

(1996) 01 AHC CK 0085

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 25694 of 1995

Salim

APPELLANT

Vs

First Additional Civil Judge, Senior Division, Saharanpur and
others

RESPONDENT

Date of Decision : 17-01-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2A, 151
Constitution of India, 1950 — Article 227
Partition Act, 1893 — Section 4
Transfer of Property Act, 1882 — Section 44, 52, 53A

Citation : AIR 1996 All 342

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : B.D. Mandhyan, for the Appellant;

Final Decision : Dismissed

Judgement

1. Leave is granted on the prayer of Shri B. D. Mandhyan. Learned counsel for the petitioner to correct the cause, title so as to convert the petition into one under Article 227 of the Constitution of India.

2. Facts as emerging from this case are that the respondent No. 3 as plaintiff instituted a suit being suit No. 310 of 1990 in the Court of learned Munsif (City) Saharanpur, on 29th September, 1990 against the Respondent No. 4 and 5 and the petitioner herein as defendant No. 1,2 & 3 respectively for injunction restraining the defendant No. 1 & 2 (respondent No. 4 & 5) from transferring their share in the suit property and delivering possession to the defendant No. 3 (petitioner herein) without effecting any partition in respect of the family dwelling house being suit property therein. Admittedly plaintiff and the defendant No. 1 & 2 are co-sharers in respect of the family dwelling house being the suit property and the defendant No. 3 is a stranger.

3. In connection with the said case the plaintiff had filed an application for

injunction which was filed alongwith an affidavit on 19th September. 1990 for restraining the defendants No. 1 & 2 from delivering possession to the defendant No. 3. Subsequently respondent had filed another application seeking mandatory injunction directing the defendant No. 3 to remove his house-hold articles and to vacate the house.

4. The plaintiffs case inter alia was that without effecting any partition of the family dwelling house being the suit property the defendants No. 1 & 2 are attempting to transfer their share therein in favour of the defendant No. 3 and are attempting to deliver possession to him. After the suit and the application for injunction were filed on 19th September. 1990 the defendants No, 1 and 2 transferred and delivered possession to the defendant No. 3 who had entered into possession.

5. The defendant No. 3 contended that there was an agreement for sale of suit property in favour of the defendant No. 3 by defendant No. 1 & 2. The said agreement was registered on 29-5-90 and that possession was delivered to him simultaneously with the execution of the said agreement. It is admitted that the sale deed was executed on 13-1-92 in respect of the share of the defendants No. 1 & 2 in the family dwelling house. The said application for mandatory injunction for removal of the defendant No. 3 from the suit premises was rejected by an order dated 11th August, 1994 passed by the learned Munsif (city), Saharanpur. Against the said order an appeal being appeal No. 106 of 1994 was preferred by plaintiff before the District Judge, Saharanpur which was transferred to the 1st Court of Additional Civil Judge, Senior Division, Saharanpur. By an order dated 8th August, 1995, the learned Additional Civil Judge, Senior Division, 1st Court allowed the said appeal No. 106 of 1994 and directed the defendant No. 3 to remove his article from the suit premises and to vacate the possession. It is against this order that the present writ petition was sought to be moved under Article 226 of the Constitution of India but however Mr. Mandhyan prayed for leave to amend the petition so as to convert it under Article 227 of the Constitution of India which has already been granted.

6. Shri B. D. Mandhyan appearing for the petitioner contended that the main relief that was sought for in the suit was in the form of prohibitory injunction restraining the defendant No. 1 and 2 from effecting transfer of their share in the family dwelling house being the suit property and from delivering possession of their share to defendant No. 3. By reason of the order dated 8th August, 1995 directing the defendant No. 3 the petitioner herein to remove his articles and to vacate the suit premises, the Court has virtually granted the relief claimed in the plaint itself. According to him such an order of injunction cannot be granted by way of an inter-locutory order. In support of such contention he had relied upon the case of Bank of Maharashtra Vs. Race Shipping and Transport Co. Pvt. Ltd. and another, . he also relied upon the judgment in the case of Som Nath v. The Additional District Judge, Indore reported in 1994 Revenue Decision 240. He further relies upon the case of U.P. Junior Doctors' Action Committee

and Others Vs. Dr. B. Sheetal Nandwani and Others,

7. In the present case the suit was for a prohibitory injunction restraining delivery of possession by a co-sharer in respect of family dwelling house to a stranger. In such a case if injunction is applied in that event if the contention of Shri Mandhyan is accepted then no temporary injunction can be granted in as much as if inter locutory order is issued restraining the delivery of possession during the pendency of the suit in that event according to Shri Mandhyan it will amount to grant of the whole relief claimed in the plaint. Such situation is wholly against the principle enunciated in Order 39 Rules I of the Code of Civil Procedure. Order 39 Rule 1 provides where in any of the suit it is proved by affidavit or otherwise.

"(a) that any property in dispute in a suit is in danger of being wasted, damaged or wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property for dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit, as the Court thinks fit, until the disposal of the suit or until further orders.

8. Therefore the above provision was conceived so that the purpose of the suit may not be frustrated. Therefore in such a suit prohibitory injunction cannot be refused on the ground that it will grant the whole relief. On the other hand, if it is refused then further complication would arise and the plaintiff would be required to amend the plaint and add prayer for undoing an action of the defendants which cause was being sought to be prevented.

9. Admittedly in the present case the mandatory order has not been passed by way of an interim order. The same has been passed after hearing the parties and giving opportunities to the defendants. In the case of Bank of Maharashtra (supra) it has been laid down that interim order which practically gives the principle relief cannot be granted. The ratio decided therein indicates "if such orders can be granted without being concerned, the public interest and a host of other considerations may justify such ground. It has been observed that time and again this court has deprecated the practice of granting interim orders which practically give the principle relief sought in the petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, interest and a host of other considerations (see : Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop

India Ltd. and Others, , State of Rajasthan and Another Vs. Shamsheer Singh,

10. The above case does not lay down an absolute proposition that such interim order cannot at all be granted. On the other hand it suggests that balance of convenience is to be taken care of when passing such order.

11. Relying on decision of Som Nath (supra) Shri Mandhyan submits that an interim order should not be granted to the disadvantages of the defendant. Herein in this case direction vacating the premises is disadvantageous to the defendant. Therefore such an order cannot be passed during the pendency of the suit though however according to him such orders could be passed at the lime of final disposal of the suit. But the said decision also does not lay down any absolute proposition that a relief which alters the position to the disadvantage of the defendants cannot be granted. On the other hand it lays open that such relief cannot be granted without giving any opportunity to the defendant by way of ad interim injunction. In the said case it has been observed :

"The ad interim injunction order is granted to preserve the State of affairs that exists on the date of the suit but in the case the effect of the order is that it virtually grants the relief prayed for by the plaintiff in the suit or alters the position to the disadvantage of defendant such an order cannot be granted by way of ad interim injunction without giving opportunity to the defendant."

12. In Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, the Supreme Court deprecated the practice of granting interim order which practically gives the principle relief sought in the petition. In Harish Chandra Verma v. Kaisth Pathshala Trust JT 1988 (1) (SC) 625 the Supreme Court set aside an order of High Court where the defendant respondent was permitted to raise construction subject to the condition that in the event of decree being affirmed the construction shall be pulled down. The Court directed that the status quo should have been maintained. The same principle was followed in Res Talab v. IV Additional District Judge Gorakhpur, 1989 Ail Civil Journal 13. It was held that a party should not be permitted to raise construction but the parties should be required to maintain status quo during the pendency of the suit.

13. Therefore the learned counsel for the petitioner has drawn inspiration from the above cases referred in para 8 of the decision in the case of Som Nath (supra) quoted above for the proposition that in such cases status quo is to be preserved. But in the present case the facts are somewhat different and are distinguishable. The order has been passed after giving opportunity to the defendant so far as the relevant facts are concerned the same shall be dealt with shortly hereinafter.

14. On the other hand in the case of Som Nath (supra) it was held if circumstances and justice demand status quo ante can be directed to be maintained and a party shall not be allowed to take advantage of his own wrong. The observation made therein which is relevant for our present purpose is quoted

below :

"The defendant had filed application u/s 151 of the Code of Civil Procedure. He had not filed an application for punishing the petitioner for disobedience of breach of injunction order Under Order 39 Rule-2 (A) of the Code of Civil Procedure. The court had jurisdiction to pass suitable order to maintain status quo ante in the interest of justice. The court has inherent power to restore status quo ante after taking into consideration the conduct of the parties in the suit. It is not confined only when specific order is disobeyed by a party during the pendency of the suit.

The exercise of inherent power vested in a court is based on the principle that no party can be allowed to take advantage of his own wrong in spite of the order to the contrary passed by the court vide *The State of Bihar Vs. Usha Devi and Another*, , and *Hari Nandan Agrawal and Another Vs. S.N. Pandita and Others*,

The appellate court has recorded a finding that in spite of stay of operation of the injunction order granted by the trial court, the petitioner raised construction. The petitioner had obtained injunction order on 12th July, 1991. The order was served through special messenger. The house of the plaintiff-petitioner and defendant are adjoining to each other and both the parties claim the disputed land as part of their share. On the stay order having been passed the petitioner should have stopped raising any construction. As observed above, the petitioner had sought assistance of the court for raising construction without which he was unable to construct the boundary wall in question. The conduct of the petitioner was against the spirit of the order passed by the appellate court. He deliberately raised the boundary wall and affixed the doors. The Commissioner submitted the report that after the construction had been raised by the petitioner the defendant neither could take out his cattle nor dung of these cattle outside the house. The egress and ingress of his house was also affected. The raising of the boundary wall has virtually shut two doors of the house of the defendant."

15. In the case of *U. P. Junior Doctor's Action Committee (supra)* it was held as follows :

"It is a well-known rule of practice and procedure that at interlocutory stage a relief which is asked for and is available at the disposal of the matter is not granted. The writ petitioners wanted admission into post-graduate course as the main relief in the writ petition. To have it granted at the threshold creates a lot of difficulties. In a case where the petitioner ultimately loses in a case of this type a very embarrassing situation crops up. If he has by then read for two to three years, there is a claim of equity raised on the plea that one cannot reverse the course of time. In a case of this type equities should not be claimed or granted. Taking an overall picture of the matter we are of the view that unless there is any special reason to be indicated in clear terms in an inter-locutory order as a rule no provisional admission should be granted and more so into technical courses."

16. Here also in the expressions "to have it granted at the threshold creates a lot

of difficulties" and unless there is any special reason "clearly indicates that the question of the convenience was in the mind which has been taken into consideration. Therefore the proposition was not absolute bar for granting interlocutory order which almost grants the relief claimed in the suit. On the other hand the observation in the case of Som Nath (*supra*) has been made only with regard to the facts in hand. The view taken was based solely on the situation emerging from the said case.

17. It is by now an established principle that an overall view and totality of the situation are to be looked into. One of the principal consideration that are to be taken into account for the grant of injunction is balance of convenience and inconvenience. The other is the existence of *prima facie* case. It is the discretion of the Court while exercising jurisdiction in the matter of grant of relief and passing an order in the circumstances of each case. Therefore contention of Shri Mandhyan that by way of interlocutory order, the principal relief claimed in the suit cannot be granted is subject to the exception as observed herein before.

18. Now turning to the facts of the present case it appears the Lower Appellate Court being the fact finding court has arrived at a finding of facts which does not appear to be perverse on the basis of the material produced before me. High Court while exercising power of the Superintendence under Article 227 of the Constitution of India it exercises a revisional power with the restriction as has been laid down consistently by the High Courts and the Supreme Court. The finding of the facts arrived at by the court below cannot be interfered with unless, in a compelling situation viz; it suffers from perversity or non consideration of material facts. In the present case Shri Mandhyan has not been able to point out any perversity or non consideration of material facts. The lower appellate Court on facts found that the suit was filed on 19th September. 1990. Possession was taken on 25th September. 1990, namely after the suit was filed, whereas the sale deed was executed on 18-1-1992 to the defendant No. 3 (petitioner herein). The defendant claims his possession on the basis of the agreement dated 29-5- 1990 and that possession was delivered to him on 29-5-1990. The Lower Appellate Court disbelieved the same. The contention of learned counsel for the respondent that the sale deed was registered on 13-1-1992 was also not contradicted by Shri Mandhyan though he had claimed that the agreement was registered on 29-5-1990.

19. Shri Mandhyan's second contention was that the defendant No. 3 (petitioner herein) having been in possession prior to the suit, the said situation cannot be interfered with. It is admitted position in law that a situation existing prior to the institution of the suit cannot be interfered with. But the said question is to be looked into altogether from a different angle in view of the facts and circumstances of this case.

20. Section 53-A operates only against the transfer but not against a co-sharer who was not a party to the transfer nor does it have any effect of superseding Section 44 of the said Act and frustrate the right of co-sharer in a family dwelling

house as contemplated in Section 44 of the said Act. The possession even if given pursuant to an agreement does not confer any absolute right to frustrate Section 44 of the said Act. The sale deed having been executed on 13-1 -92 is hit by Section 52 of the said Act. Therefore by reason of the possession as indicated above the defendant cannot frustrate the plaintiff's right available u/s 44 of the said Act.

21. In the present case the lower appellate court having found that the defendant No. 3 (petitioner herein) having come into possession after the suit with regard to which Shri Mandhyan has not been able to point any perversity or non consideration of material records, this court cannot interfere with such finding.

22. Now on the factual aspects of the present case it is to be seen whether a mandatory order can be passed. As has been held in the case of Som Nath (supra) no party can be allowed to take advantage of his own wrong. In the present suit having been filed on 19th September, 1990 and the possession having been taken after suit in order to frustrate the relief claimed such possession cannot be allowed to continue. The present case discloses action on the part of the defendant with regard to which the terms bona fide cannot be applied. That apart Section 44 of the Transfer of Property Act 1982 envisages special situation namely :

"Where one of two or more co-owner of immovable property legally competent in that he-half transfers his share of such property or any interest therein, the transferee acquires, as to such share of interest, and so far as is necessary to give effect to the transfer, to transfer this right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, bill subject to the conditions and liabilities affecting, at the date of transfer, the share of interest so transferred.

23. Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him of joint possession or other common or part enjoyment of the house."

24. Section 44 of the said Act specifies that in respect of the transfer of share of a dwelling house, belonging to an undivided family, to a stranger does not entitle the transferee to joint possession and enjoyment of other common part of the house. In this case it is not in dispute that the house is a family dwelling house belonging to an undivided family qua property has not been partitions by meats and bounded- Therefore the right acquired by the defendant No. 3 (petitioner herein) is a restricted right only for enforcement of partition. He cannot have any right to joint possession or other common or part enjoyment of the property.

25. Shri Mandhyan has contended that there is no concept of joint undivided family among the muslims. In the present case according to him all the parties being muslim the concept of undivided family as is envisaged among Hindus

cannot be attracted. Such contention is devoid of rationale. Transfer of Property Act is applicable to the property and it does not make difference as to the cast creed or religion of the holder of the properties. Section 4 of the partition Act also does not, differentiate among person seeking partition in respect of the joint property on the basis of cast creed or religion. The property if is joint it requires partition which attracts the provision of the partition Act. Similarly transfer of joint property attracts the provision of Transfer Property Act. In this respect I am fortified by the Full Bench decision of this Court in the case of Sultan Begum AIR 1990 SC 324 quoted with approval in the case of Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, wherein it has been held (".....In it (Section 4 of the Partition Act) we find nothing to indicate that it was intended to apply to any limited class of community. The words "undivided family" as used in this section appear to be borrowed from Section 44 of the Transfer of Property Act. The last clause of that section prescribed that where the transferee of a share of a dwelling house belonging to an undivided family in this section shall not be deemed to entitle him to joint possession or other common or part enjoyment of the dwelling house. This provision of the statute is clearly of general application, and the effect of it is to compel the transferee of a dwelling house belonging to an undivided family, who is a stranger to the family, to enforce his rights in regard to such share by partition. There appears to me to be no reason why the words "undivided family" as used in Section 4 of the Partition Act, should have a narrower meaning than they have in Section 44 of the Transfer of Property Act. If the Legislature intended that Section 4 should have limited operation we should expect to find some indication of this in the language of the Section. For example, instead of the words "undivided family" the expression "undivided Hindu Family, or joint family" might have been used."

26. With reference to the object and purpose of such a provision the Full Bench further observed :

"as was pointed out by Mr. Wells Judicial Commissioner, in the case of Kalka Parshad v. Bankey Lal (1906) 9 Oudh Cases 158 is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferor's family have a right to live, and that the word "undivided family" must be taken to mean "undivided as to the dwelling house in question, and to be a family which owns the house but not divided " it."

27. The words "family" and "undivided family" have been construed as under:

"The word "family" as used in the Partition Act, ought to be given a liberal and comprehensive meaning, and it does include a group of persons related in blood, who live in one house or under one head or management. There is nothing in the Partition Act to support the suggestion that the term "family" was intended to be used in a very narrow and restricted sense, namely a body of persons who can trace their descent from a common ancestor, vide Khirode Ghoshal v. Saroda Prosad Mitra, (1990) 7 Ind Cas 136."

28. In the case of Dorab Cowasji Warden (supra) it has been held that

"We are afraid that some notions of coparcenary property of a Hindu Joint family have been brought in, which may not be quite accurate in considering Section 44; but what is relevant for the purpose of these proceedings was whether the dwelling house belonged to an undivided family. We have already pointed out that even if the family is divided in status in the sense that they were holding the property as tenants in common but undivided qua the property that is the property had not been divided by metes and bounds it should be within the property of Section 44 of the Act."

29. In the case of Dorab Cowasji Warden (supra) the case of Bhim Singh v. Ratnakar AIR 1971 Ori 198 was quoted with approval where it has been held that:

"If in this State of things, a member of the family transfers his share in the dwelling house to a stranger paragraph 2 of Section 44 of the Transfer of Property Act comes into play and the transferee does not become entitled to joint possession or any part enjoyment of the dwelling house although he could have the right to enforce a partition of his share. The object of the provision in Section 44 is to prevent the intrusion of strangers into the family residence which is allowed to be possessed and enjoyed by the members of the family alone in spite of the transfer of a share therein in favour of stranger. The factual position as has been determined is that the property is still an undivided dwelling house, possession and enjoyment whereof are confined to the members of the family. The stranger-transferees being debarred by law from exercising right of joint possession which is one of the main incidences of co-ownership of the property should be kept out."

30. Their Lordship in the case of Dorab Cowasji Warden (supra) had referred to the judgment in the case of Udayanlal Sahu v. Ratnakar Bej AIR 1967 Ori 139 that "we may respectfully state that this is a correct statement of the law. There could be no doubt that the ratio of the decisions rendered u/s 4 of the Partition Act equally applies to the interpretation of the second paragraph of Section 44 as the provisions are complementary to each other and the terms "undivided family" and "dwelling house" have the same meaning in both the sections."

31. The courts have laid down certain guidelines for grant of mandatory injunction namely that the plaintiff has strong case which shall be a little higher than a prima facie case normally required for prohibitory injunction and to prevent irreparable or serious injury which normally cannot be compensated in terms of money and the balance of convenience and inconvenience in favour of the person seeking relief. Now with regard to the question whether joint possession of dwelling house by a stranger could be compensated by money was also considered in case of Dorab Cowasji Warden (supra) in the following expression.

"This next question for consideration is whether irreparable injury would be caused to the appellant which could not be compensated in terms of money and

whether the balance of convenience is in favour of the appellant. While Section 44 does not give a transferee of a dwelling house belonging to an undivided family a right to joint possession and confer a corresponding right on the other members of the family to deny the right to joint possession to a stranger transferee. Section 4 of the Partition Act gives a right to a member of the family who has not transferred his share to purchase the transferee's share on a value to be fixed in accordance with law when the transferee filed a suit for partition. Both these are valuable rights to the members of the undivided family whatever may be the object or purpose for which they were conferred on such members. As we have pointed out in some cases it is stated that the right to joint possession is denied to a transferee in order to prevent a transferee who is an outsider from forcing his way into a dwelling house in which the other members of this transferee's family have a right to live. In some other cases giving joint possession was considered to be illegal and the only right of the stranger purchaser is to sue for partition. All these considerations in our opinion would go only to show that denying an injunction against a transferee in such cases would prima facie cause irreparable injury to the other members of the family."

32. In the present case the defendant No. 3 (petitioner herein) had entered into an agreement for purchase of undivided share in the family dwelling house pre-supposes that he has supposed to be aware of the limited and restricted title of the respondent No. 1 and 2 and the bar of joint possession provided in the second paragraph of Section 44 of the said Act. In the present he had purchased the property long after the suit was instituted namely on 13-1-92. Almost the same was the situation as is obtained in the case of *Dorab Cowasji Warden* (supra) wherein it has been held that,

"This provision in the agreement clearly shows that that the fourth respondent knew that respondents 1 to 3 have only a limited right to transfer their undivided one half share to a stranger purchaser and they contemplated litigation in this regard. The said sale was itself hurriedly executed. In a hush-hush manner keeping the entire transaction secret from the appellant. The purchasers were also inducted in the premises in a manner which clearly suggests that the respondents were attempting to forestall the situation and to gain an undue advantage in a hurried and clandestine manner defeating the appellant's attempt to go to court for appropriate relief."

33. It was further held that "these facts in our view clearly establish that not only a refusal to grant an interim mandatory injunction will do irreparable injury to the appellant but also balance of convenience is in favour of the appellant for the grant of such injunction. In the result we allow the appeal, set aside the judgment of the High Court and restore that of the trial Court with costs in this appeal." In the present case as well possession could not be obtained by the defendant No. 3 (petitioner herein) in view of the Section 44 of the Transfer of Property Act by virtue of only an agreement for sale and particularly on the basis of the finding of fact arrived at by the learned lower appellate Court that the

possession was obtained after the institution of the suit.

34. In the facts and circumstances of the case, therefore defendant No. 3 cannot maintain his possession and frustrate the relief claimed in the suit. Relying on the ratio decided in the case of Dorab Cowasji Warden (supra) I do not find any reason to interfere with the order. Therefore, the petition fails and is dismissed without any costs.

35. Petition dismissed.