

(2002) 04 CAL CK 0041
In the Calcutta High Court
Case No : C.O. No. 2710 of 2001

Sambhu Nath Pandey

APPELLANT

Vs

Jitesh Pandey and Others

RESPONDENT

Date of Decision : 23-04-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 115, 144, 151
Criminal Procedure Code, 1973 (CrPC) — Section 133, 340, 401, 482

Citation : 106 CWN 586

Hon'ble Judges : Subhro Kamal Mukherjee, J

Bench : Single Bench

Advocate : Sabyasachi Bhattacharya, for the Appellant; Prabal Kumar Mukherjee, for the Respondent

Judgement

Subhro Kamal Mukherjee, J.—This is to consider an application u/s 115 of the CPC against the judgment and order dated September 22, 2000 passed by Shri Bilas Mukhopadhyay, learned Additional District Judge. First Court at Alipore. District 24 Parganas (South) in Misc. Appeal No. 11 of 2000 reversing the order dated December 23, 1999 passed by Shri S.S. Sadhu, learned Civil Judge (Senior Division), Fifth Court at Alipore, District 24 Parganas (South) in Title Suit No. 64 of 1999. The relevant facts, which are necessary for disposal of this revisional application, are summarised as under:

Sambhu Nath Pandey, the defendant no. 3 in this suit, and Janardan Pandey were inducted as premises tenants by Samarjit Sinha, the husband of the defendant no. 2 in this suit, and Shrimati Urmilata Sinha, the defendant no. 1 in this suit, in respect of one hall room with bath and privy with floor area measuring about 1000 sq. ft. on the north eastern corner in the ground floor of premises no. 11/A, Braunfeld Row, Police Station, Ekbalpore, Calcutta-27 at a monthly rental of Rs. 350/- (Rupees three hundred fifty) only payable according to English calendar. However, an arrangement was reduced into writing in the shape of an agreement of tenancy executed by the aforesaid persons on March

20, 1984. In the said agreement it was expressly noticed that the tenants should be entitled to use the premises for residential or for go down purposes and small manufacturing purposes.

2. Shrimati Jaysree Sinha wife of the said Samarjit Sinha initiated a proceeding u/s 133 of the Code of Criminal Procedure against Sambhu Nath Pandey in the court of Executive Magistrate at Alipore and the said proceeding was registered as M.P. Mo. 3358 of 1998. It is alleged in the said application that she was the owner of the said premises and Sambhu Nath Pandey was a licensee in respect of a room at a monthly licence fee of Rs. 50/- (Rupees fifty) only. It was further, alleged that the said Sambhu Nath Pandey left the tenanted room about a year back taking away all his articles and belonging, after locking the said room. It was complained that for few days bad smell was coming out from the said room causing public nuisance.

3. On November 24, 1998 the Executive Magistrate at Alipore directed the Officer-in-Charge, Ekbalpore Police Station to enquire and report by December 22, 1998 on the allegations made in the said application and he was, further, directed to see that no breach of peace took place. On December 22, 1978 a report was submitted by the Officer-in-Charge, Ekbalpore Police Station alleging that the said Shrimati Jaysree Sinha was the owner of the premises and Sambhu Nath Pandey was holding a temporary licence in respect of a room at a monthly licence fee of Rs. 50/- (Rupees fifty) only. It was, further, reported that some obnoxious smells were coming out from inside the said room, which was injurious to health.

4. On December 31, 1998 the Executive Magistrate, upon perusal of the said police report, drew up a proceeding u/s 133 of the Code of Criminal Procedure and directed Sambhu Nath Pandey to file show cause by January 15, 1999.

5. On January 21, 1999 the Executive Magistrate made the order drawing up proceeding u/s 133 of the Code of Criminal Procedure absolute and the Officer-in-Charge of the local police station was directed to see that the nuisance be removed from the disputed room by the first party, namely, Shrimati Jaysree Sinha, after making a list of articles, which were kept inside the room in presence of a police officer. The case was, thus, disposed of Taking advantage of the order passed by the Executive Magistrate, the said Shrimati Jaysree Sinha, in collusion with the Officer-in-Charge of Ekbalpore Police Station, broke open the lock of the tenanted room and removed all the articles stored therein. After removing the goods, Shrimati Jaysree Sinha locked the said room and guards were posted.

6. Sambhu Nath Pandey on February 4, 1999 filed two applications. In one such application he prayed for an order for immediate restoration of possession. The second application was filed praying for initiating a proceeding u/s 340 of the Code of Criminal Procedure against the said Shrimati Jaysree Sinha for making false statements on oath. Similarly, a put up petition was filed, inter alia, praying

direction on the office to put up the records of the M.P. Case No. 3358 of 1998 to enable Sambhu Nath Pandey to move his aforesaid two applications. On February 4, 1999 the learned Advocate for the said Shrimati Jaysree Sinha accepted notice of the said applications on behalf of his client and gave an undertaking that the disputed room would not be let out to any other person till the hearing of the case.

7. However, by order dated February 9, 1999 the learned Executive Magistrate rejected both the said applications filed by Sambhu Nath Pandey holding that the court had no scope to reopen the case at that stage.

8. Sambhu Nath Pandey being aggrieved approached this court in the Criminal Revisional Jurisdiction u/s 401 read with Section 482 of the Code of Criminal Procedure impugning the said orders passed by the Executive Magistrate at Alipore. The said criminal revisional application was registered as C.R.R. No. 511 of 1999.

9. By order dated April 30, 1999 D.P. Sengupta. J. allowed the revisional application and set aside the orders passed by the Executive Magistrate. The Magistrate was directed to see that the possession of the tenanted room be restored and handed over to the said Sambhu Nath Pandey along with articles within a period of four weeks from the date of communication of the order and, if necessary, the Magistrate was directed to provide necessary police help for such restoration of possession.

10. In the meantime, however Jitesh Pandey, the opposite party no. 1, filed Title Suit No. 64 of 1999 in the court of the learned Civil Judge (Senior Division), Fifth Court at Alipore, inter alia, for declaration that he was a monthly tenant at will of the suit premises upon declaration that the defendant nos. 1 and 2 have no right or authority to evict him otherwise than in law. A decree for perpetual injunction was prayed to restrain the defendants from disturbing the said plaintiff from peacefully possessing the suit property and to restrain the defendant no. 3 Sambhu Nath Pandey, and/or his men and agents from doing wrongful acts to dispossess the said plaintiff from the suit property. The said suit was filed on April 12, 1998. It is categorically alleged in the plaint that the said plaintiff was inducted in the suit premises as a monthly tenant by the defendant no. 1, Shrimati Urmilata Sinha, and the defendant no. 2, Shrimati Jaysree Sinha, who was the first party in the application u/s 133 of the Code of Criminal Procedure and her learned Advocate, on her behalf, gave an undertaking on February 4, 1999 before the Executive Magistrate that no third party interest would be created till the disposal of the applications filed by Sambhu Nath Pandey.

11. In connection with the said Title Suit No. 64 of 1999 the said plaintiff filed an application for temporary injunction under Order 39, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure. The learned trial judge by order dated April 19, 1999 passed an ex-parte ad interim order of status quo.

12. Being aggrieved Sambhu Nath Pandey preferred Misc. Appeal No. 230 of

1999 in the court of the learned District Judge at Alipore, which was, however, eventually transferred to the court of the learned Additional District Judge, Seventh Court at Alipore. The learned Additional District Judge, however, set aside the ex-parte ad interim order passed by the learned trial judge.

13. Being aggrieved Jitesh Pandey moved an application u/s 115 of the CPC in the civil revisional jurisdiction of this court, which was registered as Civil Order No. 1444 of 1999. By Judgment and order dated October 13, 1999 Bhaskar Bhattacharya, J. allowed the revisional application and restored the ex-parte ad interim order of status quo. However, the learned trial judge was directed to dispose of the application for temporary injunction positively within a month from the date of the reopening of the court after long vacation in accordance with law and that he was directed not be influenced by the order passed by this court as the scope of ad interim temporary injunction was different from that of the main temporary injunction after contested hearing.

14. The learned trial judge by order dated December 23, 1999 rejected the application for temporary injunction on contest, but without cost, holding inter alia, that it would be an act of grave indiscretion to tilt the balance of discretion in favour of the plaintiff.

15. Being aggrieved Jitesh Pandey preferred Misc. Appeal No. 11 of 2000 in the court of the learned District Judge at Alipore which was, however, eventually transferred to the court of the learned Additional District Judge, First Court at Alipore, District, 24 Parganas (South)."

16. By the impugned judgment and order dated September 22, 2000 the learned judge in the lower appellate court allowed the appeal on contest against Sambhu Nath Pandey, but without cost and set aside the order passed by the learned trial judge dated December 23, 1999. The defendants have been restrained from interfering with the peaceful physical possession of the plaintiff in the suit premises till the disposal of the suit. The learned judge in the lower appellate court observed that whether the plaintiff, Jitesh Pandey, was a tenant and was lawfully occupying the suit premises and as such could not be evicted without adopting due process of law could only be determined at the time of trial upon recording the evidence both oral and documentary. It was observed that even assuming that the occupation of the plaintiff was illegal, but, according to law, even a trespasser could not be evicted without adopting due process of law by its landlord or landlady. It was observed that as the plaintiff was in occupation of the suit premises, be it legal or illegal, the balance of convenience and inconvenience was in his favour and the defendant no. 3, Sambhu Nath Pandey, was not competent to evict him from the suit premises without adopting due process of law.

17. Being aggrieved the defendant no. 3, namely, Sambhu Nath Pandey, has come up with this revisional application u/s 115 of the Code of Civil Procedure.

18. The Supreme Court of India in the case of Gurjoginder Singh Vs. Jaswant

Kaur (Smt) and Another, observed, while considering a case u/s 144 of the Code of Civil Procedure, "as it is the decree holder who has put Respondent 2 in possession and, therefore, when the decree has been set aside he is bound to restore to the judgment-debtor what he gained under the decree and subsequently transferred to Respondent 2".

19. In Hanumanthappa Vs. Muninarayanappa, it has been laid down that no injunction could be issued in law against the lawful owner of the property.

20. The Supreme Court of India in the case of Samir Sobhan Sanyal Vs. Tracks Trade Pvt. Ltd. and others, observed "The Court cannot blink at their unlawful conduct to dispossess the appellant from demised property and would say that the status quo be maintained. If the Court gives acceptance to such highhanded action, there will be no respect for rule of law and unlawful elements would take hold of the due process of law for ransom and it would be a field day for anarchy. Due process of law would be put to ridicule in the estimate of the law-abiding citizens and rule of law would remain a mortuary."

21. A division bench of this court in the case of Sushil Kumar Jhunjhunwala vs. S.M. Chowdhury & Anr. reported in CAL LT 1998 (3) HC 179 observed that The court can take judicial notice of the fact that premises which is very valuable for business purpose, tenants are ejected by the landlords and persons interested fight inter se amongst themselves to obtain possession of such premises. The landlord or the contesting party take law in their own hands in ousting a lawful tenant. The apex court has also taken a similar view in Samir Sobhan Sanyal Vs. Tracks Trade Pvt. Ltd. and others, wherein it was held that if it is proved that a tenant was dispossessed without due process of law, the same must be held to be illegal. In Sri Hanumanthappa vs. Sri Maninarayanappa, reported in JT 1996(10) SC 309 the apex court held that no injunction can be granted against a lawful owner of property."

22. A learned single judge of Delhi High Court in the case of Rama Saroop Vs. Daljit Singh, observed that where the landlord evicted the tenant in execution of ex-parte eviction decree, but later on the eviction decree has been set aside and that order has become final, the landlord was liable to restore possession of the premises to the tenant. The effect of setting aside of the decree was that there was no eviction decree against the tenant and, therefore, the landlord could not claim or retain possession of the tenanted premises. Even if the tenancy created by the landlord was proper and not sham, the inductee or the new tenant would be liable to be dispossessed as per the Jaw. The new tenant derived his title to the premises only from the landlord and if the landlords own title was defective or not legal, he could not bestow a better title on the alleged tenant. Even if a fresh tenancy has been created by landlord in favour of a third party who had no knowledge of litigation between landlord and the present tenant, on the ex parte eviction decree in favour of landlord being set aside, he was bound to restore possession of the premises to the tenant judgment-debtor. If the new tenant allegedly inducted in the premises has no right to remain in possession under

law, evidence as to if the new tenancy was bona fide or not was not relevant or material.

23. In the case of State Transport Authority. Bhopal us. Sehore Ashta Joint Motor Service, reported in AIR 1956 Bho 49 it was observed that the grant or refusal of a temporary injunction is governed by three well established principles, that is (1) if the plaintiff has made out a prima facie case, (2) if the balance of convenience is in his favour, that is, a would cause greater inconvenience to the plaintiff if the injunction is not granted than the inconvenience to which the defendant or persons claiming through him would be put to if the temporary injunction is granted, and (3) if the plaintiff would suffer an irreparable injury. The appellate courts can interfere with the order only if they find that the well-established principles had not been followed or the facts of the case are such as to justify an interference or that the opinion expressed by the trial court is perverse. But where the appellate court does not properly exercise its jurisdiction and upsets the discretion of the trial court simply because it formed a different opinion of the facts, the revisional courts can interfere with the order of the appellate court on the ground that the appellate court did not exercise its jurisdiction properly or the jurisdiction so exercised was exercised with material irregularity. The grant or refusal of temporary injunctions must always be decided on the merits of the case and not on the speed shown by a party in coming to Court.

24. Hoffmann, J. in Films Rover International Ltd. & Ors. vs. Cannon Film Sales Ltd., reported in (1986) 3 All ELR 772 observed 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" decision, 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."

25. Having heard Mr. Bhattacharya, learned Advocate for the petitioner and Mr. Prabal Kumar Mukherjee, learned Advocate for the opposite party no. 1, in depth and detail and upon perusal of the materials on record, I failed to appreciate as to how the plaintiff could insist upon an order of temporary injunction restraining the defendant no. 3 from taking possession of the suit premises. The grant or refusal of temporary injunctions must always be decided on the merits of the case and I think that the plaintiff in this case has miserably failed to make out any case for temporary injunction. Prima facie, it has been established beyond any doubt that the defendant no. 3 is a tenant in respect of soil premises and that he was dispossessed taking advantage of the orders passed in a proceeding u/s 133 of the Code of Criminal Procedure and I am prima facie, satisfied that

the initiation of the proceeding in the court of the Executive Magistrate at Alipore was neither bona fide nor lawful. Even on February 4, 1990, it was represented to the Executive Magistrate that no third party interest would be created and the specific case of the plaintiff in the plaint is that he was inducted in the suit premises on February 4, 1999. Therefore, the bona fide of the plaintiff is, also, at doubt. The learned Additional District Judge ought not to have interfered with the order passed by the learned trial judge when the learned trial judge rejected the application for temporary injunction by exercising sound discretion in the facts and peculiar circumstances of the case. Shrimati Jaysree Sinha, the defendant no. 2 of this suit, obtained an order from the criminal court and dispossessed a lawful tenant from the tenanted premises and she has inducted this plaintiff in the suit premises on February 4, 1999. This Court has set aside the orders passed by the Magistrate in criminal revisional jurisdiction. This court directed restoration of possession in favour of the defendant no. 3/ petitioner. The plaintiff cannot have better title than that of the landladies. When the order of dispossession have been set aside, the defendant no. 3 is entitled to get back possession notwithstanding creation of alleged tenancy in favour of the plaintiff/ opposite party no. 1.

26. In my view, the learned judge in the lower appellate court nurtured in the cradle of wrong idea that even if the possession of the plaintiff is illegal the plaintiff is entitled to an order of injunction as he is in possession of the suit premises. No order of temporary injunction can be passed to protect unlawful possession. The learned judge applied wrong legal tests and thereby committed error of jurisdiction in passing an order of injunction in favour of the plaintiff till the disposal of the suit. The order impugned has caused failure of justice and irreparable injury to the defendant no. 3/petitioner.

27. Accordingly, the judgment and order impugned passed by the lower appellate court is set aside and that of the learned trial judge is restored. The application for temporary injunction filed by the plaintiff in Title Suit No. 64 of 1999 is rejected.

28. There will be no order as costs. I, however, make it clear that the trial judge at the disposal of the suit will proceed uninfluenced by the observations made by me herein as to the merits of the case inasmuch as findings arrived at in dealing with the application for temporary injunction pending disposal of the suit cannot take the place of findings in the final decision of the suit. Let the hearing of the suit be expedited as far as possible.

Let xerox certified copy of this order, if applied for be supplied to the parties expeditiously.