

(1990) 08 OHC CK 0016
In the Orissa High Court
Case No : Misc. Appeal No. 343 of 1989

Paidiseti Bhankaranarayana

APPELLANT

Vs

Paidiseti Rajeswar Rao and Others

RESPONDENT

Date of Decision : 17-08-1990

Acts Referred:

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

Citation : AIR 1991 Ori 92

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

Bench : Single Bench

Advocate : Biswanath Rathe, S.N. Mohapatra and K.R. Mohapatra, for the Appellant; Manoj Mishra, P. Mohanty, A.K. Rath, B. Routgay, A.K. Dash, K.B. Kar, R.K. Mohapatra, Jaganath Rath and S.K. Sethy, for the Respondent

Final Decision : Partly Allowed

Judgement

P.C. Misra, J.—This appeal under Order 43, Rule I of the Civil P.C. (hereinafter referred to as the "Code") is directed against the order dated 19-8-1989 in M.J.C. No. 10/89 passed by the learned Subordinate Judge, Bherhanpur. The aforesaid miscellaneous proceeding under Order 39, Rules 1 and 2 of the Code arises out of Title Suit No. 6/89 pending in the same Court praying for partition and separate allotment of the plaintiffs share in the suit schedule properties consisting of houses, moveables and bank accounts.

2. The plaintiff in the aforesaid suit is the appellant in this appeal. Defendants 1 and 2 are his brothers and defendant No. 3 is the father of the plaintiff and defendants I and 2. Defendant No. 4 is a partnership firm having defendant No. 3 and his three sons as partners. Defendant No. 5 is the wife of defendant No. 2. Defendants 6, 7 and 8 are the Nationalised Banks where money has been deposited in the names of the partnership and other members of the family. In the suit the plaintiff has prayed for partition of his 1 / 4th share in the suit properties for a declaration that the partnership firm has been dissolved since 1-4-1976 and for rendition of accounts of the joint family business and the

partnership firm. In the application under Order 19, Rr. 1 and 2 of the Code he prayed for restraining defendants 1, 2, 3 and 5 from entering into the residential house of the plaintiff and also from disturbing the plaintiffs possession of the shop house in Venkateswar temple street where the plaintiff alleges to have been carrying on his individual business. At the initial stage the learned Subordinate Judge by an interim order directed status quo to be maintained, but at the final hearing the order of status quo was vacated and so also the injunction prayed for. This appeal is directed against the said order.

3. The background of filing of the present suit as stated by the plaintiff is as follows :

In 1977 defendants 1 and 2 filed Title Suit No. 63 of 1977 against the present defendant No. 3 and the appellant for partition of the joint family properties, which was dismissed for default on 18-7-1980. Thereafter defendant No. 2 alone filed another suit (Title Suit No. 34/83) against the appellant, and present defendants 1 and 3 which was also not pursued and was dismissed on 2-11-1983 as not pressed. The present defendant No. 3 was residing with the appellant in one of the family houses, but during the absence of the appellant, he left the house with all his belongings and has been trying to sell away the joint family houses being under the evil advice of defendant No. 2 for which the present suit has been filed.

4. Out of the suit properties described in Schedule "A", the plaintiff claims to be staying in the house in Marthapeta street described in item No. 1 of Schedule "A" and carrying on his business in a shop house in Venkateswar temple street appertaining to item No. 2 of the Schedule "A". The plaintiff has alleged that defendant No. 2 has managed to obtain a registered deed of gift from defendant No. 3 in respect of the suit shop house in Venkateswar temple street (item:- No. 2 of Schedule "A") where the plaintiff has been carrying on business and the defendants are presently planning to sell away other joint family properties and bent upon to dispossess the plaintiff from the residential house where he has been residing with his family. In the application under Order 39, Rr. 1 and 2 of the Code the plaintiff alleged that as defendants 1 to 3 and 5 have become very much hostile and inimical to the plaintiff, they have been also trying to forcibly enter into the residential house where the plaintiff is living and to dispossess him therefrom. The plaintiff has similar apprehension in respect of the shop house which stands already gifted away in favour of defendant No. 2. Defendant No. 1, one of the brothers of the plaintiff, supported him in his counter filed in the aforesaid M.J.C. No. 10/89 admitting the plaintiffs possession in respect of the residential and shop premises and further asserting that defendants 2 and 3 are attempting to create false documents being in collusion with each other and they are also trying to dispossess the plaintiff and/or otherwise disturbing in his peaceful possession. Defendants 2 and 3, however, denied each and every allegation of the plaintiff and asserted that by virtue of the registered deed of gift executed by defendant No. 3 in favour of defendant

No. 2, the latter is entitled to take possession of the property appertaining to the shop house in Venkateswar temple street. As regards the residential house in Marthapeta street (item No. 1 of Schedule "A"), it was alleged that the same is the self-acquired and exclusive property of defendant No. 3 and the plaintiffs occupation thereof is that of a licensee. It has also been alleged that defendant No. 3 was occupying the said house, but (he plaintiff and his wife physically prevented him from entering into the house for which he has been out of possession since 11-1-1989. In his counter defendant No. 3 supported the stand of defendants 2 and 5 and further alleged that since he was not permitted to occupy the house in Marthapeta street by the plaintiff and his wife, he has been staying with defendant No. 2 against his wishes. As alternative defence was taken that assuming that the said property Belongs to the joint family and not to defendant No. 3 alone, there can be no injunction against the co-sharers to use the joint family property. The Subordinate Judge in the impugned order after hearing the parties rejected the prayer for injunction on a finding that the plaintiff has not been able to make out a prima facie case and the balance of convenience is also against him. It is against this order the present appeal has been filed.

5. The cause of action for the suit is stated by the plaintiff arose on account of the series of events which took place one after the other after 1976 and the plaintiff claims 1/4th share in the suit properties including the joint family business since defunct. There is serious controversy between the parties as to whether the properties described in the plaint schedule are joint family properties or the self-acquired properties of defendant No. 3. Most of the disputes which arose for consideration in the Miscellaneous Case were also the issues to be decided in the suit. But it stands practically admitted that at present the plaintiff has been residing in the house situated in Marthapeta street (item No. 1 of Schedule "A") and he is carrying on business in the shop house situated in Venkateswar temple street (item No. 2 of Schedule "A"). It is also admitted that some time back defendant No. 3 was living in the same house along with the plaintiff though at present he is living with defendant No. 2. The plaintiffs version is that defendant No. 3 shifted to the house of defendant No. 2 during his absence with all his belongings at the instance of defendant No. 2, whereas defendants 2 and 3 allege that he was driven out of the house by the plaintiff as defendant No. 3 gifted the house in Venkateswara temple street in favour of defendant No. 2 ignoring the claim of the plaintiff. The injunction sought for by the plaintiff is in a sense to prevent any disturbance of his present possession and to maintain status quo as on the date of filing of the suit till its disposal.

6. It has been strenuously argued on behalf of the respondents 2 and 3 (defendants 2 and 3 in the court below) that in order to be entitled to an order of injunction, the appellant should establish prima facie case and balance of convenience in his favour and it must be further shown that he would suffer irreparable injury in the event the injunction prayed for is refused. They rely upon a 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 Satyanarayart Singh), wherein it has been emphasised that all the aforesaid 3 elements must be found in favour of the plaintiff in order that he would be entitled to an order of injunction. His Lordship has followed the leading decision on the subject in Brajendra Nath Ghosh and Others Vs. Sm. Kashi Bai and Others, . There can be no dispute as to the legal proposition that the interlocutory relief by way of temporary injunction cannot be granted as a matter of course and that the Court is required to exercise judicial discretion in granting the relief only when the three essential conditions are satisfied by the party praying for injunction.

7. Prima facie case does not mean that it must be shown that in all probability the party applying for injunction would succeed in the suit. It would be sufficient for him to show that he has a fair question to raise as to the existence of the right he claims and that it is necessary in the interest of justice to preserve the said right till the disposal of the suit. In the present case admittedly the plaintiff has been residing in the house in Marthapeta street and is carrying on his business in the shop house in Venkateswar temple street. The further admitted case of the parties is that defendant No. 3 was residing in the said house along with the plaintiff. The plaintiff claims partition of the said property alleging that it is one of the items of joint family properties. Defendant No. 1, one of the brothers of the plaintiff, supports the plaintiff saying that the said house is a joint family property in which each of the co-owners is having equal interest. No doubt a dispute has been raised in the written statement of defendants 2 and 3 that the said property is the self-acquisition of defendant No. 3, but materials now available on record are not sufficient for a prima facie view to be taken accepting or rejecting either of the aforesaid pleas. The only circumstances relied upon by the respondents 2 and 3 is favour of the property being held to be self-acquisition of defendant No. 3 is the joint written statement filed by the present plaintiff and defendant No. 3 in Title suit No. 133 1982 in which both of them took a joint stand that it was the self-acquired property of defendant No. 3. The learned counsel for the appellant has referred to some decisions wherein it has been held that an admission of a party in a pleading of an earlier suit can be explained away in which event the same would not bind him. The learned counsel for the appellant has, however, urged that the present defendant No. 2, who filed Title Suit No. 133/82 in the Court of Munsif, Berhampur claimed a share in Marthapeta house alleging that it is one of the items of joint family property. In order to explain the admission made by the plaintiff in the earlier suit, it has been alleged by him that the earlier suit was being looked after by defendant No. 3 and the plaintiff signed the written statement as suggested by his father. Be that as it may, the stands of the plaintiff and of defendant No. 2 in the aforesaid suits and that in this suit are not consistent.

8. Defendant No. 3 has taken a plea in this suit that the suit house was purchased by him out of his personal income from his individual business and not from out of the income of the partnership business. The case of defendants 2

and 3 in their written statement is that the plaintiff has been in possession of the residential house and the shop house as a permissive occupant, but at this stage it is not possible to accept either of the pleas as it would be a matter to be ultimately decided in the suit on the evidence to be adduced by both parties and to appreciate which, various other circumstances may be relevant. Since the plaintiff has been admittedly residing in the residential house at Marthapeta street and is carrying on his business in the shop house in Venkateswar temple street, his present possession, which is said to be continuing since long, the question which arises to be decided in the suit is as to whether such possession was permissible as alleged by the defendants 2 and 3 or he has been possessing it on his own right as a member of the joint family. Admittedly the previous suits filed for partition of the properties in question by different parties were dismissed for non-prosecution. The possession of the plaintiff is not of recent origin and has not been interfered with during the pendency of such suits. In the facts and circumstances of this case, it would not be correct to say that the plaintiff has failed to raise a fair question to be decided in the suit. I would, therefore, hold that the plaintiff's prayer for protection of his possession during the pendency of the suit cannot be brushed aside.

9. Admittedly the parties are living in separate houses. The plaintiff has no alternative residence. If the plaintiff's occupation of the said house is not protected, the comparative mischief or inconvenience to him would be more and, therefore, the balance of convenience leads in his favour. Similar would be the position so far as the question of irreparable injury is concerned. The plaintiff cannot be adequately compensated by way of damage, if he is thrown out of possession of the house in which he is residing and the shop house where he is carrying on his business for his living. Thus all the 3 elements for grant of temporary injunction in favour of the plaintiff stand satisfied for the limited purpose of protecting his possession in respect of the properties in item Nos. 1 and 2 of Schedule "A" of the plaint.

10. There remains yet another question in this connection, which requires to be dealt with. The controversy has been extended to the question whether protection of the possession of the plaintiff in respect of the residential house would also mean that defendant No. 3 who was occupying the same house along with the plaintiff should be prohibited an entry therein. In this connection, it has been urged on behalf of the respondents 1 & 3 that defendant No. 3 has got exclusive title over the said property inasmuch as it is his self-acquisition. Alternatively, even if it is held that it is one of the items of the joint family properties, each of the co-sharers has an interest in the same and, therefore, defendant No. 3 cannot be prohibited from coming to the said house. Mr. Mohapatra, the learned counsel for the respondent No. 3 has argued that it is not possible to grant injunction against one co-owner at the instance of another as each of the co-owners is entitled to enjoy the joint properties in their own right. Reliance has been placed in this connection in a decision of this Court reported in *Lingaraj Misra and Others Vs. Bhubaneswar Mohapatra and Others*, . The

question which arose in the said decision is slightly different. In the facts of that case his Lordship held that where during the pendency of a suit the defendant-co-sharers were alleged to put certain temporary structures with the permission of the court subject to the ultimate result in the suit and the land on which such structures were raised was the land which was allotted by the award of the arbitrator to the defendants, but the award had been set aside as a result of the suit, such defendants cannot subsequently claim any equity after the result of the suit had gone against them and cannot also be allowed to take advantage of the Court's order which permitted them to put up certain kutchha structures. It was thus held that the defendants are liable to remove the structures raised by them during the pendency of the suit and they are to be restrained from making any constructions in future on the suit land till their shares are defined in a properly constituted partition suit. His Lordship also indicated that while considering a question of injunction each case must be decided upon its own peculiar facts and it would be left to the Court to exercise its judicial discretion upon proof of circumstances showing on which side the balance of convenience lies. Another decision of this Court relied upon by the learned counsel for the respondent No. 3 is the one reported in 1973 (2) CWR 1525 (Nagendranath Bose v. Girija Prasad Bose). His Lordship indicated that before issuing injunction a court is called upon to determine whether there is exclusive prima facie title in favour of the plaintiff and whether he is in exclusive possession so as to restrain the defendants from appropriating their respective shares of the profits out of the suit properties. The said case arose out of a suit relating to the income of a Hat. His Lordship in that case found that the plaintiff and defendants have joint title and possession in respect of the Hat in question and in view of the aforesaid undisputed factual position, his Lordship held that no injunction should have been issued by the courts below. What appears to me in this case is that defendant No. 3 was occupying the same residential house along with the plaintiff some time prior to the suit. He has now shifted from that place either being in connivance with defendant No. 2 as alleged by the plaintiff or being driven out by the plaintiff as alleged by himself and defendant No. 2. Even accepting the plaintiff's case that the said residential house is one of the items of joint family properties, it may not be strictly possible in law to injunct defendant No. 3 to come and reside in the said house specially in view of the fact that he, in the recent past, had been living there. But any attempt to put defendant No. 3 back in the said premises would, in my opinion, result in further embittering their relationship. It would create further complications then bringing about a solution. It may, however, be remembered that present possession of one or more of the co-sharers during the pendency of the suit would be without prejudice to the rights claimed by each of them in respect of the said property. I would, therefore, refuse to prohibit defendant No. 3 by way of injunction to deprive him of his right of entry in the residential house where the plaintiff now resides. But his entry, if at all, would not entitle defendant No. 2 or his men to take advantage of the situation for creating disturbance in the possession of the plaintiff.

11. In the result, I would allow the appeal to the extent that the plaintiffs possession over the residential premises and the shop house in items 1 and 2 of Schedule "A" shall be protected by injuncting the defendants not to create any disturbance therein and at the same time refuse to grant to any injunction against defendant No. 3 prohibiting his entry into the residential house in item No. 1 of Schedule "A". The other defendants are, however, restrained not to come over and disturb the possession of the plaintiff in respect of the aforesaid property. The appeal is thus allowed in part.

There shall be no order as to costs.