

(1986) 09 CAL CK 0005
In the Calcutta High Court
Case No : C. O. No. 982 of 1986

Pranab Kr. Sarkar

APPELLANT

Vs

Basanti Ray

RESPONDENT

Date of Decision : 17-09-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 1(a), Order 39 Rule 2, Order 43 Rule 1(r), 115

Citation : 91 CWN 665

Hon'ble Judges : Mitra, J

Bench : Single Bench

Advocate : Sadananda Ganguly and Arun Prokash Bose, for the Appellant;
Mukul Prokash Banerjee and Sanat Kumar Sil, for the Respondent

Judgement

Mitra, J.—The petitioner filed title Suit No. 118 of 1982 in the 2nd Court of the learned Munsif at Sealdah, 24-Parganas against the defendant/opposite party inter alia, for eviction and recovery of suit premises on revocation of licence, mesne profits and damages. The defendant/opposite party contested the said suit by filing the written statement denying and disputing the case of the petitioner as made in the plaint and claiming a tenancy right in the suit premises. The defendant/opposite party also filed an application under Order XXXIX Rules 1 and 2 read with Section 151 of the CPC inter alia, praying for a temporary injunction and also for a Mandatory order directing the plaintiff/petitioner to restore the bath and privy on the 1st floor of the suit premises to its original condition which was opposed by the plaintiff/petitioner by filing a written objection. The learned Munsif by his order No. 57 dated 9.7.1985, however, allowed the said application of the opposite party. Against the said order of the learned Munsif the plaintiff/petitioner preferred an appeal being Misc. Appeal No. 798 of 1985 before the learned District Judge at Alipore. In the case a learned Pleader Commissioner was appointed for local inspection who filed his report on 13.12.1982 and the learned District Judge, by his order No. 2 dated 10.1.1986 dismissed the petitioner's said appeal relying upon the learned Commissioner's

report. Against the said order of the lower appellate court the petitioner has moved this Court in revision and obtained the present Civil Order No. 982 of 1986. Mr. Sadananda Ganguly, learned Advocate appearing on behalf of the petitioner has contended before me that from the learned Pleader Commissioner's report it was clear that the existing condition of the bath and privy on the 1st floor of the suit premises was such that it was incapable of being used by any person and nothing appeared from the said Commissioner's report that the petitioner was in any way responsible for the existing condition of the said bath and privy. Mr. Ganguly also referred to the petitioner's objection to the injunction application filed by the opposite party wherein the petitioner categorically stated inter alia, that there was no bath and privy on the 1st floor of the suit premises and the bath and privy on the ground floor thereof were being used by the tenants of the said premises including the opposite party.

2. Mr. Mukul Prokash Banerjee, learned Advocate appearing on behalf of the opposite party, however, has contended that from the Commissioner's report it clearly appears that there was a bath and privy on the 1st floor of the suit premises which was being used by the opposite party previously and it should be fairly presumed that the plaintiff/petitioner was responsible for its dilapidated and/or damaged condition and as such the courts below rightly held in favour of the opposite party in directing the petitioner to restore the condition of the bath and privy to its original form. Mr. Banerjee also relied upon the decision in Indian Cable Company Limited Vs. Smt. Sumitra Chakraborty, (1) Calcutta High Court Notes 428 in support of his contention that in exceptional cases court even can grant temporary mandatory order to restore the anterior to the suit where one party is found to have changed the status quo anticipating the suit and forestalling any order that may be passed therein and the present case actually is one of such exceptional cases. Mr. Banerjee also contended that since the application for mandatory injunction was really u/s 151 of the CPC as the defendant in a suit could not take recourse to the provisions of Order XXXIX Rules 1 and 2 of the Code, the order passed by the learned Munsif was not an appeal able one and as such the appeal filed by the petitioner was misconceived. He should have came up straight way to this Hon''ble Court in revision against the order of the learned Munsif and that having not done, the present application in revision u/s 115 of the said Code is not maintainable.

3. It should be noted that the plaintiff/petitioner is a subsequent purchaser of the suit property and that the suit was for the eviction of a licensee. From the learned Pleader Commissioner's report it does not appear at all that both the bath and privy on the 1st floor of the suit premises were damaged by the petitioner after the institution of the suit or after his purchase. It is true, that from the said Commissioner's report it is found that there is no existence of bath and privy on the 1st floor of the suit premises where the opposite party is residing at present but at the same time there is no sufficient material before the Court to come to any definite conclusion that even after the purchase of the suit property by the petitioner or even after the institution of the suit the opposite

party continued to enjoy the bath and privy on the 1st floor of the suit premises and that she did not enjoy the bath and privy existing on the ground floor of the said premises. The learned Pleader Commissioner's report also does not throw any light on that point except what the learned Pleader Commissioner had seen about, the condition of the disputed bath and privy on the day when the commission had taken place and is also absolutely silent on the point whether there has been any mischievous act on the part of the petitioner in damaging and/or destroying the bath and privy on the 1st floor of the suit premises subsequent to the purchase or subsequent to the institution of the suit. Therefore, in my view both the courts below had acted with material irregularity in passing the order in favour of the opposite party relying on the learned Pleader Commissioner's report, as such their findings are based on surmises and conjectures only and hence the same are perverse and cannot be sustained in law.

4. So far as the nature of a temporary mandatory injunction that can be passed in a suit, reference was made to the well known Divisional Bench decision of this Court in the case of Nandan Pictures Ltd. Vs. Art Pictures Ltd. and Others, and the observations made by Chakravarti, C.J. therein that it is only in very rare cases that amendatory injunction is granted on an interlocutory application and instances where such an injunction is granted by means of an ad interim order pending the decision of the application itself are almost unknown, injunctions are forms of equitable relief and they have to be adjusted in aid of equity and justice to the facts of each particular case. If a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the "status quo" and not granted to establish a new state of things, differing from the state which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff's suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issued in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action or a new type of suit had arisen. When such is found to be the position, the court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiff's suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit. Referring to the said decision it is contended by Mr. Ganguly there is nothing on record in the present case to prove that the plaintiff/petitioner had damaged the bath and privy on the 1st floor of the suit premises and made it unfit of human use after the institution of the suit or after his purchase of the suit property.

5. Mr. Justice Anil Kumar Sen, (as His Lordship then was) delivering the judgment of the Court in Indian Cable Co. Ltd.'s Case (supra) explaining the decision in Nandan Pictures Case (supra) and considering the decision cited at

the Bar, held inter alia that if a Court is called upon to grant any relief on an interlocutory application which, when granted, would mean granting substantially the relief claimed in the suit, the court will very slow and circumspect in the matter of granting any such prayer and it is indeed true that such a relief claimed should be granted only in exceptional cases. But at the same time no court should think that in law there is any absolute bar to the court granting such relief. In deserving cases, the court should not hesitate to come in aid of a litigant and upheld that cause of justice by granting such relief and in exceptional cases, the court is entitled to grant interim orders in mandatory form for restoration of possession anterior to the suit where the defendant of possession anterior to! the suit where the defendant has changed the status quo anticipating the suit and forestalling any order that may be passed therein and the observations made by Chakraborty C.J. Nandan Pictures Private Ltd.'s case (supra) must be read merely as illustrative and should not be read as laying down any absolute proposition that in no case a court can grant an interlocutory order directing restoration of status-quo ante.

6. In my view, however, the principle of law laid down in Indian Cable Co. Ltd.'s Case (supra) is not applicable to the facts of the present case. The point involved in the present Civil Order is not at all whether by granting temporary mandatory order it would mean granting substantially the relief claimed in the suit itself. In the suit, out of which the present Civil Order arises, the plaintiff had prayed for recovery of possession of the suit premises from the defendant on revocation of license treating him to be a trespasser and he did not pray for any temporary mandatory injunction. The defendant of course had filed an application for temporary mandatory injunction against the plaintiff for restoration of the damaged bath and privy of the suit premises to its original condition on the allegation that the plaintiff had damaged the same, which application was allowed by the trial court, which order was also affirmed by the Court of appeal below. But as has been already observed, there is hardly any material on record in the present case, from which it can be concluded that the plaintiff/petitioner is responsible in any way for damaging the" disputed bath and privy as alleged by the defendant/opposite party.

In such view of the matter, it can not be said that the defendant is entitled to get the temporary mandatory injunction as prayed for as the plaintiff wants to "steal a march" on the defendant by changing the status quo anticipating the application for injunction by the defendant and forestalling any order that may be passed therein. Therefore on this point the decision in Indian Cable & Co. Ltd.'s Case (supra) is also of no help to the defendant/opposite party.

7. So far as the question of appeal ability of the order passed by the learned Munsif is concerned, the nature of an order is not to be determined by the provision of law to which it may wrongly have been assigned and the true test is what the order itself is. Where an order purports to be under an appealable provision, though wrongly, an appeal will lie there from. In the present case the

application for temporary mandatory injunction was made by the opposite party under Order XXXIX Rules 1 and 2 of the CPC read with Section 151 of the said Code and taking into consideration the purports and/or true of the order of the learned Munsif it must be held that the order was really passed under the provision of Order XXXIX of the CPC which is certainly an appeal able order under the provisions of Order XLIII Rule I(r) of the said Code. Moreover, where an order appealed from, is silent as to whether it was passed u/s 151 or under any other provisions of the Code, the appeal court must decide the question in order to ascertain whether an appeal lies there from. In the present case the lower appellate court having decided the appeal on merits and no objection having been raised by the opposite party in the appeal as to the maintainability of the appeal, it must be held that the order of the learned Munsif was really made under the provisions of Order XXXIX Rules 1 and 2 of the Code of Civil Procedure.

8. So far as the other contention of Mr. Banerjee is concerned whether the defendant in a suit can pray for temporary injunction against the plaintiff under Order XXXIX of the Code of Civil Procedure, an injunction under Order XXXIX can be granted and/or issued both in favour and against a party to the suit or even against a third party in proper cases and "party to the suit includes both the plaintiff and the defendant in a suit. In this matter I am also tempted to quote the wordings of Buckley J., in the well known case of *Collison v. Warren* reported in (1901) 1 Ch. 812 where Buckley, J. after referring to a number earlier decisions of the English Courts quoted Lopes, L.J. in the case of *Carter v. Fey* reported in (1824) 2 Ch. 541 at page 545 :

The question is this whether the defendant can move for an injunction against the plaintiff without filing a counter-claim or issuing a write in a cross action. In my opinion, he can in some cases but only in cases where the defendant's claim to relief arises out of the plaintiff's cause of action or is incidental to it.

The above principle of Law has also been followed in India where it has been held by different High Courts including this Hon'ble Court that it is not the plaintiff alone who can apply for an injunction under Order XXXIX Rule 1 of the CPC in a suit. The defendant can also apply for an injunction under the said provision against the plaintiff in the suit if occasion arises. References may be made to the decision in *Sivakami Achi v. Narayan Chettair* repeated in AIR 1939 Mad 495; *Rattu Vs. Mala and Another*, ; *Suganda Bai v. Sulu Bai & Ors.*, reported in AIR 1975 Kar 137; *Dr. Ashis Ranjan Das Vs. Rajendra Nath Mullick*, ; *Loken Bose v. Smt. Ashima Dey & Anr.*, reported in 81 Cwn 648 : 1977 (2) Cal LJ 69 and *Sm. Katyani Dutta Vs. Mantu Shaw Alias Mantu Chandra Shaw*, .

9. Therefore, it cannot be said as a general proposition of law that an injunction under Order XXXIX Rules 1 and 2 cannot be prayed for by the defendant against the plaintiff in a suit at all. Certainly the defendant can make application under Order XXXIX at least under Order XXXIX Rule 1(a) of the CPC against the Plaintiff in a suit in proper cases. Even when new circumstances arises, injunction may be

granted to the defendant on fresh application made after the original application. The contention of Mr. Banerjee, therefore, fails. In view of the facts and circumstances of the case and also in view of my observations made above the impugned orders in my view cannot be sustained and. the same are therefore, set aside. The Civil Order is accordingly allowed. There will be no order as to costs.

Let this order be communicated to the Court of the learned Munsif as expeditiously as possible.