

(2002) 03 GAU CK 0051

In the Gauhati High Court

Case No : Civil Revision Petition No. 64 of 2002

Phulmati and Others

APPELLANT

Vs

Bidyut Joyti Dutta Choudhury and Others

RESPONDENT

Date of Decision : 19-03-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 91, Order 21 Rule 97, Order 21 Rule 99, Order 39 Rule 1, Order 39 Rule 2
Specific Relief Act, 1963 — Section 41

Citation : (2002) 2 GLT 299

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Advocate : D. Mazumdar and S. Saikia, for the Appellant; N. Choudhury, S.C. Kayal, S.K. Ghose and R.C. Paul, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Roy, J.—The present revision Petitioners are Plaintiffs in Title Suit No. 175/98 filed in the Court of learned Civil Judge (Junior Division) No. 1, Karimganj praying for a decree inter-alia for declaration of their jote right over the suit land and for a further declaration that the judgment and decree obtained by the opposite party No. 1 in Title Suit No. 68 of 1967 and Title Suit No. 34 of 1968 from the Court of Munsiff, Karimganj against the opposite party No. 2 to 6 and the proceedings of the Title Execution case No. 3 of 1998 are illegal, null and void and in -operative in law. They also prayed for a permanent injunction restraining the opposite party No. 1 from dispossessing them from the suit land by executing the decree obtained in the above mentioned suits. Along with the plaint they also filed an application under Order 39 Rule 1 and 2 CPC for temporary injunction restraining the opposite party No. 1 from executing the decree in the aforesaid suits.

2. Their case in short, in the plaint is, that the manager of the opposite party No. 1 gave jote settlement of the suit land to one Muslim Ali and his wife Joyful Bibi

by executing a registered deed No. 2364 dated 23.2.1948. Muslim Ali died leaving behind his widow Joyful Bibi, two sons, Nuruddin (opposite party No.2) and Abdul Sabur (opposite party No. 3) and three daughters Haribibi, Chand Bibi and Kamlibibi. Chand Bibi died leaving behind her husband Shekhawat Ali (Petitioner No. 5) and two daughters Asarun Bibi (Petitioner No. 3) and Sheela Bibi (Petitioner No. 4). Their further case is Haribibi died leaving behind her husband Abdul Ali, son Kutub Ali (opposite party No. 6) and two daughters namely-Phulmati (Petitioner No. 1) and Kalu Bibi. Kalu Bibi died leaving behind her daughter Alokjan Bibi (Petitioner No. 2). Eventually Joyful Bibi died leaving behind her son Noor Uddin (opposite party No. 2) and Abdus Sabur and daughter Kamli Bibi (opposite party No. 5). Similarly Abdul Sabur, son of Muslim Ali died leaving behind Golapjan Bibi (opposite party No. 3) and two daughters Ala Khatoon (opposite party No. 4) and Leela Bibi (Petitioner No. 6). The substance of the case of the Petitioners in the suit is that the Title Suit No. 68/67 and Title Suit No. 34/68 were filed without making them parties though they were vitally interested in the suit land and therefore the decrees obtained in the said suits were illegal, void and in Coperative in law having been procured fraudulently and behind their back.

3. The opposite party No. 1 filed his written statement Contending inter-alia that the decrees obtained in the above mentioned suits were legal and vaild all aspects and that the Petitioners had no prima-facie case to go for trial. They contended that the above mentioned suits were filed against all the legal heirs of Muslim Ali and Joyful Bibi and therefore the claim made by the Petitioners in the suit case wholly untenable. They asserted that the balance of the convenience was in favour of the opposite party No. 1 and that there was no justification for entertaining the prayer for injunction as made in the suit and in the application for temporary injunction.

4. The learned trial Court after hearing the parties by order dated 12.5.99 rejected the application for temporary injunction. The Petitioners filed an appeal before the learned Civil Judge (Senior Division), Karimganj being Misc. Appeal No. 15/99. The learned lower appellate Court also by the impagned and order dated 16.11.2001 dismissed the appeal. Hence judgment this revision.

5. I have heard Mr. D. Mazumdar, learned Counsel for the revision Petitioners and Mr. N. Choudhury, learned Counsel for the opposite party No. 1. Mr. Mazumdar while assailing the impugned judgment and order passed by the learned lower appellate Court has emphatically argued that none of the Courts below took note of the fact that the Petitioners who were admittedly the heirs of Muslim Ali and Joyful Bibi were not made parties in Title Suit No. 68/67 and Title Suit No. 34/68 as mentioned above and that therefore the decrees in the said suit, having been obtained behand their back are illgal, null and void. Mr. Mazumdar has drawn the attention of this Court to the relevant portion of the order passed by the learned Courts below in support of his said submission. He has further submitted that considering the issue involved in the suit, if injunction prayed for is not granted,

the suit would be rendered infructuous and the Petitioners would suffer irreparable loss and prejudice. On the other hand, the learned Counsel has argued that it would be in the interest of justice that the suit may be directed to be decided early after granting temporary injunction as prayed for.

6. In reply, Mr. Choudhury, learned Counsel for the opposite party No. 1 while refuting the contentions raised on behalf of the revision Petitioners, argued that in the Title Suit No. 68/67 and 34/68, the predecessors in interest of all the revision Petitioners were arrayed as Defendants and therefore in the said suits their interest was adequately represented by them. In support of his submission the learned Counsel produced before this Court the certified copy of the plaint in Title Suit No. 68/67 wherefrom it appears that Abdus Sabur, Haribibi and Chan Bibi, the predecessor in interest of the present revision Petitioners were impleaded as Defendant No. 2, 4 and 5 respectively. The learned Counsel also produced before the Court the genealogical table relating to Muslim Ali and Joyful Bibi in support of the above facts. The correctness of the chart and the certified copy of the plaint so produced has not been challenged by the learned Counsel for the revision Petitioners.

Mr. Chowdhury, has further submitted that the Title Suit No. 68/67 and 34, 68 were decreed after hearing both the parties and the appeals filed against the judgments and decrees were dismissed by the First appellate Court. Thereafter Second Appeal No. 61/83 and Second Appeal No. 62/83 were filed before this Court which were also dismissed on 7.11.90. He contended that the opposite party No. 1 had thereafter started Title Execution Case No. 3/98 for execution of the decrees obtained in the above mentioned suits and the said execution case is pending in the Court of Civil Judge (Junior Division) No. 1, Karimganj, Drawing the attention of this Court to the fact, that Title Suit No. 175/98 filed by the revision Petitioners is also pending in the same Court, he argued that injunction as prayed for was not permissible in view of the Section 41(b) of the Specific Relief Act inasmuch as the execution proceedings being pending in the same Court such injunction cannot be granted in law. In support of his said contention the learned Counsel has placed reliance on a decision of the Apex Court reported in Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, Mr. Choudhury has further argued that in the facts and circumstances of the case, assuming that the revision Petitioners had any merit in their claim it was open for them to file an appropriate application under Order 21 Rule 97 or 99 of the CPC praying for necessary reliefs. In that view of the matter, the learned Counsel has argued that the prayer for injunction in the suit is also hit by Section 41(h) of the Specific Relief Act, 1963. He further submitted that as a matter of fact an application had already been filed by the revision Petitioners in Execution Case praying for stay of the said proceedings but the same had been rejected. He contended that it was therefore not open for the revision Petitioners to pray for any injunction in the suit as done and as in the facts and circumstances of the case relief of permanent injunction was not permissible the question of granting temporary injunction did not arise. He has further

contended, that as a matter of fact, the present revision Petitioners and the opposite party Nos. 2,3,4,5 and 6 had jointly filed an application before the learned Executing Court describing themselves as judgment debtors and praying for stay of the execution proceedings which was however rejected. Thus, the learned Counsel argued is a clear pointer to the fact that the present suit was a collusive one filed only for the purpose of frustrating the decrees obtained by the opposite party No. 1 in the above mentioned suit.

7. Mr. Mazumdar however submitted in reply that in the decision of the Apex Court reported in Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, It had been observed by their Lordships of the Supreme Court that in any appropriate case, a court can grant temporary injunction in exercise of its inherent power where the provision of Order 39 CPC is strictly not applicable. He has further argued that the application said to have been filed by the revision Petitioners in the execution case was not under Order 21 Rule 91 CPC and therefore the present suit was not barred in view of" the rejection thereof, as. It was an application praying for stay of the execution proceedings plain and simple. He argued that in any case, this is not the stage where this Court should weigh the cases of the parties in golden scales and held a mini trial and that if this Court is satisfied that the Petitioners have a prima-facie case for trial, injunction as prayed for should be granted.

8. Countering the said arguments Mr. Choudhury, learned Counsel for the opposite party No. 1 has emphatically submitted that even if this Court is satisfied that the revision Petitioners have a prima-facie case, no injunction ought to be granted as no application under Order 39 Rule 1 CPC had been filed before this Court. He further added, that in any case, such a question did not arise as on the face of the records the revision Petitioners had no prima-facie case at all.

9. I have carefully considered the rival contentions of the parties. On a perusal of the certified copy of the plaint in Title Suit No. 68/67 and the genealogical table referred to above it is clear that the predecessors in interest of the present revision Petitioners had been arrayed as Defendants in the said suit. In that view of the matter the contentions raised on behalf of the revision Petitioners that the decrees obtained in the said suits are illegal null and void is not sustainable inasmuch as it is apparent on the face of the records that their interest was adequately represented in the said suit by their predecessors in interest.

10. With regard to the submission made by the learned Counsel for the opposite party No. 1 referring to the bar containing in Section 41(b) of the Specific Relief Act, 1963. Suffice it to notice the observations of the Apex Court in the case of Cotton Corporation of India Ltd. (Supra) to the effect that Section 41(b) of the said act denies to the court the jurisdiction to grant an injunction restraining any person from instituting or prosecuting any proceedings in a court which is not subordinate to the court from which the injunction is sought and that as a necessary corollary it follows that the Court is precluded from granting such

injunction in respect of a proceeding in a Court of co-ordinate or superior jurisdiction. Admittedly, in the instant case, the suit has been filed in the same court in which the execution proceeding is pending. In view of the above observations of the Apex Court with which I respectfully agree, the prayer for injunction to restrain the opposite party to proceed with the execution case is barred u/s 41(b) of the aforesaid Act. It is apposite to notice here, that the Apex Court in the said decision while observing that in appropriate cases not covered by Order 39 CPC temporary injunction can be granted in exercise of its inherent power, it has been further observed that while exercising the inherent power the Court should not overlook the statutory provision regarding restraintment of any person from initiating or prosecuting any proceeding in a Court as one contained in Section 41(b) of the above Act. In view of the above, I am inclined to accept the contention of the learned Counsel for the opposite party No. 1 that the prayer for injunction made by the revision Petitioners in the suit is squarely hit by the aforesaid provision of law.

11. With regard to the submission of the learned Counsel for the opposite party No. 1 that the prayer for injunction is also barred in Section 41(h) of the aforesaid Act, I am not inclined to go into the details of that aspect of the matter in view of the fact that no such application had in fact been filed and is pending before any Court. I therefore wish to leave it at that.

12. In view of what has been stated above, I am of the considered opinion that the revision Petitioners have failed to establish a prima-facie case and therefore they are not entitled to any order of injunction as prayed for. The opposite party No. 1 has obtained decrees in the aforesaid suits which had been tested in higher Courts and eventually affirmed in Second Appeal No. 61/83 and 62-83 by this Court. It is therefore not possible to hold that by executing the said decrees, in the facts and circumstances of the case, the revision Petitioner would suffer any legal injury. On the same reasoning I am constrained to hold that the balance of convenience is also in favour of the

opposite party No. 1.

13. For the forgoing reasons, I find no merit in the revision petition and the same is hereby dismissed. The interim orders passed earlier are vacated. There would be no order as to costs.