

(1990) 03 PAT CK 0025

In the Patna High Court

Case No : Appeal from Original Order No. 91 of 1986

Kanhaiya Tiwary and Another

APPELLANT

Vs

Raj Kumar Tiwary and Others

RESPONDENT

Date of Decision : 16-03-1990

Acts Referred:

Specific Relief Act, 1963 — Section 38

Citation : (1991) 1 BLJR 103

Hon'ble Judges : Binod Kumar Roy, J

Bench : Single Bench

Judgement

Binod Kumar Roy, J.—The plaintiffs are the appellants.

2. They are aggrieved by an order rejecting their prayer to grant injunction restraining the defendants from cutting the trees as well as from changing the status quo of the disputed land.

3. The relevant facts are short. The suit in question was filed by the appellants for partition of their 7/12 shares in the properties described in Schedule-I of the plaint, their 1/2 shares in the properties described in Schedule-II of the plaint and their 3/4 shares in the properties described in Schedule-III of the plaint. The appellants filed an application dated 28th June, 1985 for restraining the defendants from cutting several trees standing on several plots in dispute on the grounds inter alia that they are hard litigants and that they want to cut away the trees to cause irreparable loss to the appellants. Notices were issued to the defendants. They filed show cause alleging that the petition is not maintainable; that the number of the trees mentioned are not correct; that the plaintiffs have got no prima facie case; that the balance of convenience is not in their favour and that no irreparable loss shall be caused, if the injunction prayed for is rejected.

4. It appears that the court below also appointed a Pleader Commissioner at the instance of the plaintiffs for making local inspection who submitted his report

mentioning therein that in fact several trees are standing in the disputed land consisting several plots.

5. However, the court below after recording a finding that the plaintiffs have got a prima facie case rejected the prayer of the appellants after observing as to how the defendants, who are admittedly co-sharers along with the plaintiffs succeed in the suit, they may claim the price of the trees which can be ascertained in terms of money and thus the balance of convenience as well as irreparable injury do not lean in favour of the plaintiffs.

6. This appeal was admitted by the order dated 20.5.1986. On an application filed by the appellants for grant of ad interim injunction against the respondents from cutting the trees standing over the lands in dispute during the pendency of this appeal, notices were directed to be issued also by the said order dated 20.5.1986 to the respondents restraining them from cutting the trees pending final hearing of that petition. By an order dated 23rd July, 1986, interim order passed on 20th May, 1986 was also made absolute taking into account also the fact that despite notices, no one had appeared on behalf of the respondents.

7. No one has appeared even now on behalf of the respondents when this appeal was heard on 20th January, 1989 and today.

8. Mr. Raghu Bansh Singh, learned Counsel appearing for the appellants, submits as follows:

(i) On the findings recorded that the appellants are co-sharers, they could not be deprived by the defendants of their rightful claim in the trees by its forcible cutting away by them and thus the balance of convenience was not in favour of the defendants.

(ii) The court below has further erred in thinking that if the plaintiffs succeed, they may claim price of the trees which can be ascertained in terms of money.

9. Mr. Singh, to support his submission, also relied upon a judgment of this Court in Mt Maharup Kuer Vs. Mahabir Singh and Others, , wherein this Court held as follows:

Now the question that arises in this case is whether the order of the learned District Judge was so manifestly bad as to be in a sense a denial of justice. One thing certain can be stated and that is, if the defendant, always assuming that the plaintiff as a right to this timber, proceeds to destroy it by cutting it down then the whole subject matter of the action will disappear and the action will consequently be infructuous....

...It appears to me that no kind of evidence could establish the fact that the cutting of growing timber could be properly compensated by money. There is no doubt that the English authorities from which the practice as regard injunction in this country is derived, clearly establish the fact that in a case of waste, such as this is or is alleged to be, although an injunction cannot be stated to be as of

right, yet the Court will always exercise its discretion in favour of an applicant for an injunction to restrain such waste. In my view, to allow the order of the learned District Judge to remain would be to deprive the plain till of her rights in the suit and to make infructuous and, therefore, it is, in my opinion, manifestly bad and in that view of the matter, I propose to grant the injunction in terms of the prayer in the petition.

10. Illustration (n) to Section 38 of the Specific Relief Act, 1963 which confers jurisdiction on a civil court to grant perpetual injunction to a plaintiff runs as follows:

A, B and C are members of an Undivided Hindu Family. A cuts timber growing on the family properties, and threatens to destroy part of the family property and to sell of the family utensils. B and C may come for an injunction to restrain him.

11. At page 638 of Banerjee's Tagore Law Lectures 1906, the Law of Specific Ruling in British India, Second Edition, 1917 it has been stated as follows:

In India, among Hindus, joint tenant and coparceners predominate over tenants in common, and they clearly have a right to prevent a member of the family from, say, cutting trees growing on the family property, or destroying part of the family house of selling some of the family utensils.

12. A co-sharer is entitled to enjoy the joint properties as well as its possession and another co-sharer cannot be allowed to exclude him from the enjoyment. The cutting away of the trees, would mean deprivation of the enjoyment thereof by plaintiffs and therefore they were entitled for its protection. The cutting of trees by the respondents apparently involved a legal injury and material damage to the appellants which could not be measured in terms of money.

13. The ratio laid down by this Court about 62 years ago has unfortunately escaped the attention lot the trial court, and I am of the view that the court below has committed an error in refusing to grant injunction. The prayer of the appellants in the court below for restraining the defendants from cutting the trees was absolutely justified and ought to have been allowed.

14. In the result, the impugned order is set aside, this appeal as well as the injunction petition filed by the appellants are allowed. The respondents are restrained from cutting any tree from the disputed lands.

15. However, since no one has appeared on behalf of the respondents, there shall be no order as to costs.