiff, or otherwise causing injury to him in relation to any property in dispute until the disposal of the suit or until further orders.

8. The expression "change in circumstances" is referable to alteration in conditions or events which are pertinent to the injunction matter. Thus, when after a temporary injunction is granted, there is a change in the relevant circumstances, it might become necessary to discharge, vary or modify an order of temporary injunction. Thus, the Court may take into account the subsequent events. Again, in case, an undue hardship is caused by an order of temporary injunction, the Court has been empowered to exercise its powers under Order 39 Rule 4 of the Code After all, both permanent and temporary injunctions are

equitable and therefore, discretionary reliefs. Therefore, the court under the second proviso to Rule 4 may discharge, vary or set aside an order of temporary injunction when it satisfied that the same had caused undue hardship to a party who had made the application. "Hardship" according to the common parlance, means "harsh or oppressive treatment or injustice". When an order of temporary injunction has caused adverse repercussion which is disproportionate to the need for which the same had been passed, the Court, in its discretion, may discharge, vary or modify the said order.

9. Although the impugned order of the Court below is a brief one the said order modifying the temporary injunction matter may be justified both on grounds of "change of circumstances" and "undue hardship. The plaintiffs have themselves alleged that the principal defendants have half share in the suit property. The parties are governed by the Dayabhaga School of Hindu Law. Prima facie the co-sharers who have defined shares, are entitled to alienate their undivided interests in joint properties without the consent of the other co-sharers. A transfer of undivided interest may be also subject to the general or any special law of pre-emption by remaining co-sharers. Further, such transfer of undivided interest cannot prejudicially affect the interest of other co-owners. In the event of a partition, a purchaser of an undivided interest of a co-owner may pray for assigning to him his transfer's share in the joint property. It is settled law that when during the pendency of a partition suit or appeal therefrom a co-sharer transfers his share in the suit property, the transferee could be bound by the result of the litigation and in the interest of justice and to completely and effectually decide the case, the Court may add such a transferee as a party in the suit. We also note that Mulla in his Commentaries on CPC (13th Edition) Vol II at page 1513 has observed that "A temporary injunction granted under this Rule has not the effect of making subsequent alienation of the property void. Hence if a party against whom a temporary injunction is granted restraining him from alienating the property, sells or mortgages the property pending the injunction, the sale of mortgage is not void. The only penalty incurs by alienating the property, inspite of the injunction is that prescribed by Rule 2(3).....".

10. When the plaintiffs originally applied for temporary injunction against the defendants the latter had asserted that the properties had been already partitioned and they were claiming to be the owners of the properties recorded in their name in the finally published records. The Court by its order dated 28th February, 1970 observed that it did not find much force in the said submission and maintained the order of temporary injunction. Later on, when it transpired that the defendants had transferred their interest in some of the suit properties, the suit was taken off the peremptory list and summons of the suit were issued on the parties who were added as defendants at the instance of the plaintiffs. Therefore, the hearing of the suit is likely to be delayed which might not have been anticipated at the time of the passing of the aforesaid order of temporary injunction.

11. The defendants have alleged that for litigation expenses they had borrowed moneys for conducting the suit promising to execute deed of sale in respect of a portion of the suit property in their occupation. Undoubtedly, in case the said allegation of the defendants be true a undefined restraint upon them from alienating their share of the joint properties may cause undue hardship to them. The defendants have submitted before us that unless they are in a position to repay their alleged loans and also raise money for defending the suit, they may suffer serious detriment and prejudice. We have given our anxious consideration to the matter and we find that if the order of the Court below be modified in the manner indicated below, temporary injunction already made would no longer be harsh and oppressive upon the defendants. At the same time, the interest of the plaintiffs would be sufficiently protected.

12. We have already pointed out that the plaintiffs themselves alleged that they have 8 annas interest while the remaining 8 annas interest are owned by the co-sharer-defendants. The defendants have applied for transferring their half portion in the specific plots mentioned in the schedule to their application under Order 39 Rule 4 of the Code. Therefore, in the event, before the defendants are permitted to transfer half portion of these specific plots the court below may issue a commission to demarcate and divide the said plots whose half shares are proposed to be transferred by the defendants. Mr. Mitra appearing on behalf of the respondents had submitted that his clients have no objection to the above suggestion for demarcating the said plots before his client, transfer their half interest. We accordingly dispose of this appeal in the following terms :-

We modify the order dated 20th June, 1980. We direct the Court below to appoint a Commissioner to demarcate and divide in two equal shares the plots mentioned in the schedule of the defendants' application under Order 39 Rule 4 of the Code. The plaintiffs will be entitled to first exercise their choice in the matter of allotment of one-halves of the said divided plots and they will be entitled to remain in possession of the said divided portions subject to the decision in the suit and without prejudice to the rights and contentions of the parties. Only after such division of the plots are made and the defendants are given possession in the manner indicated above, the defendants would be entitled to alienate the other halves of the suit plots subject to the decision in the suit and without prejudice to the rights and contentions of the parties. The costs of commission would be paid at the first instance by the defendants subject to order for adjustment to be made at the time of the drawing up of the final decree.

Let the hearing of the suit be expedited.

Let a copy of this order be communicated by the office to the Court below by Special Messengers at the cost of the respondents if the costs are put in.

Records, if received, be sent down. No decree need be drawn up.

No separate order is necessary on the application. The application is disposed of without any order as to costs.

Sharma, J.

I agree.