

(1998) 08 OHC CK 0030

In the Orissa High Court

Case No : Miscellaneous Appeal No. 24 of 1996

Graftek Pvt. Ltd. and Others

APPELLANT

Vs

Shri Lord Lingaraj Mahaprabhu

RESPONDENT

Date of Decision : 31-08-1998

Acts Referred:

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

Citation : AIR 1999 Ori 49 : (1999) 2 CivCC 125 : (1999) 88 CLT 290

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : R.K. Mohapatra, S.P. Mishra and S. Das, for the Appellant; B.B. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—The defendants are the appellants against an order passed by the trial Court allowing the application of the plaintiff-respondent for injunction and restraining the present appellants from changing the nature and character of the disputed land and from doing any kind of alienation in respect of the suit land till disposal of the suit.

2. The plaintiff-respondent has filed Title Suit No. 235 of 1995 for declaration that defendants I to 4 or their vendor had riot acquired any right of occupancy or any other right in respect of the disputed land. It is alleged that plaintiff is the owner in respect of the disputed land. By Resolution dated 10-3-1937 and 11-3-1937, it had been decided to lease out the disputed land in favour of Dr. Ramendu Ray subject to certain conditions and subject to depositing Rs. 250/-. Though the said Ramendu Ray deposited Rs. 250/-, but the other conditions were not fulfilled and plaintiff continued in possession. On 24-9-1941, the Manager of the plaintiff wrote a letter to Dr. Ramendu Ray to comply with other conditions, but Ramendu Ray did not comply the same, but possessed the disputed land. When the plaintiff found out that Ramendu Ray's widow Bibhabati Ray was in wrongful possession of the disputed land, O. J. Case No. 66 of 1970

was filed u/s 68 of the Orissa Hindu Religious Endowments Act. Thereafter the disputed land vested in the State Government and was settled with the plaintiff in a proceeding under the Orissa Estates Abolition Act. The matter came up to High Court in O.J.C. No. 166 of 1984 which was allowed in favour of the present appellants. The plaintiff filed Civil Appeal No. 5253 of 1995 in the Supreme Court. The Supreme Court while dismissing the appeal by judgment dated 2-5-1995 directed the plaintiff to file a suit in the Civil Court. Thereafter the suit in question was filed before the Civil Court. During the pendency of the suit, a petition under Order 39, Rules 1 and 2 Code of Civil Procedure, was filed seeking to restrain the defendants from alienating the disputed property and from raising any construction on the disputed land.

3. The defendants in their objection raised several contentions against maintainability of the suit on the ground of limitation, principles of estoppel and res judicata and made averments indicating that the defendants had acquired indefeasible right over the disputed property.

4. The trial Court found that there was prima facie case infavour of the plaintiff and the balance of convenience was also in favour of the plaintiff, On these findings, the trial Court passed an order injuncting the defendants from alienating the disputed property and changing the nature and character of the disputed land till disposal of the suit. Hence, the present appeal by the defendants 1 to 4.

5. The learned counsel appearing for the appellants has submitted that the trial Court has not found out if any irreparable loss would be caused to the plaintiff in case injunction would have been refused. The learned counsel for the appellants also submitted that the findings of the trial Court regarding existence of prima facie ease and balance of convenience in favour of the plaintiff are not tenable.

The learned counsel appearing for the respondent has supported the reasoning given by the trial Court and has submitted that since serious questions relating to title are involved, the order passed by the trial Court should not be interfered.

6. The principles governing grant of injunction are well-known and any attempt to re-formulate those principles is likely to be repetitive. Even then, the well-recognised principles need be reiterated particularly in view of the serious contentions raised by counsels for both parties. As early as in the decision, reported in *Brajendra Nath Ghosh and Others Vs. Sm. Kashi Bai and Others*, , a Division Bench of the Patna High Court had laid down the various principles relating to grant of an order of injunction. It was observed in the said case that in order to obtain an interlocutory injunction, it is not enough for the plaintiff to show that he has a prima facie case. He must further show that in the event of withholding the relief of temporary injunction, he will suffer an irreparable injury. The plaintiff should establish that the balance of convenience is in his favour or, in other words, his inconvenience in the event of withholding the relief of temporary injunction will in all events exceed that of the defendant in case he is

restrained. The plaintiff must also show a clear necessity for affording immediate protection to his alleged right which would otherwise be seriously injured or impaired. The aforesaid decision has been very often followed in all the Courts in Orissa. The said principle has been noticed and reiterated in the decision of this Court, reported in 40 (1974) CLT 336 (Orissa State Commercial Transport Corporation Ltd. represented by its Secretary Sri C.B.S. Ramchandra Rao v. Sri Satya-narayan Singh) wherein, it was observed :--

"The following propositions are to be established in order to invoke the jurisdiction of the Court to get an interlocutory order of injunction under Order 39, Rules 1 and 2, Civil Procedure Code:

- (i) Plaintiff has a prima facie case,
- (ii) If interim injunction is refused he will suffer art irreparable injury.
- (iii) The balance of convenience is in his favour."

The Supreme Court in the decision reported in Dalpat Kumar and another Vs. Prahlad Singh and others, , while considering the principle relating to grant of temporary injunction, observed :--

".. .It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the Court satisfying that

(1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the Court, there is a probability of his being entitled to the relief asked for by the plaintiff/ defendant:

(2) The Court"s interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and

(3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it."

The Supreme Court further observed (at page 277 (of AIR):

:".... Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised/ bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of

damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

In subsequent paragraph, the Supreme Court further observed (at page 278"(of AIR):

".... The phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation, but words of width and electricity, to meet myriad situations presented by man's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice,.... "

7. Tested against the aforesaid backdrop of legal principles involved in the matter of grant of injunction, the impugned order appears to be vulnerable. It is, of course, true that, it cannot be said that there is no prima facie case in favour of the plaintiff particularly in the backdrop of the case and the observation of the Hon" ble Supreme Court in the Civil Appeal that the rights of the parties have to be established in a Civil Court. But even assuming that there is a prima facie case, the question is whether any irreparable loss would be caused to the plaintiff if injunction is not granted and further whether balance of convenience was in favour of the plaintiff.

8. So far as the question of irreparable loss is concerned, the trial Court does not appear to have adverted to this aspect. The injunction sought for is against alienation and against making any construction on the disputed land. So far as alienation is concerned, since a suit is already pending, the doctrine of lis pendens would be squarely applicable and as such no irreparable loss can be caused to the plaintiff even if there is alienation as the a liences would be bound by the decision in the civil suit, whether they are impleaded or not impleaded as parties to the suit. To allay any further apprehension in the mind of the plaintiff, a condition can also be imposed to the effect that in case the property is alienated, it must be indicated by the vendor in the sale deed that the property is subject-matter of the suit and the purchaser should be bound by the decision of the Civil Court.

9. The question of not making construction may stand on a different footing depending upon the facts and circumstances of a particular case. For example, if the dispute is relating to agricultural land and any construction is to be made on such agricultural land, the nature of the land may be irretrievably lost and may

cause irreparable injury to the plaintiff. Similarly, where the disputed land is a tank required for irrigation by the plaintiff and the same is converted to agricultural land or homestead land, it can be said that irreparable loss can be caused. In other words, where nature and user of the land are likely to be changed, a Court can justifiably come to a conclusion that irreparable loss is likely to be caused to the party. From the materials on record, it is apparent that the disputed property which is situated in Bhubaneswar, though originally agricultural land, has lost its character as agricultural land and, in fact, constructions have been made on part of the disputed land, as admitted by the plaintiff. It is not the case of the plaintiff that agricultural land was sought to be utilised for the purpose of construction of building and thus the nature of the land would be lost for ever causing irreparable loss to the plaintiff. In course of hearing of this appeal, the learned Advocate on record has submitted in clear terms that the defendants would not claim any equity in case they ultimately lose in the suit and were prepared to restore possession of the land to the plaintiff in the same condition in which the lands were at the time of filing of the suit, In other words, defendants are prepared to under- take to restore status quo ante if so required in the event of ultimate success of the plaintiff. The learned counsel has further submitted that if required, a written undertaking supported by affidavit to the aforesaid effect can be furnished.

As observed in the decision reported in Thomas Ben Vs. Parvathy Ommini, , where in a suit plaintiff applies for injunction restraining the defendant from constructing any building on the disputed land and defendant undertakes that building constructed would be removed without raising any claim for compensation in case the plaintiff's right to recover possession of the property is established, the application for injunction should be rejected. In view of the statement made by the learned counsel for the defendant-appellants, I direct that the defendants shall furnish a written undertaking supported by affidavit to the effect that they will not claim any equity and shall restore vacant possession of the disputed land in favour of the plaintiff in the event of ultimate success of the plaintiff. In view of such direction, I do not think any injury, far less irreparable injury, would be caused to the plaintiff in case injunction is refused.

10. Coming to the question of balance of convenience, I am unable to accept the reasonings of the trial Court. As found by the trial Court itself, the defendants have remained in possession of the disputed land since 1972 and their predecessor-in-interest were in possession since 1937. It is not disputed that on a portion of the disputed land some constructions had already been made by the defendants much prior to the filing of the suit. Considering the question of comparative hardship to the plaintiff and defendants, I feel the balance of convenience definitely tilts in favour of the defendants rather than the plaintiff.

11. For the aforesaid reasons, in disagreement with the trial Court, I hold that it is not a fit case where order of injunction should have been issued. The appeal is, therefore, allowed subject to the following conditions :--

(1) The defendants shall furnish an undertaking in the trial Court to the effect that they shall not claim any equity and shall deliver vacant possession to the plaintiff in the event of success of the plaintiff, If the undertaking is not furnished, the appeal shall be deemed to have been rejected;

(2) In case the disputed land or part of it is alienated, a specific clause shall be incorporated in the sale deed indicating that the alienated property is subject-matter of the present suit and the purchaser shall be bound to deliver vacant possession of the land in the event of success of the plaintiff; and

(3) Violation of the above conditions would amount to contempt of the order of the High Court.

I make no order as to costs.