

(1993) 03 CAL CK 0010
In the Calcutta High Court
In Re: Gautam Kumar Hada

Date of Decision : 09-03-1993

Acts Referred:

Partnership Act, 1932 — Section 69, 69(1), 69(2), 69(3)

Citation : (1994) 1 ILR (Cal) 72

Hon'ble Judges : N.K. Mitra, J

Bench : Single Bench

Advocate : Sudhis Dasgupta, for the Appellant; Somnath Chatterjee, for the Respondent

Final Decision : Allowed

Judgement

N.K. Mitra, J.—In this Revisional application, the Petitioners have challenged the Order No. 2 dated February 9, 1993, passed by Sri S. P. Dutta, learned District Judge at Alipore, South 24-Parganas, in Miscellaneous Appeal No. 64 of 1993. The contentions of Mr. Dasgupta, learned senior Counsel appearing on behalf of the Petitioners, inter alia, are that the Petitioners filed Title Suit No. 36 of 1993 in the Second Court of the learned Munsif at Alipore, South 24-Parganas, against the opposite parties, inter alia, for declaration, accounts of partnership firm and permanent injunction. The case as made out by the Petitioners in the plaint, inter alia, were, that the Petitioners, along with the opposite parties, were carrying on partnership business, inter alia, as financier and hire-purchaser in the name and style of "Meenakshi Finance Corporation" and as iron and steel dealer under the trade name of "Meenakshi Steel" having its registered office at 27. Ashutosh Chowdhury Avenue, Police Station Ballygunge, Calcutta-19 ; that it was agreed by and between the partners that the said partnership firm would be solely managed by the opposite party No. 1 and the Petitioners would not be responsible for any accounts and losses of the said partnership firm ; that the said partnership firm obtained from the father of Petitioners, a tenancy right in respect of the entire premises No. 27, Ashutosh Chowdhury Avenue, Calcutta-19, under the landlord Sri Sankari Nath Chowdhury of 6, Suburban Hospital Road, Calcutta-20, and by a separate memorandum of understanding, it was agreed by and between the parties, that two rooms situated in the western side of the first

floor (near to puja-glwr), would belong to Sri G. R. Hada, father of the Petitioners and his family and the other two rooms in the first floor would belong to the opposite party No. 2 and his family, and in case the Petitioners' father of his family members were not in Calcutta. Those two rooms which were to be used by the Petitioners' father, would be used by the opposite party No. 1 and the rest of the house would have a common use; that in the first week of January 1993 the Petitioner No. 1 was approached by a third party and was told that the opposite parties were desirous of transferring the said tenancy right in favour of the said third party and the Petitioner No. 1 was requested to give his consent in the matter which, however, was refused by the Petitioner No. 1 ; that the Petitioner No. 1 then contacted the opposite party No. 1 and requested him not to transfer the said tenancy right to any person, but the opposite parties declined to accede to such request and, as such, the Petitioners were forced to file the above title suit, inter alia, for a declaration and injunction that the opposite parties had no right, title or interest to transfer the said tenancy right without the consent of the Petitioners.

2. In the said title suit, the Petitioners filed an application for temporary injunction for restraining the opposite parties from the disputed tenancy right and also from causing any obstruction to the free ingress and egress of the Petitioners in the suit premises No. 27, Ashutosh Chowdhury Avenue, Calcutta-19, and by the Order No. 3 dated February 2, 1993, the learned Munsif issued a notice upon the opposite parties to show cause as to why the said prayer for temporary injunction should not be granted, and passed an ad interim injunction in favour of the Petitioners. Against the said order, the opposite parties preferred the above-mentioned miscellaneous appeal, and also filed an application for stay of operation of the aforesaid order of the learned Munsif, and the learned District Judge by the impugned order granted an ad interim stay, which is the subject-matter of challenge in the present Revisional application.

3. Mr. Dasgupta contends, inter alia, that he lower appellate Court in the proper exercise of jurisdiction vested in him by law, ought not to have granted an ad interim order of stay, thereby practically disposing of the appeal itself at the initial stage, by granting relief to the opposite parties what they had prayed for in the appeal, and the proper cause for the learned District Judge should have been to hear out the appeal at an early date without granting any such ad interim stay. Mr. Dasgupta further contends that since the Petitioners had lodged a caveat in the lower appellate Court, the learned District Judge had acted illegally and with material irregularity in granting the ad interim order of stay without hearing the caveators.

4. Mr. Chatterjee, learned senior Counsel, appearing on behalf of the opposite parties, contends, inter alia, that since the suit as framed by the Petitioners, is not maintainable in law in view of the specific bar as provided u/s 69 of the Partnership Act, as the partnership firm is not a registered one, the learned Munsif had acted illegally and without jurisdiction in granting an ad interim order

of injunction and, as such, the lower appellate Court was right in granting an ad interim stay order, and in support of his contention, refers to the plaint and also the prayers made therein and the decision. In the matter of *In Re: Abani Kanta Pal*, " Mr. Chatterjee further contends that non-implication of the landlord as a party to the suit is a fatal defect and, as such, the Petitioners are not entitled to claim my relief.

5. Mr. Dasgupta in reply contends, inter alia, that whether the suit, as framed by the Petitioners, would be barred u/s 69 of the Partnership Act, is to be considered at the time of hearing of the suit and not at the injunction stage, where the Court is only to see on the affidavits and other materials, as to whether the party-praying for an order of injunction has been able to make out a prima facie case and also to consider the balance of convenience and inconveniences and refers to the decision in *Sm. Muktakesi Dawn and Others Vs. Haripada Mazumdar and Another*, in support of his contention.

6. The grant or refusal of temporary injunction is covered by three well-established principles, namely,

- (i) whether the Petitioner has made out a prima facie case,
- (ii) whether the balance of convenience is in his favour, and
- (iii) whether the Petitioner would suffer irreparable injury.

In order to consider whether prima facie case has been made or not, it becomes necessary to decide whether the action, as prayed for, is maintainable or not. At the same time, it does not mean that Court should examine the merits of the case closely and come to a conclusion that the Applicant has a case in which he is likely to succeed. This would amount to prejudging the suit on merits. Deeper examination of the question is not permissible at the injunction stage. The stand taken by the respective parties are not to be proved in such a manner that a final decision can be given in regard to them. In deciding prima facie case, the Court is to be guided by the apparent strength or otherwise of the Plaintiff's case, as revealed in the affidavit or other materials. In order to make out a prima facie case, the Plaintiff need not establish his title. It is enough, if the Plaintiff can show that he has a fair question to raise as to the existence of a right, which he alleges, and can satisfy the Court in the matter. The Plaintiff is not required to make out a clear legal title. It is enough, if he can show that he has a serious question to be tried. The prima facie case implies the probability of the Plaintiff obtaining a relief on the materials placed before the Court at that stage. In this context, the following observations of Chittatosh Mookerjee J. (as His Lordship then was) in the Division Bench decision of this Hon'ble Court in *Debabrata Mukherjee v. Kalyan Kumar Roy* 1981 (1) Cri. L.J. 339 would also be relevant:

... Secondly, it is settled principle governing grant of interlocutory injunction that the Court ought to see that there is a bona fide contention between the parties and then on which side, in the event of success, will lie the balance of

convenience if the injunction does not issue. At the interlocutory stage, the Court may only consider whether triable issues have been raised by the Plaintiff and whether there were substantial questions to be investigated. We have already observed that the question of res judicata ought to be determined at the time of the final hearing and not at the interlocutory stage of the suit. Therefore, to decide the application for temporary injunction the balance of convenience ought to be the main criterion.

7. The contention of Mr. Chatterjee that the suit as framed by the Petitioners is hit by Section 69(1) & (2) of the Partnership Act and, as such, the suit ex facie is not maintainable, however, is not to be judged at the injunction stage. That is to be judged in the suit itself. Similarly, the contention of Mr. Dasgupta that the prayers made in the plaint, if judged properly, would take away the suit outside the embargo as imposed by the aforesaid provisions, also is not to be considered by the Court while dealing with injunction matters)

8. The decision in the matter of Abanikanto Paul(Supra) " is a decision given on the question of allowing an application for amendment of the plaint, and while dealing with such matter, the Court has to go deeper into the question as to whether the suit as framed is maintainable, or whether the proposed amendment would change the nature and character of the suit, but as I have already observed that, at the injunction stage, the Court should not examine the merits of the suit closely and come to a definite conclusion, that the Plaintiff has a case in which he is likely to succeed. In other words, deeper examination of the merits of the suit at the injunction stage is not permissible. If that is done, that would amount to pre-judging the suit itself. Injunction matters are to be decided on the basis of affidavits and materials on record.

9. Moreover, even if ad interim injunction is granted ex parte, after the other side shows cause pursuant to the notice served upon him in the matter, the Court may revise and/or re-consider his decision whether temporary injunction should be granted till the disposal of the suit as has been held by the Division Bench of this Hon'ble Court in Muktakeshi Dawn v. Haripada Mazumdar (Supra (1098, para. 6)) inter alia, as follows:

The Defendant has not as yet filed his show-cause against the Plaintiff's application for injunction and, therefore, at this stage, all the statements made in the application will have to be accepted as true moodeed forms. And when so taken, the allegations, in our view, make out a case for ad interim injunction. As and when such show-cause would be filed by the Defendant and the Plaintiff's application for injunction would be taken up for final hearing, the learned trial Judge would obviously consider such show-cause and all such materials as would then be available to him and would come to his own finding as to whether a case for temporary injunction till the disposal of the suit has not been made out and he should do so being wholly uninfluenced by any observation made by us herein as to the merits. As is well-known, findings arrived at in dealing with applications for temporary injunction pending disposal of suit, even if they relate to any

material question involved in the suit, cannot take the place of findings in the final decision of the suit, and if any citation is necessary for such a well-established opposition, reference may be made to the observations of Das Gupta J. (as His lordship then was) in the Division Bench decision of this Court in *Ashalata Mitra Vs. A.D. Viz, A fortiori*,, therefore, the findings, if any made by us in disposing of this appeal against the impugned order of ex parte injunction cannot in any way take the place of the findings to be arrived at in disposing of the application for temporary injunction now pending before the learned trial Judge.

10. Further, the scope of granting temporary or ad interim injunction or stay in a suit or in a regular appeal, is quite wider than that in a miscellaneous appeal, arising out of the order granting or refusing any ad interim injunction in the suit. The scope of the miscellaneous appeal before the lower appellate Court in the present case is, whether the order granting ad interim injunction, passed by the trial Court, is legal or not. Such appeal should be heard expeditiously by the lower appellate Court, but ordinarily, the lower appellate Court should not pass any ad interim order resulting practically allowing the appeal itself at the initial stage without hearing the other side.

11. Accordingly, I hold that the order under challenge, passed by the lower appellate Court, suffers from material irregularity in the sense, that the lower appellate Court, in passing the said order, has virtually decided the appeal itself, without hearing the other side thus acting illegally in the proper exercise of jurisdiction vested in it by law, and as such, relying on the principle of law as decided in the case of *Muktakeshi Dawn (Supra)* I set aside the said order.

12. The lower appellate Court, however, is directed to hear out the appeal as early as possible, but positively within a month from the date of communication of this order, on merits without being influenced by this order, in any way, I further make it clear that I make no observation so far as the contentions raised by the learned Counsels for the respective parties regarding the provisions of Section 69(1), (2) & (3) of the Partnership Act are concerned, and also the merits of the suit, and I keep all questions open.

13. The Revisional application, accordingly, succeeds and is thus allowed without, however, any order as to costs.

14. The learned Advocates appearing for the respective parties are permitted to take the gist of this order and communicate the same to the lower appellate Court, who is to act on such communication without pressing for production of any certified copy of this order.

15. Considering the facts and circumstances of the case let a xerox copy of this order be also given to the Applicant within seven days from the date of compliance of the formalities in the matter, positively.