
(1987) 02 CAL CK 0008
In the Calcutta High Court
Case No : F.M.A.T. No. 608 of 1986

Phani Bhusan Dey

APPELLANT

Vs

Sudhamoyee Roy and Another

RESPONDENT

Date of Decision : 19-02-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : 91 CWN 1078

Hon'ble Judges : Ajit Kumar Nayak, J;A.M. Bhattacharjee, J

Bench : Division Bench

Advocate : M. Palit, for the Appellant; Asoke Kumar Sengupta, for the Respondent

Final Decision : Allowed

Judgement

A.M. Bhattacharjee, J.—In the suit giving rise to this appeal, the plaintiff/respondent No. 1 obtained an order of temporary injunction restraining the defendant No. 1/respondent No. 2 from transferring the suit-property of any part thereof to anyone in any manner. But it is alleged that while the aforesaid order of injunction was in operation, the defendant No. 1, in violation of the said order of injunction, executed a Deed of Sale in respect of the suit-property to and in favour of the defendant No. 2/appellant and that on the strength of such sale, the defendant No. 2 has now raised a construction on the suit-land.

2. The plaintiff thereafter filed another application for injunction under Order 39, Rule 1 of the CPC restraining the defendant No. 2 from obtaining electric connection to the newly constructed house till the disposal of the suit and such injunction was granted on 13.8.1985. The defendant No. 2 has thereafter filed an application under Order 39 Rule 4 read with Section 151 of the Code for having the aforesaid order of injunction discharged or varied and the said application having been dismissed, the defendant No. 2 has preferred this appeal.

3. It is true, that the defendant No. 2 not having preferred any appeal against

the order of injunction, but having preferred this appeal only against the order dismissing his application for discharge or variation of the order of injunction, the legality or the propriety of the aforesaid order of injunction may not be directly assailed in this appeal. We have not, however, been able to appreciate the legality or the propriety of the said order. It is too well-settled to require any citation that even if the plaintiff has made out a prima facie case, a temporary injunction ought not to be issued in his favour unless he would suffer irreparable injury without such an order of injunction. Even assuming argue do that the plaintiff is entitled to the suit-land and the defendant No. 1 could not convey the same to the defendant No. 2, we still fail to understand that the defendant No. 2 being admittedly in possession thereof and having constructed a house thereon, what injury, it at all, the plaintiff could suffer if during the pendency of the suit the defendant No. 2 obtained electric connection or say, water connection, to the house for domestic use. Then again, it is equally well-settled that a temporary injunction is not to be granted in favour of the plaintiff unless the Court is satisfied that the balance of convenience and inconvenience is in his favour and is against the defendant. Now, here in this case, if the plaintiff succeeds in her suit and establishes her title to the suit-land, she would get all the relief's in respect thereof and the electrification of the house in the meantime would not and cannot adversely affect any of those in the relief's. But if the suit finally fails and the defendant No. 2 remains injected from obtaining electric connection to the house during the pendency of the suit, the inconvenience suffered by him during the period would remain irremediable.

4. As would appear from the order of injunction granted on 13.8.1985, the reasons which weighed with the trial Judge in granting the injunction were mainly two. Firstly, the sale-deed under which the defendant No. 2 claims title to the suit-land was executed by the defendant No. 1 in violation of the order of injunction restraining the defendant No. 1 from effecting any such alienation and, therefore, allowing the defendant No. 2 to obtain electric connection to the house constructed on the suit-land would be putting premium on such illegality. And, secondly, prohibition against obtaining electric connection would not cause any loss or injury to the defendant No. 2, but would, at the most, cause some amount of inconvenience only.

5. As to the first reason, it must be pointed out that it is the learned Judge's own finding in the impugned order that "although the defendant No. 1 was restrained from transferring the suit-property to any one by an order of injunction, yet by concealing the fact of passing of the said order, the defendant No. 1 managed to transfer the property in suit to the defendant No. 2", and, therefore, no malafide or blemish has been attributed to the defendant No. 2. But that apart, whether or not one can appreciate the propriety of or the reason behind the rule, the ordinary rule is that alienation made even in contravention of an order of injunction is not void and the existence of a prohibitory injunction does not invalidate an alienation in breach of such order. One may refer to Mulla's CPC (13th Edition Volume 2 - page 1513) to find the law to have been stated thus :-

A temporary injunction...has not the effect of making subsequent alienation of the property void. Hence, if a party against whom a temporary injunction is granted restraining him from alienating the property, sells or mortgages the property pending the injunction, the sale or mortgage is not void.

6. These observations have been quoted with approval by a Division Bench of this Court in *Bepin Krishna Sur and Others Vs. Gautam Kumar Sur and Others*, , a decision which has been cited in the impugned order itself and to which we would have occasion to refer again hereinafter. If the defendant No. 2 has not, according to the learned Judge's own finding, acted illegally or in violation of the order of injunction in purchasing the suit-land and the purchase is not illegal in spite of the order of injunction, then allowing him to obtain electric connection to the house constructed on the suit-land during the pendency of the suit cannot amount to putting any premium on any illegality.

7. As the second ground, we are afraid that the learned Judge has put the question the other way round. It would be trite to say that a temporary injunction is not to be granted merely because it would not be causing any loss or injury to the defendant and the material, and rather the most material, question to be considered is whether the plaintiff would suffer any irreparable injury but for the grant of such injunction. And as we have already indicated, we have not been able to ascertain what irreparable injury the plaintiff would suffer if the defendant No. 2 having already constructed the house, obtains electric connection thereto for domestic purposes during the pendency of the suit. According to the learned Judge, if defendant No. 2 is allowed to take electric connection to the house already built, "that will mean further encroachment on the right, title and interest of the plaintiff for which she is fighting". All that we see, "the plaintiff is fighting" for the suit-land claiming to have inherited the same as the sole heir of her deceased son and asserting that the defendant No. 1, who has sold the suit-land to the appellant/defendant No. 2 as the widow of that son of the plaintiff, was not the married wife of that son. If the plaintiff's case is found to be true, then the defendant No. 2 having purchased the suit-land from the defendant No. 1 and having constructed thereupon, might have "encroached" upon the rights of the plaintiff. But can taking electric connection or say, water connection, to the said house amount to "further encroachment" on the rights of the plaintiff? Then the defendant No. 2 must be regarded to be making such "further encroachments" every moment by staying therein with his family and even by cooking food therein and the like. One must not forget that *Lax Non Curat De Minimis*, the law cares not for trifles. But assuming *arguendo* that obtaining electric connection by the defendant No. 2 would amount to some further invasion of the rights of the plaintiff, we cannot persuade ourselves to go further and to agree with the startling theory propounded by the learned Judge that every "invasion on the right, title and interest of the person is always considered as an irreparable loss". Then, in that case every invasion of a legal right, even though fully redressable in damages, would have warranted grant of a temporary injunction and the principle that in order to obtain temporary

injunction the plaintiff must show possibility of irreparable injury without such an interlocutory order, would not have been so assiduously evolved and so firmly established in the relevant law. The principle is too well-settled to require any citation, but yet reference may still be made to Woodroffe's Tagore Law Lectures on the Law relating to injunction (6th Edition - 1964 - page 111) where it has been stated on the high authority of spelling that "nor will an interlocutory injunction be granted to restrain a wrong which is a mere technical invasion of the plaintiff's rights and does not threaten any serious injury". For all these reasons we are of the view that on well-settled principles of law governing the matter, the learned Judge ought not to have granted the injunction restraining the defendant No. 2 from obtaining electric connection to the house.

8. Mr. Sengupta, the learned Counsel for the plaintiff/respondent No. 1 has, however, repeatedly urged that this being an appeal, not against the order of injunction granted, but against the order refusing to discharge or vary the same under Order 39 Rule 4, the legality and/or the propriety of the Order of injunction is no longer open to be challenged in this appeal and that the only question for our consideration in this appeal is whether the learned Judge was right in refusing to vary or discharge the order of injunction. Mr. Sengupta has very strongly urged that the order of injunction in this case having been passed after giving the concerned party an opportunity of being heard, the order cannot, under the Second Proviso to Rule 4 of Order 39, be "discharged", varied and/or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances or unless the court is satisfied that the order has caused undue hardship to that party. This Proviso to Rule 4 has been inserted by the Amendment Act of 1976, but even before that, the ordinary *cursus curiae* was that once a court has granted injunction after giving the parties due opportunity of being heard, the order was not to be discharged or otherwise interfered with except on presentation of some new materials not available to the party when the original order was made. This will appear from, among others, the decision of the Madras High Court in *Govinda Ramanuja v. Vijaramaraju* (AIR 1929 Mad 809) on which reliance has been placed by Mr. Sengupta and also from the decision of the Madhya Pradesh High Court in *Sitaram Madan Ahir Vs. Rajkunwarbai and Others*, . But even then, we would have liked to consider the question as to whether an injunction may be discharged or varied on a motion to that effect when the Court is satisfied that on the face of it, the same was granted without any advertence to and in violation of the fundamental principles governing the matter, like the possibility of any irreparable injury being caused unless such an injunction was granted. There is the very high authority of Woodroffe in his Tagore Law Lectures (*supra*, at 175) to the effect that "if the court shall be of opinion that the injunction was improperly granted, it will order the injunction to be dissolved". At any rate, even going by the terms of the Second Proviso to Rule 4 of Order 39, we might have held that since a prohibitory injunction generally causes some hardship to the

person against whom it is granted, the hardship caused by such an order made in clear violation of the fundamental principles governing temporary injunction can not but be undue hardship within the meaning of the said Proviso, for no hardship can be due if it is caused by an order passed in violation of the fundamental principles of law.

9. But we need not decide the question on abstract principles for we are satisfied that the order of injunction in this case has in fact caused undue hardship to warrant its discharge. It was stated in the application filed by the defendant No. 2 under Order 39 Rule 4, supported by affidavit and several Medical Certificates that his children with defective eye-sight cannot prosecute their studies at night without electric light and the absence of electric light is causing injury to their eyes and is hampering their education. It is also stated that the brother of the defendant No. 2 being a asthmatic patient direly needs electric fan and is accordingly suffering immensely for want of it. If, as already indicated therein before, the impugned order of injunction restraining the defendant No. 2 from obtaining electric connection was not necessary to protect the plaintiff from any injury which could be regarded to be irreparable, then the adverse repercussion caused by the impugned order was obviously disproportionate to the need for which the order was passed. Following the ratio in the Division Bench decision of this Court in Bepin Krishna Sur and Others Vs. Gautam Kumar Sur and Others, we would hold that when an order of temporary injunction causes adverse repercussion which is disproportionate to the need for which the same had been passed, the order must be held to have caused undue hardship to warrant its discharge on that ground.

10. Mr. Sengupta has urged that if we allow the appeal and discharge the order of injunction on the ground that this was impermissible under the relevant law, we would be virtually converting this appeal against the order refusing to discharge the injunction to an appeal against the injunction order itself, which we cannot do under the law. As we have already indicated, we are allowing this appeal and discharging the order of injunction on the ground that the same is causing undue hardship within the meaning of the second Proviso to Order 39 Rule 4 and we have taken into consideration the patent impropriety of the order of injunction only to determine the question and the extent of such hardship resulting therefrom and we do not think that we have gone beyond law. May we, however, say that law in its majestic magnanimity excuses little wrong for doing greater right and that if law is good, justice is still better and would mould the law wherever it can ?

We accordingly allow the appeal, set aside the impugned order dated 11.4.1986 refusing to discharge the order of injunction dated 13.8.1985 and discharge the said order of injunction. No order as to costs.

Ajit Kumar Nayak, J.

11. I agree.

Appeal allowed.