
(1997) 08 GAU CK 0040
In the Gauhati High Court
Case No : M.A. (F) No. 203 of 1996

Nur Islam and Others

APPELLANT

Vs

Mustt. Samasta Banu and Others

RESPONDENT

Date of Decision : 28-08-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (1998) 1 GLT 443

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : B.K. Goswami and B.M. Sarma, for the Appellant; N. Chakraborty, M.A. Sheikh and Naibaris Chakraborty, for the Respondent

Judgement

J.N. Sarma, J.—This appeal has been filed against an order of learned District Judge, Morigaon in Misc. (J) Case No. 12/96 arising out of Title Suit No. 7/96. By the impugned order the learned District Judge granted an ad interim injunction restraining the principal-Defendants from proceeding with the execution of decree of TS 4 of 1983 of the Court of Assistant District Judge, Nagaon which was obtained by them and which was confirmed in appeal as well as in Second Appeal by both the Courts.

For disposal of this appeal, it is necessary to have a look at the brief facts of the earlier suit. A portion of that judgment i.e. in T.S. No. 4/83 is quoted below:

One Abbas Ali was the original owner of the suit property. During his life time he sold the same to his wife Mustt. Saburajan Bibi. Mustt. Saburajan Bibi sold the suit land by a registered deed dated 12.11.51 in favour of Maimutuddin Seikh, the predecessor in interest of the Plaintiffs. The possession thereof was duly delivered in favour of Naimatuddin Seikh. Naimatuidin Seikh accordingly had been possessing the suit land. The suit land was also mutated in his name in the relevant patta. Naimatuddin Seikh died in the year 1972 leaving the Plaintiffs as his heirs. The Plaintiffs then have been possessing the suit land. The names of the Plaintiffs have also been recorded in the Chitha record. Against this mutation

Defendant Hasen Ali and 2 others filed an objection before the learned S.D.C. Laharighat. The learned S.D.C. by his order dated 28.10.81 struck off the names of the Plaintiffs from the relevant chitha. Being encouraged with the aforesaid order the Defendants forcibly tried to dispossess the Plaintiffs and in a bid to their illegal steps, they set fire on a house meant for the use of the labour. The Plaintiffs then lodged an ejahar with the concerned police station. The Plaintiffs also filed a case u/s 145 Code of Criminal Procedure against the Defendant in respect of the suit land and the learned Magistrate declared the possession in favour of the Plaintiffs and directed O.C. Laharighat to hand over the possession of the suit property in favour of the Plaintiffs. Police accordingly complied with the order of the learned Magistrate. But the Defendants did not obey the declaration of the order of the learned Magistrate. The Defendants had no manner of possession of the suit property. Hence, the Plaintiffs have been compelled to file this suit praying inter alia for a decree of khas possession.

The suit is resisted by the Defendants Nos. 1 to 5. The suit will proceed *ex parte* against the other Defendants. In their written statement the answering Defendants Nos. 1 to 5 inter alia pleaded that the suit has got no cause of action and is not maintainable. The suit is also barred by limitation and adverse possession. It is also contended that the suit is bad for non-joinder of necessary parties. The answering Defendants deny the allegations that Saharjan purchased the suit land from late Abbas Ali. It is averred that late Abbas Ali, the father of Defendant No. 1 was the original owner of 8 bighas of land appertaining to suit dag and out of these 8 bighas he gifted 4 bighas of land in favour of Baharuddin and Baharuddin, on the other hand, sold 4 bighas of land to Sayed Ali. The remaining 4 bighas of land, has been possessing by the son of late Abbas Ali as his heirs. As such, the suit is liable to be dismissed.

2. It may be stated herein that proceeding also the issue being Issue No. 4 whether the suit is bad for nonjoinder of parties and deciding Issue No. 4, the trial Court arrived at the following finding:

It is asserted by the Defendants that the suit is bad for non-joinder of necessary of party. According to them all the pattadars should have been arrayed as necessary parties in this suit. But the plaint discloses that the Plaintiffs filed the case for a plot of land measuring 4 bighas of the patta in question. The predecessor of the Plaintiff purchased this specific plot of land from the wife of one of the pattadars. The answering Defendants nowhere stated that the suit land has been owned by all the pattadars. So, in view of above, I do not feel all the pattadars should be impleaded as necessary parties in the suit. Consequently, this issue is answered in the negative and in favour of the Plaintiffs.

When the decree was sought to be executed the brothers and sisters of the original Defendants filed the present suit and in that suit the present injunction has been granted. The law is that an injunction can be granted" restraining execution of the decree obtained earlier only on the ground of fraud. If any

authority is required for this proposition of law, one may have a look at AIR 1978 Gau 56 (Tazmul Ali and Ors. v. Md. Ulairaja) (FB) wherein the Court pointed out that execution of a decree obtained by fraud or collusion is an injury. The Full Bench pointed out that mere allegation of fraud is not sufficient. Fraud is required to be established by law and must be brought home before an injunction can be granted. If on a mere allegation of fraud an injunction is granted, any decree obtained can be stalled. The fraud as is understood means as pointed out by the Apex Court in S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, as follows:

A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is deception in order to gain by another's loss. It is a cheating intended to get an advantage.

To find out what is the position in the present case, let us have a look at the plaint of the present suit. In the present suit the only allegation is that the decree was obtained fraudulently and it is not executable decree and there the sisters were not made parties in the earlier suit. The bare perusal of the facts quoted above will show that the sisters were not necessary parties as found by the trial Court in the earlier suit. So, the question of fraud does not arise. If fraud is not established, even prima facie the question of granting injunction restraining the execution of the decree does not arise.

3. Dictum of the Privy Council is that in India it is easy to obtain a decree, but difficult to reap the fruit of it. That observation was made by the Privy Council as far as back as in 1856 in 12 M.I.A. That observation of the Privy Council still holds good. A time has come when the Court must take strict view of the matter and an injunction in such a casual and cavalier manner should not be granted. The Court may grant an injunction in an appropriate case, but that must not become a rule, if it is made so easy and every decree obtained can be challenged and another round of litigation shall start. That will mean a body blow to the concept of justice. A decree instead of assuring finality will be always in a topsy turvy situation.

4. The learned District Judge in granting the injunction even did not have a look at the earlier decree.

5. Shri N. Chakraborty, learned Counsel for the Respondents places reliance in a recent decision of the Supreme Court reported in State of Madhya Pradesh and another Vs. Brijesh Kumar Awasthi and others, where the Supreme Court pointed out that in a situation where a case of fraud is made out as pointed out by Full Bench of this Court an injunction may be granted. In that particular case, the Supreme Court found the earlier decree to be fraudulent and having arrived at this finding, only the Supreme Court laid down the law that an application for injunction restraining the Defendants from executing a fraudulent decree may be granted. There is no quarrel with this proposition. What is required is that the Court must come to a prima facie finding that the earlier judgment is a

fraudulent one. That was not done in the instant case.

6. Accordingly, this appeal is allowed. The judgment passed by the learned District Judge, Morigaon in Misc. (J) Case No. 12/96 shall stand quashed. I have heard Sri B.K. Goswami, learned Counsel for the Appellants and Sri N.C. Chakraborty, learned Counsel for the Respondents. It is needless to say that the decree will be executed for the land for which the decree has been obtained.