

(1993) 05 CAL CK 0010
In the Calcutta High Court
Case No : F.M.A. No. 1048 of 1992

Lakshmi Debnath

APPELLANT

Vs

Renu Aich and Others

RESPONDENT

Date of Decision : 07-05-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 97, Order 21 Rule 98, Order 21 Rule 99, Order 39 Rule 1

Citation : (1994) 1 CALLT 58

Hon'ble Judges : Nripendra Kumar Bhattacharyya, J; Mukul Gopal Mukherji, J

Bench : Division Bench

Advocate : Shyama Prasanna Roy Chowdhury and Siddheswar Chandra, for the Appellant; Priyabrata Mukherjee and Murari Chakravarti, for the Respondent

Judgement

Mukul Gopal Mukherji, J.—The defendant appellant Smt. Lakshmi Debnath impugns in the present appeal an order bearing No. 4 dated 23rd May, 1992 passed by Shri C.A. Rahim, Judge-in-Charge, 13th Bench, City Civil Court, Calcutta in Title Suit No. 1030 of 1992 whereby the learned Judge passed an order of ad interim injunction against her, restraining her from obtaining possession of the suit premises of executing the decree in Title Execution Case No. 44 of 1986 arising out of Title Suit No. 1523 of 1978.

2. The suit premises is but one room covered with verandah in the ground floor of premises No. 36, Sree Gopal Mallick Lane, Calcutta-12.

3. It would be necessary in this perspective to trace the background of the case which led to the issuance of an ad interim temporary injunction against the present appellant. The appellant as a plaintiff filed Title Suit No. 1523 of 1978 against one Smt. Sova Rani Mitra (who happened to be the sister of the plaintiff respondent No. 1 Renu Aich) for recovery of khas possession of the suit premises. The said suit was decreed on contest against the said Smt. Sova Rani Mitra on 30th April, 1983. Smt. Sova Rani Mitra filed an appeal before this Hon'ble Court being F.A. No. 358 of 1983 which stood dismissed by the Hon'ble

Court on 17th June, 1986. In the said suit Smt. Sova Rani Mitra gave an undertaking to court to vacate the premises by February 1987 but ultimately she did not vacate. The decree holder appellant as a decree holder proceeded with the execution case being Title Execution Case No. 44 of 1986. In the said execution proceeding the present respondent No. 1, Renu Aich as a third party filed an application which was registered as Misc. Case No. 301 of 1988 the same being treated as a miscellaneous proceeding under Order 21 Rule 97 read with Section 151 of the Code of Civil Procedure. The said proceeding stood rejected on contest by order No. 49 dated 18.9.90. The present respondent No. 1 Renu Aich moved this Hon'ble Court by way of preferring an appeal against the said order being FAMT 3209 of 1990 and the appeal was dismissed by a Division Bench of this court on 12.11.91. On 7th August, 1991 the present appellant as a decree holder prayed for police help under Civil Rules and Orders 208 and police help was allowed for effecting delivery of possession. On 22nd April, 1992, a revisional application impugning the order for police help was moved by the respondent No. 1 before this Hon'ble Court and the revisional application preferred by her also stood rejected. The date of delivery of possession of the decreetal room was fixed on 29.5.92 by the executing court. The respondent No. 1 thereafter filed a suit being Title Suit No. 1030 of 1992 for a declaration of her right, title and interest in respect of the suit premises, praying inter alia for partition of the suit property being 36, Sree Gopal Mallick Lane, Calcutta and also prayed for an injunction restraining the decree holder appellant Smt. Lakshmi Debnath from obtaining possession of the decreetal premises by executing the decree in Title Execution Case No. 44 of 1986, arising out of Title Suit No. 1523 of 1978. In the said suit she also filed an application under Order 39 Rules 1 and 2 of the CPC contending inter alia that she came to know of the said decree dated 13.12.86 when the decree holder along with the Court baliff and some other anti-social elements went to execute the decree, that she was residing in the suit premises on her own right, and the premises in question is her own ancestral property. It was contended by her that the decree in Title Suit No. 1523 of 1978 was obtained by the present appellant Smt. Lakshmi Debnath in collusion with Smt. Sova Rani Mitra, her own elder sister and it was a sham contest. The learned Trial Judge decreed the suit on 13th April, 1983 and even though Sova Rani Mitra preferred an appeal against the aforesaid judgment and decree being F.A. No. 358 of 1983, there was a collusive decree similarly passed in the said appeal since Smt. Sova Rani Mitra gave an undertaking before the Hon'ble Court that she would vacate the suit premises within a stipulated period. On 13th December, 1986 at 12-30 p.m. she came to know about the collusive decree. Thereafter several proceedings have been taken by her including an application for getting her added as a party to the execution proceeding. In the mean time Sova Rani vacated the said suit premises and went over to 6A, Radha Madhab Garden Lane, Calcutta-10. The plaintiff respondent No. 1 claimed that she was one of the owners of the suit premises and alternatively she was a licensee of Smt. Lakshmi Debnath, the decree holder. On searching the old papers and documents, she got certified copies and xerox copies of important

documents which could not be produced by her at the time of passing the order "in Misc. Case No. 301 of 1988 and its appeal before this Hon"ble Court or in any of the earlier proceedings connected therewith. On a discovery of new and important documents, she is now quite certain that defendant/appellant practised fraud upon the court and entire action taken by her was mala fide. She further averred that Jugal Kishore Aich, her father was one of the owners of the suit premises who used to reside in the ground floor of his said dwelling house with his entire family consisting of his old and ailing mother Smt. Sarojini Aich, his wife Bina, his younger brother Krishna Chandra @ Kesto Aich (a bachelor) and his two daughters Sova and Renu. Sarojini Aich died intestate in 1953 and Jugal Kishore Aich died intestate on 26.12.70. His wife Bina predeceased him. Sova was married with one Amulya Mitra and as and when she became a widow, she came with her children to live in her father's house at 36, Sree Gopal Mullick Lane, Calcutta in May 1965. According to the present appellant Late Jugal Kishore Aich who was the owner of the suit premises in its one third share sold the said premises to one Lakshmi Devi Samaddar, wife of Binoy Krishna Samaddar, who in her turn sold the premises to the present appellant. She was previously a tenant under Jugal Kishore Aich and thereafter under Smt. Lakshmi Devi Samaddar from whom she purchased the suit premises long back on 2.6.1975. Jugal Kishore Aich by an indenture dated July 30, 1947 along with his mother Sarojini mortgaged their 2/3rd share to Bijoy Gopal Samaddar. The said Bijoy Gopal Samaddar made a false indenture in the names of his wife Smt. Lakshmi Samaddar on 12.7. 1949 and by that indenture Jugal Kishore and Sarojini sold their respective 1/3rd shares each totally 2/3rd shares for a mere consideration of Rs. 10,000/- to Smt. Lakshmi Samaddar. Her grandmother's life estate could not be sold out except for legal necessity. The plaintiff respondent No. 1 contends that no consideration really passed in between Jugal Kishore and Sarojini on the one hand and Lakshmi Devi Samaddar on the other and the said Jugal Kishore and Sarojini did not put their respective signatures on the said indenture. The plaintiff respondent No. 1 and her sister Sova Rani were always told by their father, grand-mother and uncle that they never sold out the said property. Their grand-mother Sarojini died in 1953, Jugal Kishore died in 1970 Krishna Chandra died in 1973. Krishna Chandra also sold out his 1/3rd share on 21.3.54 to Lakshmi Debi Samaddar. It is the contention of the plaintiff No. 1 that where no consideration passed and when Krishna Chandra never put his signature to the said deed, Lakshmi Debi Samaddar Merely obtained fraudulently some other person's signature on the said document. It was on 2.6.75 that Lakshmi Debi Samaddar sold out the property to the present appellant by a registered indenture at a throw-away price of Rs. 20,000/-.

4. The learned Judge despite the objection raised by the present appellant in the court below that there was no scope to decide over again the plaintiff's claim in respect of the said property on the face of the pronouncements in the earlier proceeding under Order 21 Rule 97 C.P.C. filed at her behest which was confirmed by the Hon"ble High Court and the doctrine of res judicata was

applicable in the case, held inter alia that it was not the proper stage when such material point should be adjudicated upon. The date of taking possession by the defendant appellant No. 1 who is the decree-holder has already been fixed on the following day through execution proceeding and if the plaintiff respondent No. 1 was thrown out of the suit property to the streets not only her suit would be infructuous but she would be prejudicially affected beyond redemption. The Trial court was of the view that there were materials which actuated the court to scrutinise the case of the plaintiff on merits and the balance of convenience and inconvenience being in favour of the plaintiff, her prayer for ad interim injunction at least at this stage, should be granted.

5. Mr. Shyama Prosanna Roychowdhury, Senior Advocate appearing in the case contended inter alia on behalf of the appellant that on the face of the earlier proceedings in between the parties in the execution case where the plaintiff respondent No. 1 sought to get herself impleaded even though the execution proceeding was pending against her sister by filing an application under Order 21 Rule 97 C.P.C. she has no scope whatsoever now to renew her claim when the judgment of the court in the earlier proceedings stared her on her face. That apart there was at least constructive res Judicata in the present case which restrained her from reagitating her claims over again. That apart it was too late in the day now to contend that her grandmother could not sell out the premises where she had merely a life estate and that her uncle did not at all enter into a sale deed in favour of predecessor in title of the present appellant Smt. Lakshmi Debnath. Mr. Roychowdhury further contended that the onus was entirely heavy on her to prove that the documents of sale executed by her grandmother and also by her uncle were sham transactions where no consideration passed as alleged or at all, a burden which she would never be able to shift at the trial. Her mere contention that she was unable to get the papers and documents at the earlier stage when she contested the earlier proceedings under Order 21 Rule 97 C.P.C. and she lost even on an appeal therefrom or even the prayer for police help under Rule 208 of the Civil Rules and Orders was allowed against her, would not help her to reagitate the points over again.

6. Mr. Priyabrata Mukherjee, Advocate appearing for the respondent submitted before us that the court while granting a temporary injunction is not merely concerned with a prima facie case but would reckon whether an arguable case is made out. He cited an English decision in *American Cyanamid Co. v. Ethicon Ltd.* reported in (1975) 1 All E.R. 504 : (1975)2 W.L.R. 316 in support of his contention.

7. Mr. Mukherjee cited a decision reported in *Smt. Isabella Johnson Vs. M.A. Susai*, for the proposition that a court which has no jurisdiction in law cannot be conferred with the jurisdiction by applying principles of res judicata. Further it was well settled that there cannot be any estoppel on a pure question of law and the question of jurisdiction is a pure question of law. The Supreme Court in this case disapproved the ratio propounded in *Avtar Singh and Others Vs. Jagjit Singh*

and Another, and reaffirmed its faith in an earlier three-judge judgment of the Supreme Court in Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, wherein it was held that a question relating to jurisdiction of a court cannot be deemed to have been finally determined by an erroneous decision of that Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not operate as *res judicata*. Similarly by an erroneous decision, if the court assumes jurisdiction which it does not possess under the statute, the question cannot operate as *res judicata* between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise, because if those decisions are considered as conclusive, it will assume the status of a special rule of law applicable to the parties relating to the jurisdiction of court in derogation! of the rule declared by the legislature. We respectfully agree with this decision cited by Mr. Mukherjee.

8. Mr. Mukherjee further cited before us a judgment of the Full Bench of the Madhya Pradesh High Court in Smt. Usha Jain and Others Vs. Manmohan Bajaj and Others, . It was held in this case that when the decree-holder or auction-purchaser was met with obstruction or resistance in obtaining possession, one of the options open to him is to apply under Rule 97 but that provision is merely permissive and not mandatory and it is open to the decree-holder or auction-purchaser to apply instead for a fresh warrant of possession. An enquiry at the instance of a third party in possession is contemplated only under Order 21 Rule 100 C.P.C. after he was dispossessed and not before it. The omission by the executing court to investigate into the objection filed by a third party, does not result in injustice to the third party. It cannot be said that he would have no remedy to protect his possession and have his right and title judicially investigated prior to his dispossession, his only remedy then being under Order 21 Rule 100 C.P.C. after dispossession. Another remedy available to such a third party is to institute an independent civil suit for a declaration of his title claiming therein the relief of temporary injunction to protect his possession. After amendment of Order 21 C.P.C. in 1976, a full investigation into the question of title is contemplated under Rule 97 and not a summary enquiry. Thus it would cause greater hardship to the decree holder, if every claim by the third party is to be investigated by the executing court. The executing court has no jurisdiction to start enquiry suo motu or at the instances of a third party other than the decree holder/auction purchaser under Order 21 Rule 97. On the face of this judgment, Mr. Mukherjee contended that the earlier proceeding taken by the plaintiff respondent No. 1 by seeing to get herself impleaded in the execution proceeding and/or thereby initiating a proceeding purportedly under Order 21 Rule 97 C.P.C. would be to exercise a jurisdiction unwarranted in law. It could not thus confer the court jurisdiction to investigate her title on that particular stage treating it as a proceeding under Order 21 Rule 97 C.P.C.

9. Mr. Mukherjee further cited a Single Bench judgment reported in Chouthmal Vs. Sunderlal and Others, It was a case where there having been a mortgage decree, an application was made for execution of the decree and tenants who

were not parties to the decree filed objections. There was adjudication of their claims and evidence was recorded. It was held by the Madhya Pradesh High Court in the facts of the case that the order does not thereby become one in terms of Rule 98 of Order 21 and appeal filed against orders by tenants is also not maintainable. They were also not persons who were dispossessed. Therefore, none of the provisions of Order 21 Rules 97, 98, 99 or 100 C.P.C. were attracted just because of the fact that the claims of the appellants/tenants were investigated on their application and order was passed after recording their evidence and it cannot be said that the order was passed under Order 21 Rule 98 C.P.C.

10. Mr. Mukherjee further pointed out a Single Bench judgment of the Kerala High Court in *E.M. Ahmu Vs. P.S. Ramalingam*, for the proposition that on an appeal against an ad interim injunction preferred under Order 43 Rule 1 (r) C.P.C. the Appellate Court has no jurisdiction to hear and dispose of the injunction petition itself on merits.

11. A Full Bench judgment of Allahabad High Court in *Zila Parishad, Budaun and Others Vs. Brahma Rishi Sharma*, was referred to in the judgment and it was held that the aggrieved parties can either get the injunction order discharged or varied or set aside under Rule 4 of Order 39 and if unsuccessful avail of the right of appeal as provided for under Order 43 Rule 1(r) or straightway file an appeal under Order 43 Rule 1 (r) against the injunction Order passed under Rules 1 and 2 of Order 39 C.P.C. It is observed that it is not unusual to provide for alternative remedies. To enable the Appellate Court to adjudicate finally on injunction for the first time will be virtually conferring such a jurisdiction on the appellate court which it otherwise does not have.

12. We respectfully disagree with the view as propounded by the Kerala High Court Single Bench judgment and we are of the confirmed view that, the Appellate Court in such matters is not deprived of its jurisdiction in passing observations on merits while considering whether the prima facie case is at all made out by the plaintiff in obtaining an interim order in his/her favour.

13. Regard being had to the facts and circumstances of the present case we think that the plaintiff respondent No. 1 really does have an arguable case which warrants a full throated hearing on merits. There is no such rule as was held in *American Cynamid Co. v. Ethicon Ltd.* (ibid) that court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if the case went to trial upon no other evidence than is before the court at the hearing of the injunction application the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunction sought. The use of such expression as "a probability" "a prima facie case or "a strong prima facie case" in the context of the exercise of discretion any power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the case is not frivolous and vexatious or in any other words that there is a

serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve the conflicts of evidence on affidavit as the facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and nature considerations. These are matters to be dealt with at the trial. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. Where other factors appeared to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake, whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial. We think that the Trial Judge rightly came to the conclusion that the balance of convenience lay in favour of his exercising his discretion; by granting an interlocutory injunction tentatively for some time and as an Appellate Court we should be hesitant to overrule the Trial Judge's exercise of his discretion, unless we are absolutely satisfied that he has gone wrong in law. In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who eventually is to try the case and that is why we desist from dealing with the existing evidence in detail and from giving reasoned assessment of our own views as to the relative strength of each party's cases. At this stage the court is not entitled to decide what is the correct answer to be given to the questions at the hearing of the suit but merely whether there is a fair point for trial in the sense that there is a substantial question to be investigated and that the matter should be preserved in status quo until that question is finally disposed of.

14. The learned Trial Judge has already fixed the hearing on 25th June, 1993. We direct the learned Judge to hear out the injunction application in a full throated manner so that the present defendant appellant can contest the same efficaciously. At the present stage we do not think it advisable to go into the merits but would direct the learned Trial Judge to hear out the injunction application in all finality either on June 25, 1993 or on a date within a period of eight weeks from this date i.e. by July 2, 1993 at the latest. The filing of an affidavit-in-opposition or petition of objection and affidavit-in-reply, if not already made, must be so done within a period of three weeks from this date. We make it clear that none of the observations made by us will fetter the learned Trial Judge in his final adjudication so as to tilt the balance in favour of either of the

parties and the learned Trial Judge is directed to hear out the injunction matter in all finality on merits at the time of disposal of injunction application. If the Trial Judge is not available, the matter is to be heard out by the learned Judge who is in charge of the said Court.

The appeal as also stay application are disposed of accordingly.

There will be no order as to costs. Let a xerox copy of the order be made available to the learned advocates for the parties on usual undertaking. Let a copy of this order be sent by a special messenger to" the trial Court at the cost of the appellant, the costs being put in by Tuesday next.

N.K. Bhattacharyya, J.

I agree.