

(1992) 07 SHI CK 0006

In the High Court Of Himachal Pradesh

Case No : Civil Revision Petition No. 231 of 1991

Bhori Singh

APPELLANT

Vs

Ram Lal and Others

RESPONDENT

Date of Decision : 29-07-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 6, Order 39 Rule 7, Order 39 Rule 8(1), Order 39 Rule 8(2), Order 39 Rule 8(3)
Constitution of India, 1950 — Article 227

Citation : (1993) 2 ShimLC 282

Hon'ble Judges : Davinder Gupta, J

Bench : Single Bench

Advocate : N.K. Thakur, for the Appellant; N.K. Sood and K.D. Sood for Respondent Nos. 1 and 2, for the Respondent

Judgement

Devinder Gupta, J.—Defendant-Petitioner has questioned the two orders passed by Sub-Judge First Class, Amb on 10th July, 1991 and 12th July, 1991 in Civil Suit No. 388 of 1986 with a prayer to quash and set aside the same in exercise of revisional jurisdiction or in the alternative in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

2. Plaintiffs-Respondents No. 1 and 2 instituted a suit against Defendant-Petitioner impleading Respondents No. 3 and 4 as Defendants No. 2 and 3 in the subordinate court at Amb praying for a decree for permanent prohibitory injunction restraining the Defendants from interfering with their possession over the suit land measuring 2-25-24 hectares situate in village Polian Jaswala in District Una. The decree was claimed alleging the suit land to be owned and possessed by them. The Defendants contested the suit refuting the Plaintiff's claim and asserting the suit land to be owned and possessed by them having been allotted in their favour as a result of Consolidation of Holdings proceedings in the village. Issues were framed in the suit and thereafter the case was posted for Plaintiff's evidence.

3. On 9th July 1991, when the subordinate court was closed for summer vacation, an application was moved by the Plaintiffs under Order 39, Rule 7, CPC alleging that the Defendants-Respondents, taking undue advantage and benefit of summer vacation in the court, on 6th July 1991, felled a big Sheesham tree from out of the suit land and thereafter with the help of one Jeewan Singh son of Defendant No. 1 got Anr. big size Sheesham tree and Jamun tree felled from the suit land. It was also alleged that process of cutting other remaining trees from out of the suit land by the Defendants was still in progress. Though the matter was reported to the police and forest authorities but they refused to take any action in the matter because of the pendency of civil litigation. Accordingly, a prayer was made for appointment of a Commissioner with a view to visit the spot and to make a note of the existing position of the spot and pass further appropriate orders in the matter in order to prevent further felling of the trees. Simultaneously, Anr. application u/s 151 CPC was also made for taking up the application on the same day being a matter of urgent nature. The trial Court made an order on the application that the file be put up the next day, that is, 10th July 1991, on which date the following order was passed by the trial Court, without any notice to the opposite party (the Defendants):

10-7-91 : Present : Sh. N. Sharma, Counsel for the applicants.

The application put up today with file of the main suit because of urgency. I have gone through the record of the case. The parties have civil suit in the court pertaining to the suit land comprised in Khewat No. 1 min. 4 min. 15 min and 23/25, Khatauni No. 1, min. 3, 8 min. 39 min and 59, and Khasra No. 73/2, 66, 79, 137/2, 142, 75, 71, 80, 81, 59 and 78 situated in Polian Jaswala, Teh. Amb. In the interest of justice Sh. Rajkumar, Adv. Amb is appointed as L.C. to go at the spot and report as to how much trees have been cut from the suit land. He should also report the measurement of the cut trees and their logs if any. His fee is fixed Rs. 200 to be paid by the applicants at the spot. Report be called for 16-7-1991.

In the meantime S.H.O. Amb is directed to immediately seize the trees and logs if any found cut in the suit land till further orders. Compliance report be called for 16-7-91 P.F. is on the file. Orders be issued.

Sd/- 10-7-91

4. Though a direction had been made in the order directing the S.H.O. Amb to immediately seize the felled trees and the logs in the suit land and to submit compliance report on 16th July 1991, it appears that on 12th July 1991, when compliance report was submitted to the Court, not by the S.H.O. of Police Station, Amb, but by the Head Constable-Karam Singh, the trial Court made the following order:

12-7-91. Present: Sh. Karam Singh, H.C. No. 187; P.S. Amb in person.

Compliance report received. Nobody is ready to take over the custody of the

wood. Hence the H.C. is ordered to auction it and deposit the amount in the court which will be given to the party which succeeds in the main suit. Papers be tagged with application.

Announced Sd/- 12-7-91 12-7-91

5. It is contended by the learned Counsel for the Petitioner that as a result of the impugned order passed on 12th July 1991, the Head Constable sold the trees and the logs worth more than Rs. 35,000 for a paltry sum of Rs. 3,500.

6. The revision petition was preferred in this Court on 8th October, 1991 and the case was taken up on 12th March, 1992. By the time notice of admission was given to the opposite party for 24th April 1992, mischief according to the learned Counsel for the Petitioner had already been done. The case was admitted for final hearing on 24th April 1992. Although, the property which was taken possession of by the Head Constable in pursuance to the Court's order dated 10th July 1991, was subsequently sold on the strength of order passed on 12th July, 1991, yet the legality and validity of the orders is under challenge. It is contended by Mr. Thakur that grave miscarriage of justice has occasioned since the property in question was ordered to be sold by the trial Court in the absence of either party to the litigation and without complying with the requirements of law. The order being illegal and without jurisdiction is liable to be set aside.

7. I have heard the learned Counsel for the parties. The facts as stated by the learned Counsel for the Petitioner are not disputed by the Respondents.

8. Apparently, the prayer which the Plaintiffs made by moving the application was to pass an appropriate order, in view of the urgency of the matter, with a view to preserve the property, namely, taking down the factual position so as to get it on record. The factual position as found on the spot, namely, the number of trees felled, number of logs, if any, available on the spot etc. so as to enable the court to make appropriate orders at a later stage by the facts and circumstances of the case and to determine the rights of the parties vis-a-vis the property.

9. The application was moved under Order 39 Rule 7, CPC which makes a provision for detention, preservation, inspection etc. of subject matter of the suit and says:

R-7. Detention, preservation, inspection, etc. of subject-matter of suit-

(1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,-

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;

(b) for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c)for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, mutatis mutandis, to persons authorised to enter under this rule.

Bare reading of Clause (a) of Sub-rule (1) says that it is primarily meant to enable the Court to make an order about the detention, preservation, inspection of the property in dispute in the suit and further authorises it to pass similar orders about other property for which any question might arise in the litigation subsequently. Such a power can be exercised by the Court on an application having been moved in this regard by any party to the suit. Rule 7 of Order 39, CPC has to be read alongwith Rule 8 thereof, which provides that an application under Rule 7 can be made at any time after the institution of the suit. Sub-rule (3) of Rule 8 of Order 39, CPC says that before making an order under Rule 6 or 7 on an application made for the purpose, the Court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the opposite party. The Sub-rule (3) in Rule 8 has been inserted by the CPC (Amendment) Act, 1976. While inserting Sub-rule (3) the words "after notice to the Defendant" in Sub-rule (1) and the words "after notice to the Plaintiff" in Sub-rule (2) were omitted. The rule was amended so as to provide that the court shall direct the notice of the application to be given to the opposite party in all cases except in a case where it appears to the court that the object of making the order would be defeated by the delay caused thereby.

10. On 10th July, 1991, when the matter was taken up at the behest of the Plaintiffs, keeping in view of the urgency of the matter, the court appears to have formed an opinion that in case urgent measures were not taken in appointing a local Commissioner, to visit the spot, and also in case no order is made for seizing the timber the object of moving the application was likely to be defeated. After having made this order, in the presence of the counsel for the Plaintiffs, the court called for the compliance report for 16th July 1991, on which date the counsel for the Plaintiffs was expected to be present in court. Abruptly, before the date fixed in the application, in which no notice was given to the Defendant, the court made an order on 12th July 1992, authorising the Head Constable to dispose of the property, namely the seized timber. The order passed on 12th July 1991 is cryptic one. Neither it shows an application of mind about the urgency of the matter or the object of the same. In case, the Head Constable had reported that nobody was available on the spot to take the custody of the timber, there were numerous other courses open, which could have been followed. Since the order was passed at the behest of the Plaintiffs, nothing prevented the court in ordering the custody of the timber to be handed over to the Plaintiff as Superdar, who would naturally have held the same under the directions of the court. The power to order interim sale can be found in Rule 6 of Order 39, CPC which reads

as under:

Rule 6. Power to order interim sale.-The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

Power, if any, for passing any order for sale of the seized property would have been passed after notice to the parties and hearing them. No effort was made to serve any notice on either of the parties. Both the parties were represented by counsel. The order was passed in a mechanical manner on the representation of the Head Constable and no care was taken to prevent the mischief likely to be committed, nor any guidelines were issued to the Head Constable, who was authorised to auction the property. The Head Constable also auctioned the property without any notice to the parties. By the time the order of sale was made, parties had not led evidence in the suit. Both of them were claiming ownership of the suit property. Admittedly the trees were felled by the Defendants. Although, no doubt, an order under Rule 6 for sale on an application for the purpose, as provided in Sub-rule (3) of Rule 8 can be passed by the court ex parte, yet before doing so, the court has to be satisfied that if an order is not passed forthwith, the object of making the order would be defeated by delay. The delay of two or three days in the facts and circumstances of the present case would not have mattered much. It was not a case in which a prayer had been made to the court by a party to the litigation for sale of the property. Even no prayer appears to have been made for sale by the Head Constable, who submitted to the court the compliance report of the earlier order dated 10th July 1991. Rule 6 nowhere authorises the court to pass suo motu orders in the absence of any prayer by any party to the suit. In the absence of there being any application or prayer made a party to the suit, the court gets no jurisdiction to make an order for sale of the property. The order, if made ex parte on the application of the either party, has to be passed with greatest caution and care so as to safeguard the interests of the parties to the suit, only in cases of emergency, after forming an opinion that in case an order is not made forthwith, without notice to the other party, it might result in complete destruction of the property. But it has to be made only on a prayer having been made in this regard by a party to the suit supported with sufficient material to enable the court to form an opinion aforementioned. In the absence of any material on record and without satisfying about the urgency of the matter or likelihood of destruction of property, the order, if passed, will be termed as without application of mind. Consequently, the order passed in this case on 12th July, 1991 is not only contrary to law but is also without jurisdiction.

11. Since the timber has already been auctioned and the sale proceeds deposited in Court, no useful purpose is likely to be served by making any further

directions except to direct the trial Court to invest the said amount in a short term fixed deposit for a period of one year in its own name and every endeavour shall be made to dispose of the suit as early as possible. The ultimate disposition of the amount, alongwith interest accrued thereupon, will abide by the result of the suit.

12. In the result, the petition is partly allowed. The impugned order dated 12th July, 1991, is quashed and the revision petition stands disposed of in the aforesaid terms. No costs.