
(1988) 04 KL CK 0001

In the High Court Of Kerala

Case No : C. M. A. No. 18 of 1987

Pulippinakkadu Muthukoya and Others

APPELLANT

Vs

Muchiyan Mnthukoya and Others.

RESPONDENT

Date of Decision : 07-04-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (1988) 1 KLJ 712

Hon'ble Judges : U. L. Bhat, J;K. G Balakrishnan, J

Bench : Division Bench

Advocate : T. P. Kelu Nambiar, P. G Rajagopalan and P. Devakikutty, for the Appellant; T. P. M. Ibrahim Khan, P. K. Aboobacker and N. Viswanath Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Bhat. J

1. Appellants herein filed a suit for injunction restraining the defendants from committing trespass into the suit property. They also filed I.A. No. 139 of 1984 seeking an order of temporary injunction. The court originally allowed the injunction application. However, this court in C. M. A. Nos 68 and 73 of 1985 set aside the order and remanded the injunction application for fresh consideration. After remand the court below heard the parties and dismissed the injunction application. This order is now challenged by the plaintiffs. The court below has dismissed the injunction application on the ground that plaintiffs have not made out a prima facie case of possession. According to learned counsel for the appellants, the correct approach is not to find out whether the plaintiffs have made out a prima facie case; the correct approach is to find out whether there is a bonafide contention between the parties or. a serious question to be tried. According to learned counsel, there is a bonafide contention between the parties and a serious question to be tried and therefore an order of injunction should have been passed. In support of this argument, learned counsel has strongly

relied on the decision of a Division Bench of this court in Joshua v. Geevarghese Mar Dloscorus (1979-85 K. U. C. 243). It is pointed out that the Division Bench overruled the decision of a learned single Judge of this court in Vellakutty V. Karthiyani (1967 KLT 667).

2. In Vellakutty's case (1967 KLT 667) this court relied on an observation of the Allahabad High Court in Abdul Qadeer Vs. Municipal Board, Moradabad and Others, to the effect that:

The granting of an injunction being a very serious matter in that it restrains the opposite parties from the exercise of their rights, the Court does not issue the injunction unless it is thoroughly satisfied that there is a prima facie case in favour of the applicant.

(emphasis supplied)

The court also observed:

It is also clear that a prima facie case implies the probability of the plaintiff obtaining a relief on the materials placed before the court at that stage.

The Division Bench after considering the decision of the Supreme Court in United Commercial Bank Vs. Bank of India and Others, , observations of Lord Diplock in American Cynamid Co. v. Ethicon Ltd(1975 (1)

All. E. R. 504) at page 509 and in N.M.L. Ltd v. Woods 0979 (1) WLR 1294) and also the decisions in Bishambat Nath v. Municipal Committee (AIR 1926 Lah. 589), Brajendra Nath v. Sm. Kashi (AIR 1946 Patna 171) and a decision of a learned single Judge of this court in C.R.P.No. 1856 of 1976, held:

In the light of the discussion of the question we ate of the view that the standard set out in Vellakutty's case supra (1967 KLT 667) is unduly rigid and the approach to be made has been indicated by the Supreme Court in United Commercial Bank Vs. Bank of India and Others, and also by the Lahore High Court in AIR 1926 589 (Lahore) and the Brajendra Nath Ghosh and Others Vs. Sm. Kashi Bai and Others, and by Chandrasekhara Menon, J. in CRP No. 1856 of 1976.

(emphasis supplied)

3. There is no controversy that the standard set out in Vellakutty's case 1967 KLT 667) indeed is unduly rigid. But the question is whether the decision in Joshua's case (1979-85 KUC 243) contra indicates the need for satisfaction on the part of the court that a prima facie case is made out on the materials before it at that stage. In the Lahore decision AIR 1926 589 (Lahore) it was stated that it is sufficient if the person applying for an injunction has a case which needs consideration and in the Allahabad decision Abdul Qadeer Vs. Municipal Board, Moradabad and Others, in was stated that it is sufficient if the plaintiff can show that he has a clear question to raise. More or less to the same effect was the observation in CRP No. 1856 of 1976. This court in Joshua's case (1979-85 KUC

243) noticed the following observation of Lord Diplock in American Cyanamid's case

In those cases where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if on that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.

Page 510 "The use of such expressions "a probability", "a prima facie case" or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are the matters to be dealt with at the trial".

4. It would be instructive to delve further into the logic of the American Cyanamid's case, which it must be remembered was propounded in the context of an action for infringement of a prior patent against a trader selling letter patentee's articles and a request for interlocutory relief. Lord Diplock observed at page 509:

My Lords. when an application for interlocutory injunction to restrain a defendant from doing act alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesis the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the rise of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the

plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience," lies. At page 510:

One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, Viz. abstaining from expressing any opinion upon the merits of the case until the hearing" (*Wakefield V. Duke of Buccleuch* (1865) 12 LT 628). So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

(emphasis supplied)

5. Mark the above observations what does this mean? This means that the prospect or the absence of prospect of the applicant succeeding in his claim for permanent injunction at the time as disclosed from the materials available to the court at the hearing of the application is a matter for consideration. This is not far from saying that prima facie case must be considered.

6. Lord Diplock also explained the approach to the question of balance of convenience. Central to the question is whether the plaintiff would be adequately compensated by an award of damages for the loss he would have sustained as a result of defendant's continuing to do what was sought to be enjoined between the time of the application and the time of trial. If damages recoverable at common law would be adequate remedy and defendant would be in a financial position to pay them, no interlocutory injunction should be normally granted, however strong the plaintiff's claim appeared to be at that stage. If damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction, (see at page 510). We wish to stress that the *Cynamid* principles rested partly on the practice of English courts to obtain an undertaking from the plaintiff as to the damages. The courts in India had never

adopted any such practice.

7. In *Locohail International Finance Ltd v. Agroexport and others The Sea Hawk* (1986 (1) All ER 901), the Court of appeal, in the context of an application for interlocutory mandatory injunction noticed the following observation of Megarry, J. in *Shepherd Homes Ltd v. Sandham* (1970 (3) All 402) :

.....on motion, as contrasted with the trial, the Court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, filter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

(emphasis supplied)

and held that the statement of principles is not affected by what the House of Lords said in *American Cynamid's* case. The Court of appeal in *Films Rover International Ltd and others v. Cannon Film Sales Ltd* (1986 (3) All ER 772) noticed the above observations. Hoffman, J. observed:

.....it is important in this area to distinguish between fundamental principles and what are sometimes described as "guidelines" i.e. useful generalisations about the way to deal with the normal fun of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" derision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from, this principle.

The court finally concluded that the Court of appeal in *Locabail Inter-national Finance Ltd's* case 1986 (1) All E. R. 901) did not intend to "fetter the court's discretion by laying down any rules which would have the effect of limiting the flexibility of the remedy" to quote Lord Diplock in the *Cynamid's* case, that just as the *Cynamid's* case guidelines for prohibitory injunctions which require a plaintiff to show no more than an arguable case recognise the existence of exception in which more is required (compare *Coyne v. Global Natural Resources Plc* (1984 (1) All E. R. 225), so the guidelines approved for mandatory injunctions in *Locabil* recognises that there may be cases in. which less is sufficient. Obviously rigidity in formulation of guidelines has to be avoided; in any event guidelines should not be rigidly enforced.

7A. It is instructive to have a closer look at the approach of the court of appeal to the *Cynamid* principles. In *Cayne and another v. Global Natural Resources plc*

(1984 (1) All 225) (Court of Appeal) Kerr, LJ. observed (Page 234, 235):

It may well be self-evident that the decision in *Cynamid* cannot be treated as laying down rules of law which are applicable to all cases in which an interlocutory injunction is claimed, but it may be helpful to mention two matters in this regard. First, a literal application of the well-known passage in the speech of Lord Diplock (see (1975) 1 All. E.R. 504 at 510, (1975) AC 396 at 408) would lead to the result that whenever a plaintiff puts forward a serious issue to be tried, and whenever he is also able to show that any inconvenience, let alone injustice, to the defendant by the grant of an injunction is capable of being compensated in damages against the plaintiff's cross-undertaking, the court would be bound to grant an injunction. This was virtually the plaintiffs' submission to this court, but it cannot possibly have been Lord Diplock's intention. The question whether the defendant can be adequately compensated in damages normally only arises if the case is in fact taken to trial by the plaintiff. True, if the plaintiff does not do so, the defendant could still claim damages against the plaintiff's cross-undertaking on the ground that no injunction should ever have been granted. But this is no answer, since it is for the plaintiff to make out a case for the exercise of the courts discretion in his favour;.....

(emphasis supplied)

May, LJ. observed (page 237):

Sir Robert Megarry V-C also reminded us once again that words in a judgment ought not, however eminent the judge, to be construed as if they were an of Parliament. Respectfully I entirely agree. I think that one must be very careful to apply the relevant passages from Lord Diplock's familiar speech in the *Cynamid* case not as rules but only as guidelines, which is what I am certain Lord Diplock intended them to be.

..... The application for the interlocutory injunction was merely a holding operation pending that contemplated trial. To support that assertion, I need only refer to the well-known passage in the *Cynamid* Case (1975 (1) All KR 504 at 510. (1975) AC 396 at 408 where, in stating the guidelines based on the adequacy of damages as a remedy Lord Diplock specifically directed attention to the possible result of a postulated trial, first one way and then the other. It is only thereafter, if damages after a trial are thought to be inadequate, that one is then enjoined to look at what is described as the "balance of convenience". That is the phrase which, of course, is always used in this type of application..... I think that it is quite clear from both cases that, although the phrase may well be substantially less elegant, the "balance of the risk of doing an injustice, better describes the process involved. Again, I need only refer to a very brief passage from the speech of Lord Diplock in the *NWL* case (1979(3) All. E.R 614 at 625) In that latter case such a balancing process necessarily resulted in the court deciding that no interlocutory injunction should

be granted because when it was done it became quite clear (hat there was a substantially greater risk of injustice to the defendant as the statutory defence available to him was so well founded that there was little question but that he would succeed at the trial.

Lord Denning in *Follower & Son V. Fisher* (1976) QB 122) explained that the Cynamid principles did not apply in many cases, Lord Denning observed:

These individual cases are numerous and important. They are all cases where it is urgent and imperative to come to a decision. The affidavits may be conflicting. The question of law may be difficult and call for detailed consideration. Nevertheless, the need for immediate decision is such that the court has to make an estimate of the relative strength of each party's case. If the plaintiff makes out a prima facie case, THE Court may grant an injunction. If it is a weak case, or is met by a strong defence, the court may refuse an injunction. Some times it means that the court virtually decides the combat at that stage. At other times, it gives the parties such good guidance that the case is settled. At any rate, in 99 cases out of 100, the matter goes no further.

(emphasis supplied)

7B. In the White Book for 1982 (at page 518) it is stated by the Editor commenting on the Cynamid case "It does not follow that all the earlier authorities which have proceeded on different principles, must be treated as having been automatically overruled, or have ceased to provide guidance as to whether or not an interlocutory injunction should be granted.....It is interesting to note that that case has not been followed by other common law jurisdictions....."

8. In *Joshua's case* this court also relied on the decision of the Supreme Court in *United Commercial Bank Vs. Bank of India and Others*, of the reported decision, it is stated:

No injunction could be granted under Order 39, Rules 1 and 2 of the Code unless the plaintiffs establish that they hid a prima facie case, meaning thereby that there was a bonafide contention between the parties or a serious question to be tried. The question that must necessarily arise is whether in the facts and circumstances of the case, there is a prima facie case and, if so, as between whom? In view of the legal principles applicable, it is difficult for us to say on the material on record that the plaintiffs have a prima facie case.

9. The caution administered by Lord Diplock in *American Cynamid Co.'s case* is against the confusion as to the object sought to be achieved by this form of temporary relief by use of the word "probability", "prima facie" case", or "strong prima facie case". What is necessary to be considered is whether there is a serious question to be tried and whether the claim is not frivolous or vexatious. In the words of the Supreme Court in *United Commercial Bank's case* when one considers prima facie case what one really considers is Whether is a bonafide

contention between the parties or a serious question to be tried. The Supreme Court implied that Cyanmid Case did not in substance make a radical departure from the existing guidelines.

10. How do courts decide whether there is a prima facie case or bonafide content on between the parties or a serious question to be tried? The decision involves a consideration of the respective contentions raised by the parties, affidavits and other documents relied on by the parties. In any contested suit, there is likely to be a contention between the parties or a question to be tried, except to the extent one of the parties is, by principle of estoppel precluded from raising it or unless the court is, by principle of res judicata etc, precluded from deciding it." It is not every contention which is bonafide; it is not every question which is a serious question. Where can the court draw the line? There must be some material on record in support of the claim of legal right put forward by the person who seeks interlocutory relief of injunction; such material must, either by itself or in the light of material placed before the court by the opposite party satisfy the court that it could, at that stage and under those, circumstances act on it. This is precisely what can be comprehended by the expression "prima facie case". We cannot forget that the question of interlocutory injunction wilt arise in a variety of cases; it may be to restrain defendant from proceeding with judicial proceedings, to restrain him from executing a decree, to restrain him from committing breach of contract, to restrain him from committing waste, to restrain him from committing trespass and the like. Take the case of a plaintiff who alleges that he is in possession of an item, of immovable property and the defendant who has no possession is trying to oust him from possession and seeks a decree for injunction and interlocutory relief of injunction till the disposal of the suit. Defendant may deny the plaintiffs case and assert possession himself. The court has to consider whether there is a bonafide contention between the parties or a serious question to be tried. The materials placed by the parties before court have to be considered, before arriving at a decision. If there is no element of probability in support of the case of the plaintiff it cannot be said that there is a bonafide contention between the parties or a serious question to be tried. Plaintiff may have some materials in support of his own claim. The court will have to consider the entire materials placed before it to see whether there is a prima facie case at that stage. Without such satisfaction an interlocutory relief cannot be granted. In our considered judgment Joshua's case has not laid down any contrary principle. Traditional principles governing the matter remain unaltered. They are that the court must be satisfied that there is a prima facie case or a serious question to be tried in the suit and that the court's interference is necessary to protect the plaintiff from irreparable injury.

11. Now to the facts. Plaint schedule contains four survey numbers, viz. 826/1, 825/3, 821/1 and 822/4 of a total extent of 32.90 acres. All the plots are lying contiguous to each other. It is admitted that these items of properties originally belonged to Mochiyam or Moochil tarwad, of which plaintiff's deceased father Kuttiammad Malvi, defendants 1 to 3, mother of fourth defendant were

members. According to the plaintiffs and the fourth defendant tarwad properties were divided years ago and properties were allotted separating to each tavazhis. According to the plaintiffs, suit properties were allotted to the tavazhi of Kuttiammad Malvi, that ultimately he became the sole surviving member of the tavazhi and gifted the properties to the plaintiffs under Ext. A3 of 1971 and A4 of 1975 and since then they have been in possession of the properties. Defendants 1 to 3 contend that there was no oral partition and that different plots (actually in the islands it appears division is by the number of coconut trees) have been in the possession of different members of the tarwad by way of maintenance arrangement and they are in possession of survey nos. 822/4 and 825/3. Accordingly they are enjoying the coconut trees and actually occupying the three among the four houses in the suit properties and plaintiffs have no possession over these items. Fourth defendant supported the case of oral partition and said that survey nos. 826/1 and 821/1 (last item mentioned by way of additional written statement) thus vested in Kuttiammad Malvi's sister Kunhimosha, that she had no issues that she gifted the properties to fourth defendant's mother Kadeeja, that her husband Ahmed and her brother filed suits O. S. Nos 4/68 and 5/68 challenging the gift deed, that the suits were compromised as per which Kadeeja obtained (right over half the property (by description though not by survey number) and the other half was-given to Kuttiammad Malvi, Ahammed and Kasmi. Half the properties, viz., those comprised in survey nos. 826/1, 821/1 actually came to vest in fourth defendant's mother Kadeeja. It is thus the fourth defendant claims right. The above devolution of right is as explained by learned counsel for the fourth defendant.

12. When the appeal came up for arguments, we suggested to learned counsel that it would be sufficient if the suit is taken up for trial and disposed of and we need not go into the contention of the parties. Learned counsel for the appellants, however, submitted that this court should dispose of the appeal on merits and if an order of injunction cannot be granted, at least an order appointing receiver may be passed. We are, therefore, constrained to consider the appeal on merits.

13. At the outset we have to indicate that plaintiffs have not been able to place any documentary evidence to indicate their possession over suit properties. The only documents which have some relevance are Exts A11 to A14, which are survey notices allegedly issued to the plaintiffs in regard to said properties on 31-12-1970. But these notices would show not only the names of the plaintiffs but also name of the fourth defendant's mother Kadeeja. Therefore, at this stage no interference could be drawn from these notices. The position has to be clarified at the stage of oral evidence.

14. Learned counsel for the appellants placed strong reliance on Ext A5 judgment in O. S 4/76. That was a suit filed by defendants I to 3 and others seeking to set aside Ext A3 and A4 gift deeds and for partition of the properties among the various tavazhis on the basis that the tarwad is undivided. The suit was resisted

by present plaintiffs who were on the party array as defendants 31 to 35 and the present fourth defendant who was the 8th defendant therein. The case that the tarwad was not divided was contested and the court below held that the tarwad was divided. The decree and judgment in O. S. 4/76 have not become concluded since an appeal is pending in this court as A. S. 457/83. It has to be seen that the present fourth defendant contended in that suit that there was an oral partition, The finding regarding oral partition was necessary to see whether plaintiffs in the suit would be entitled to decree for partition. Prima facie we are unable to agree that the decree in prior suit would indicate possession of the present suit properties with the present plaintiffs. On the other hand, defendants placed strong reliance on Ext. B1 certified copy of the deposition of the present fourth plaintiff examined as DW-1 in O. S. 4/76. Parts of the deposition have been extracted in the order of the court below. Present suit properties were shown as part of item 1 in the plaint in O. S. 4/76. In the portions of the deposition extracted by the lower court deponent is seen to have stated that he has no case that all those items were obtained by his father, that all the properties contained houses where members of other tavazhis are residing (including the plaintiffs 1, 3 and 6 therein) and that three among the four houses are not included in the deponent's property. Of course in other parts of the deposition, he has stated his case. As rightly pointed out by learned counsel for the appellants, at the stage of trial appellants would have an opportunity to explain these statements.

But at this stage we can only consider what is found in the deposition and portions referred to above apparently militate against the case of the appellants. In these circumstances, we agree with the court below that there is no prima facie case made out warranting grant of interlocutory relief of injunction. We, therefore, decline to interfere and accordingly dismiss the appeal with costs of the respondents.