

(2010) 08 GAU CK 0085
In the Gauhati High Court

Ritu Mahanta S/o LT.Jogeswar Mahanta	APPELLANT
Vs	
Nilima Das W/o Late Prabin Das	RESPONDENT

Date of Decision : 20-08-2010

Acts Referred:

Citation : (2010) 08 GAU CK 0085

Hon'ble Judges : T.Vaiphei, J

Bench : Single Bench

Advocate : R.Das, R.Bordoloi, P.K.Talukdar, P.J.Saikia, K.Baruah, Advocates
appearing for Parties

Judgement

1. This revision under Article 227 of the Constitution is directed against the order dated 1952010 passed by the learned Civil Judge, Dibrugarh in Misc. (J) Case No. 72 of 2009 arising out of T.S. No. 44 of 2009 allowing crossexamination of the defendant No. 1 with respect to some of her averments in her written statement as well as her written objection against the application for interim injunction filed by the respondent. For better appreciation of the controversy, it will be profitable to reproduce below the impugned order in toto:

1952010: Parties are present through their respective Id. Counsels. The orders in respect of petition No. 677/10 is given below:

By the petition No. 677/10 dtd. 18310 Under XIX Rule 2 R/w Sec. 94 and 151 of CPC, the petitioner has prayed to pass directing the O.P. to attend the Hon''ble Court for crossexamination and till then the objection hearing of the case may be deferred for the ends of justice.

It is stated in the petition stating, inter alia that on 2622010 the O.P. filed a written objection supporting affidavit setting up several false pleas in relation to possession, boundary wall and also having dubious individual identity of the O.P., that as such, the petitioner being entitled to crossexamine the O.P. files this petition with a prayer before the court to pass order for attendance of the deponent O.P. for crossexamination and prayed as such.

The O.P. contested the petition by filing written objection. It is stated in the objection, stating inter alia, that the petition filed by the petitioner is not maintainable in fact, that the petitioner has no right to file the instant petition.

By admitting the statement made in para 1 of the petition and by denying the statement in para II of the petition, the O.P. has stated that the answering O.P. in his written objection has stated the true facts in full detail which are the matters related with the merits of the suit and the said O.P. has also asserted the frivolous statement of the petitioner in regard to his identity as well. The O.P. also stated that the matter pertaining to possession boundary wall of the suit land and also the identity of the O.P. are matter related to the merit of the suit and the alleged contention and the alleged contention and purpose of the petitioner to crossexamine the O.P. are, therefore, contrary to the provisions of Order XIX Rule 2 of the C.P.C. Objection further states that as all the alleged matters are pertaining to adjudication of the suit in accordance with the law inherent power of the Hon"ble Court cannot be invoked thereto and frivolous and vexatious contentions are contrary with the provisions established law is liable to be rejected.

Heard Id. counsels for both sides.

The contention of the petitioner is that for just decision of the case they want to crossexamine the O.P. and the O.P. has stated in the objection to dismiss the petition for the ends of justice.

However, considering the facts and circumstances as embodied in the petition as well as objection, this Court opines that for just decision of the case if the prayer of the petitioner is allowed there will be no miscarriage of justice; rather if rejected the petitioner may suffer irreparable loss.

However, considering the entirely and in keeping in view of the provisions of law, the prayer in the petition No. 677/10 is allowed.

Fix 2710 for cross examination of the O.P.

2. What prompted the respondent to move the application under Order XIX, Rule 2 of CPC for crossexamination of the petitioner herein is not mentioned by the learned Civil Judge. However, in the application filed by the respondent for crossexamination of the petitioner, it is stated by her that on 2622010, the petitioner in his written objection supported by an affidavit had set up several false pleas in relation to possession, boundary wall and also having dubious individual identity of the Opposite Party himself. At this stage, it has become necessary to refer to the relevant facts of the case. The respondent instituted T.S. No. 44 of 2009 against the petitioner and others before the trial court for declaration of her ownership of the suit land and for confirmation of her possession thereto by dismantling the illegally raised wall, etc. thereon. She also filed an application under Order 39, Rule 1 and 2 read with Section 151 CPC for issuing adinterim injunction to restrain the petitioner from dispossessing her of

the suit land and from raising any construction thereon. The trial court, after hearing both the parties, by the order dated 23122009 directing both the parties to maintain the status quo in respect of the suit land as on that day .It was after about 5 months of this order of status quo that the trial court again passed the impugned order for crossexamination of the petitioner. In my opinion, the application for crossexamination filed by the respondent is, to say the least, vague and quite sketchy .I will come back to this aspect of the matter afterwards

3. Mr. P.J. Saikia, the learned counsel for the petitioner, submits that the written objection filed by the petitioner, though supported by an affidavit, cannot by any stretch of imagination be construed to be an evidence, and as the affidavit was filed in support of the written objection and not by way of evidence, the petition under Order XIX, Rule 2 CPC for grant of permission to crossexamine him is not maintainable. It is also contended by the learned counsel that Order XXXIX Rules 1 and 2 require the trial court to dispose of the application for injunction by an affidavit or otherwise in a manner and as quickly as possible and within 30 days from the date on which exparte injunction was granted: the trial court has completely overlooked the fact that lengthy procedure of adducing evidence and crossexamination of witnesses must be avoided as otherwise the scope of the interim application would become grossly and unduly expanded and elongated. He maintains that all that the respondent has to prove for obtaining injunction is, on the basis of affidavit, the existence of a prima facie case, balance of convenience and irreparable, but she has not disclosed her reason for crossexamination of the petitioner: the trial court did not go into this aspect of the matter. He also contends that the trial court ought to have immediately disposed of the injunction application on the basis of the application filed by the respondent and the written objection filed by him and other materials available on record. In support of his contentions, the learned counsel relies on *Smt. Sudha Devi v. M.P. Narayan and others*, (1988) 3 SCC 366; *P. Phillip v. The Director of Enforcement, New Delhi and others*, AIR 1976 SC 1185; *Ashokayya Sangayya Hiremath and ors v. Sidremayya Shadaksharayya Hiremath & ors.*, 1997 (1) Civil Court Cases 302 (Karnt); *Rajib Barooah & another v. Hemendra Prasad Barooah and others*, 1993 (1) GLJ 306; *Rajeshwar Rabha v. Khagen Chandra Kalita and ors.*, (1992) 1 GLR 334 and *Ram Swaroop and ors.*, AIR 1991 Raj 56.

4. On other hand, Mr. P.K. Talukdar, the learned counsel for the respondent, supports the impugned order and submits that no jurisdictional error was committed by the trial court calling for the interference of this Court under Article 227 of the Constitution. According to him, a discretionary power is given to the trial court under Order XIX, Rule 2(1) CPC to order the attendance of the deponent of affidavit for crossexamination for eliciting the truth, and in the instant case the written objection accompanied by affidavit contains several false pleas about the possession, boundary and also having dubious individual identity which can be verified only by crossexamination of the deponent in the question: the trial court has properly exercised its discretion, which does not suffer from any irrationality or illegality. If there are two possible on a matter, so submits the

learned counsel, the view taken by the trial court cannot be disturbed by this Court on the ground that the other view was a better view. It is submitted by him that if the provision of Order XIX, Rule 2 CPC is applicable to an application for temporary injunction as held by Rajasthan High Court in Ram Swaroop case (supra), there is no reason for holding that the same provision is not applicable to the written objection filed in reply to the application for temporary injunction. He places heavy reliance on Chotu Khan v. Abdul Karim, AIR 1991 Raj 119 to fortify his submissions. He, therefore, strenuously urges this Court to dismiss the revision petition, which is devoid of merits.

5. I have given my anxious consideration to the rival submissions made at the bar. I have also perused the impugned order. Order XIX, Rule 2 CPC is in the following terms:

2. Power to order attendance of deponent for crossexamination. (1) Upon any application evidence may be given by affidavit, but the Court may at the instance of either party, order the attendance for crossexamination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

6. The question as to whether the provisions of Order XIX, Rule 2 CPC apply for deciding an application for grant of temporary injunction under Order XXXIX, CPC came up for consideration before the Division Bench of the Hon'ble Rajasthan High Court in Ram Swaroop and others (supra). The High Court held therein that any application would include the application for grant of temporary injunction under Order 39, R. 1 CPC as well. Rule 2 of Order XIX does not exclude the application made under Order XXXIX, Rule 1 in which facts may be proved by affidavit. This is what it said:

6 In Kanhiyalall v. Meghraj (supra) Division Bench consisting of Sinha, C.J. and Hidayatullah, J. as they were then, interpreted the expression any application occurring in O. 19 R. 2 CPC . It was observed that the distinction between substantive and interlocutory applications in defining the term any application in the second rule of O. 19 is without any foundation. The rule is applicable to any application which is made to the Court, irrespective of its nature. The Code itself does not define the word application nor does it make any distinction between one application and another. Other case law has been considered in the above Division Bench decision but entire agreement has been expressed with the following observations made in Shib Sahai v. Taka (AIR 1942 Oudh 350) (at page 35).

7. A perusal of this rule leaves no doubt that it is open to a Court on sufficient grounds to allow proof of facts by means of affidavits, but if the production of the declarant of the affidavit is required in good faith for crossexamination by any party, the Court shall not use such affidavit in support of the facts alleged therein without production of the declarant. R. 2 of O. 19, Civil C.P., puts the matter further beyond doubt. This rule is to the effect that upon any application

evidence may be given by affidavit, but the Court may, at the instance of either party order the attendance for crossexamination of the deponent.

8. It was perfectly open to the lower Court to have ordered the production of the witnesses either of its own motion or at the instance of the defendant, for crossexamination in order to satisfy itself about the truth of the allegations in the affidavit. It does not appear from the record that the defendant's counsel asked the Court to order the attendance of the plaintiff so as to give him an opportunity to crossexamine him, nor did the Court suo motu think it necessary to order the plaintiff's attendance. There was no counteraffidavit filed by the defendant in answer to the allegations contained in the affidavit. Under the circumstances, it cannot be said that there was no evidence before the Court in support of the allegations contained in the plaintiff's application for restoration of the suit.

9. The view of law taken by the lower court that the affidavit was no evidence of the facts alleged therein merely because there had been a verbal denial by the defendant without any attempt to controvert it by a counteraffidavit or without asking for the attendance of the plaintiff for the purpose of crossexamination, is not supported by the provisions of O. 19, Rr. 1 and 2, Civil C.P., referred to above. I have no doubt whatever that had the attention of the learned Judge been drawn to the provisions of O. 19, R 1 and 2, he would not have expressed the opinion which he did, that the affidavit was no evidence of the facts alleged therein.

10. I am in respectful agreement with the above conclusion of the Division Bench of the Rajasthan High Court. As the written objection of the petitioner supported by his affidavit was filed against the application for temporary injunction, and if the provision of Order 19, Rule 2 CPC apply for deciding an application for grant of temporary injunction under Order 39, Rule 1, there is no reason as to why the same provision will not, *ex proprio vigore*, be held applicable to the written objection supported by the affidavit. This was also the view taken by this Court in *Rajeshwar Rabha* case (*supra*) in which it was held that under Order 39, Rule 1, the Court has not only the power to dispose of the application praying for temporary injunction on affidavit but has also the jurisdiction to summon the deponent of the affidavit for crossexamination either suo motu or at the instance of a party. However, elaborate procedure of adducing evidence to prove a case for interim injunction is not warranted. A note of caution was sounded, in my opinion, rightly so, by the Karnataka High Court in *Ashokayya Singgaya Hiremath &ors* (*supra*) in which it has been held thus:

Undoubtedly, the order is on the basis of *prima facie* findings and it is wellsettled law that lengthy procedures must be avoided at that point of time. The consequences to the working of the Courts apart, the main aspect of the matter is the interests of the parties concerned and if the present state of affairs is to be permitted, merely by insisting on lengthy pleadings the production of all sorts of documents and as has happened in this case, crossexamining all witnesses, it would be open to a party to not only overload the trial court but ensure that

interim relief is not granted for months and years together. Conversely, it would also be open to a party who had secured interim relief to involve itself in all these procedures and carry on not only for years but for decades with that interim relief to be followed by an inevitable appeal, revision, etc.. The question really arises as whether there is a total and absolute bar of summoning witnesses for cross-examination at the interim stage. Undoubtedly, no Court can lay down that the inherent jurisdiction which vests in the trial court is to be either curtailed or taken away. As a rule of procedure, however, that power should not be exercised at the interim stage barring rarest of rare cases where for valid reason the learned trial court comes to the conclusion that there is no other option available.

11. Having acquainted myself with the true legal position I shall now examine the validity of the impugned order. A cursory look at the application filed by the respondent under Order XIX, Rule 2, CPC will reveal that no specific or detail reason was given by the respondent for ordering the attendance of the petitioner for cross-examination. All that she said is that the written objection, supported with affidavit, setting up several false pleas in relation to possession, boundary wall and also having dubious identity of the Opposite Party himself no other pleadings are made by her justifying her application for cross-examination of the petitioner. That apart, the trial court apparently passed the impugned order after hearing the parties, but did not indicate the compelling reason for adopting this, if I may say so, drastic procedure. However, I must hasten to state that it certainly has the power to take resort to this procedure, but then it must have adequate or compelling reason to opt for this procedure. The prayer in the application for temporary injunction filed by the respondent is for restraining the petitioner from dispossessing her of the suit land and from raising any construction thereon. In order to obtain the interim injunction, it is incumbent upon her to prove that she has a prima facie case, the balance of convenience lies with her and irreparable damage shall be caused if no such injunction order is issued in her favor. A perusal of her application for injunction which is at Annexure A will show that her case is about some persons claiming to be engaged by the petitioner had started to raise pucca boundary wall and had already constructed about 25 feet of the wall raising about a height of 5= feet by cutting down valuable plants and trees standing thereon. According to her, the above said 1 bigha land is the suit land described in the Schedule "B" below. She, therefore, prayed for ad interim injunction restraining the petitioner from dispossessing her of the suit land and from raising any construction over the suit land and from alienating or transferring the suit land till disposal of the suit. The petitioner in his written objection asserted that after due demarcation of the suit land by the revenue authority, he and others, after obtaining due permission of the development authority, constructed pucca boundary wall along the demarcated alignment by engaging mason and laborers in order to secure the suit land. On the basis of the aforesaid allegations and counter-allegations, the trial court is to determine, prima facie, the question of possession of the suit land by either of the parties keeping in mind the principle of law that the burden of

proof always lies with the plaintiff. In my judgment, this is not rarest of the rare cases for invoking the provisions of Order XIX, Rule 2, CPC. In this view of the matter, I have no alternative but to hold that the trial court exceeded its jurisdiction in passing the impugned order.

12. For the reasons stated in the foregoing, this revision petition succeeds. The impugned order has no legs to stand and is hereby set aside. The trial court shall now decide the application for injunction on the basis of the available materials on record and dispose of the same in accordance with law within a period of thirty days from the date of receipt of this order. No costs.