

(1993) 07 GAU CK 0016
In the Gauhati High Court
Case No : Civil Revision No. 70 of 1991

Brahmaputra Byam Sangha and Anr.	APPELLANT
Vs	
Shew Prasad Nimadia & Sons	RESPONDENT

Date of Decision : 10-07-1993

Acts Referred:

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

Citation : (1993) GLR 119 Supp

Hon'ble Judges : D.N.Baruah, J

Bench : Single Bench

Advocate : B.K.Goswami, H.N.Sarma, P.K.Kalita, B.D.Goswami, A.K.Phookan,
Advocates appearing for Parties

Judgement

1. This revision is directed against the judgment and order dated 7.3.91 passed by the District Judge, Jorhat in Miscellaneous Appeal No. 1 of 1991, dismissing the appeal and affirming the judgment and order dated 9.1. 91 passed by the Assistant District Judge, Jorhat in Misc. Case No 98 of 1990, vacating the order of statusquo in respect of the suit premises.

2. The petitioners as plaintiffs instituted a suit for declaration of their right to continue possession on the suit land and for injunction restraining the defendants from interfering with their possession till they are evicted in due course of law. The case of plaintiffs, inter alia, is that the first plaintiff, a Sangha, was established in the year 1979. This Sangha is and has been engaged in the development of the gymnastic culture, peacefully occupying the suit land without any interference from any quarter. On 15.12.90 the defendants through their agent insisted on the plaintiffs to vacate the suit land. The plaintiff, therefore, apprehended that they might be evicted from the suit land by the defendants. Therefore, they filed a suit (TS No. 80/90) for declaration of their right to continue in possession of the suit land and for permanent injunction restraining the defendants from interfering with their possession on the suit land.

3. The Schedule of the plaint refers to a plot of land under periodic patta No. 162 of Dag No. 1998, Jorhat Town Block No V. The Schedule, however, does not refer to any structure. The plaintiffs also filed an application for temporary injunction. They had also stated that (hey had prima facie case to go into trial, the balance of convenience was in their favour and they would suffer irreparable loss, if injunction was refused. The second plaintiff Sri Dilip Borthakur had sworn the affidavit appended to the petition for injunction.

4. The stand of the opposite party is that the suit premises was under occupation of a Hindu Undivided Family, known as Radhakrishna Ramdeo. The joint family was in occupation of the suit premises under the opposite party as tenant. An ejectment suit was filed (Title Suit No. 9/91) against the tenant by the present opposite party. The suit was decreed by the Assistant District Judge, Jorhat, and the said decree was upheld in appeal by the District Judge, Jorhat. A Second Appeal was filed which was also dismissed. Ultimately, the said tenant filed a Special I leave Petition (SLP No. 5326/90) and the said SLP was rejected by the Supreme Court allowing the tenant to remain in the suit premises till 31.12.89 on condition of their paying arrear rent. But the tenant did not comply with the direction of the Supreme Court. The opposite party in spite of that did not put the decree into execution till the last part of 1989 and the said tenant/JD remained in possession. Situated thus, the opposite party decree holder was compelled to file an execution case (Execution No. 10/90). After filing of the execution case, the petitioners filed the present suit claiming to be in occupation on the suit land with the consent and knowledge of the opposite party.

5. The Assistant District Judge by order dated 9.1.91 after discussing the facts and circumstances of the case, rejected the plaintiff's prayer for granting injunction and accordingly the Misc. Case No. 89/90 was dismissed on contest. The order of status quo granted at the time of issuance of notice was also vacated.

6. The petitioners preferred a Miscellaneous Appeal (Misc. Appeal No. 1/91) before the District Judge, Jorhal, and the said Miscellaneous appeal was also dismissed by the District Judge affirming the judgment and order of the Assistant District Judge, Hence this revision petition.

7. The District Judge while dismissing the appeal took into consideration of the principles regarding granting of adinterim injunction and found that there was no prima facie case to go into trial and the balance of convenience was in favour of the Opposite party and irreparable injury would cause to them, if injunction was granted. The District Judge also held that " a legally valid decree cannot be obstructed from execution unless fraud etc. is alleged." But in the instant case, it was not so." The plaint is absolutely silent regarding any fraud. The District Judge also held that "without claiming any right over the land with legal status the suit cannot be held to be maintainable or having prima facie case."

8. I have heard both sides. Mr. A.K. Phookan, learned counsel for the petitioners

has submitted that in the plaint the plaintiffs stated that they were in occupation of the suit premises continuously for a period of 12? years without any interference from the opposite party or from any quarter. They had also constructed houses thereon and paid municipal tax. A copy of the municipal tax receipt was also filed along with the petition. The petitioners also took electric connection from the ASEB. Mr. Phookan has further submitted that the petitioners being in occupation of the suit land by constructing houses and taking electric connection to the houses are all admitted facts. That being the position, they cannot be evicted from the suit land by force. Besides, the decree passed against the said joint family is also not binding on them. The plaintiffspetitioners having stated mat they were in occupation of the land for more than 12? years and the defendants Opposite party having admitted that they were in possession at least from 1989, the matter requires investigation, and, therefore, there is a prima facie case to go into the trial. Mr. Phookan has further stated that though the petitioners prayed for declaration of their right to continue, but actually it is a pure suit for injunction. If the petitioners are evicted from the suit land during the pendency of the suit, they will be put to great hardship and irreparable injury will be caused to them. The fact that the petitioners carrying on their activities of development of gymnastic culture itself is sufficient to show that the balance of convenience is in favour of the petitioners.

9. Mr. B.K. Goswami, learned counsel for the respondent, has submitted that a plain reading of the plaint would indicate that there is no any prima facie case, inasmuch as the plaintiffs have failed to show their right to possess the land. The plaint does not disclose any right of the plaintiffs to get a decree for injunction.

Regarding balance of convenience and irreparable injury, both the courts below after discussing the fact came to the finding against the plaintiffs.

10. On the rival contentions of the learned counsel of the parties, it is to be seen whether the impugned order passed by the District Judge refusing to grant injunction is sustainable in law. The temporary injunction can be granted under the provisions contained in Order 39 Rule 1 and 2 of Code of Civil Procedure. The primary object of granting temporary injunction pending disposal of the suit is to preserve the property in dispute till the legal rights are ascertained. That shows that a party insisting on an injunction must first establish his right to such properly. On reading of Rule 1 and 2 of Order 39, will show that where in a situation the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to the properties in a suit, injunction can be granted. However, in an appropriate case a defendant may also claim injunction. Earlier, in a case, where the defendant threatens to dispossess the plaintiff or otherwise cause injury in relation to the property in dispute, injunction could not be granted under Rule 1 and 2 of Order 39. In such cases, the Court was required to invoke its inherent power under section 151 of Code of Civil Procedure. But after the amendment of the Code of Civil Procedure (Act 104 of 1976), clause (c) was introduced to Rule 1 or Order 39; and thereby, after the

amendment the Court can now issue temporary injunction even under Rule 1 of Order 39 if the Court is satisfied the existence of necessary conditions. The interlocutory injunctions are meant to protect the rights of the plaintiff in the suit and not right acquired subsequent to the institution of the suit. However, even after the amendment the Court will grant temporary injunction only in an appropriate case, as envisages under the provision of Order 39. The Rule 1 (c) of Order 39 begins thus : "where in any suit it is proved by affidavit or otherwise that the defendant laudates to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit", the Court may grant temporary injunction. Before granting an injunction, the plaintiffpetitioner must prove that there is a serious question to be tried in the suit and on the facts before the Court, there is a probability of his being entitled to the relief asked for by him, or in other words, the plaintiff has to prove a prima facie case. The Prima facie existence of a right and its infringement is the first condition for the grant of a temporary injunction. But the existence of a prima facie case alone is not sufficient. The plaintiff's application also should show that interference is necessary to protect him from that species of injury which the court calls irreparable, before his legal right can be established on trial, by showing that irreparable injury would cause to him if the injunction is not granted. The applicant has also to satisfy the Court that the mischief likely to cause from withholding of injunction will be greater than that likely to arise from granting it, which in other words, can be said as balance of convenience. The Court can grant injunction only when the court is satisfied about the existence of all the three conditions mentioned above.

11. The Court has no jurisdiction to grant injunction by way of interim relief without first being satisfied the existence of these three conditions. The granting of temporary injunction under the power conferred under Rule 1 of Order 39 is again a matter of discretion. However, this discretion is to be exercised by the Court judicially. Therefore, all these conditions of granting injunction must be proved to the satisfaction of the Court by affidavit or otherwise as mentioned in Order 39 Rule 1 CPC. The Court, therefore, can not have any jurisdiction to grant temporary injunction without being satisfied the existence of those conditions. The existence of these conditions can be proved either by affidavit or otherwise. Therefore, it is necessary to see whether these requirements for granting injunction, in the case in hand, has been fulfilled by the petitioners.

12. Except the petition under Order 39 Rule 1 and 2, no other material was placed before the Court. This petition for injunction is the only material before the court. The Rule 1 of Order 39 says that where in a suit "it is proved by affidavit or otherwise", the court may grant injunction subject to the existence of the conditions required for grant of injunction.

13. In the instant case, only an application for granting injunction was available to the Court. It is to be seen whether on the basis of the petition filed under Order 39 Rule 1 and 2 the Court can grant injunction. As stated earlier, the Court

can grant injunction if the statements made in the petition are supported by proper affidavit. In the case in hand, certain averments have been made, such as, petitioners were and have been occupying the premises for 12? years continuously without any disturbance from anybody, and they paid municipal taxes, and that the opposite party tried to oust the petitioners from the land by various means. The petitioners further stated that they had a prima facie case and the balance of convenience was in their favour and irreparable injury could cause to them if the Opposite party disturb their possession. These are the statements made in the petition for injunction. On the basis of the statements of facts, the Court may, if it is satisfied, grant injunction provided it is proved by affidavit or otherwise.

14. As stated above, there is no other evidence except the statements made in the petition. This petition is supported by an affidavit sworn by the second plaintiff Dilip Barthakur. He verified the affidavit by saying that he was one of the plaintiffs petitioners in the case and as such he was fully conversant with the facts and circumstances of the case and it was true to his knowledge, and that the petitioner would suffer irreparable loss if an injunction was not granted. The petitioners had prima facie case and balance of convenience was in their favour. However, these statements are not verified in the manner it is necessary. The affidavit appended to the petition under Order 39 Rule 1 and 2 cannot be accepted as an affidavit as contemplated under the law. Therefore, as the petition is not supported by any proper affidavit, and in the absence of proper affidavit, and there being no other materials to prove the contentions of the petitioners, I am of the opinion that the injunction cannot be granted as prayed for. Even if the petition under Order 39 Rules 1 and 2 filed by the petitioners along with the plaint is accepted and the same is taken into consideration, the petitioners are not entitled to get injunction, as the petition does not disclose any ground to grant injunction, in as much as, the petitioners have not been able to establish their right to possess the land in suit. Further there cannot be any injury as envisaged under Order 39, if a lawful decree is executed unless the petitioners satisfy the Court that the said decree was obtained by practicing fraud.

Neither in the plaint nor in (lie petition for injunction the petitioners have alleged any fraud in obtaining the decree for eviction. They have also not shown how and in what manner they came to possess the suit land during the period of litigation between the opposite party and its tenant Radhakrishna Ramdeo and what is their right to possess this land.

In view of the above, I do not find any merit in the petition and accordingly the petition is dismissed with a cost of Rs. 500/ (Rupees five hundred) only.