

(1970) 04 KL CK 0002

In the High Court Of Kerala

Case No : Civil Revision Petition No. 81 of 1970

Sankara Pillai Madhavan Pillai

APPELLANT

Vs

Inez Rosario

RESPONDENT

Date of Decision : 10-04-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, 115, 151

Citation : AIR 1971 Ker 27

Hon'ble Judges : E.K. Moidu, J

Bench : Single Bench

Advocate : Panicker and Potti, for the Appellant; K. George Varghese, for the Respondent

Final Decision : Allowed

Judgement

E.K. Moidu, J.—The question that arises for determination in this Civil Revision Petition is whether the respondent-plaintiff has made out a case for temporary injunction restraining the petitioner-3rd defendant from entering upon the plaintiff property and conducting a tutorial college thereon and also restraining the petitioner disturbing the quiet possession of the respondent. The suit out of which the petition for temporary injunction arose was one for recovery of possession of the plaintiff schedule property and also for a mandatory injunction directing the defendants in the suit to demolish the 4 sheds erected on the property and by removing the same therefrom thereby giving vacant possession of the property to the respondent. Both the courts below granted the temporary injunction as prayed for. The decretal order passed by the trial court is couched in the following words: "The defendants are restrained from concluding any tutorial college in the 4 sheds constructed by the 3rd defendant. They are also restrained from putting up any additional shed or from interfering with the possession of the plaintiff schedule property by the plaintiff."

2. It is admitted case that the petitioner is conducting a tutorial college in the above 4 sheds which were erected on the plaintiff schedule property. The plaintiff

property belongs to the respondent. The original owner was his father, Peter Rosario, Since 1956, a tutorial college had been conducted in one of the buildings erected upon the property by one Prabhakaran. While so, the petitioner got an assignment of that shed as per Ext. 134 in 1960. Thereafter, the petitioner executed a lease deed to the 4th defendant, who is the uncle of the respondent. The petitioner has been in possession under the renewed lease deed dated 24-1-60 on payment of Rs. 200 ground rent a year to the 4th defendant. 4th defendant was the agent of Peter Rosario, who left for Penang in 1959. In the meanwhile, he had assigned the property to the respondent who is his son. By that time the respondent and his father came back from Penang, the petitioner had executed Ext. P3 rent deed dated 29-4-66 in favour of the 4th defendant. The petitioner had also erected 3 more sheds for the conduct of the tutorial college. The ground rent under the latest arrangement was to pay Rs. 400 a year. There is no case that rent had not been paid to the 4th defendant. In Ext. P3 rent deed, which is produced by the respondent in court, it is stated that when Peter Rosario came back from Penang, the petitioner would surrender the property on demolition of the sheds erected by him upon the property. It is stated that Peter Rosario and the petitioner came back to this country in 1968 and demanded the petitioner to surrender the property. Since there was no surrender effected, the instant suit had been filed along with the application for temporary injunction. The question for us to consider is whether the respondent has made out a case for temporary injunction to be issued as prayed for against the petitioner.

3. A temporary injunction can be issued under Order XXXIX, Rule 1, Civil P. C. which reads as follows:

"Where in any 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 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 defraud his creditors, 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 as the Court thinks fit until the disposal of the suit or until further orders."

4. Before a temporary injunction is granted, therefore, a court must be satisfied that (1) the applicant has a prima facie case, (2) protection is necessary from the species of injuries known as irreparable, before legal right can be established, and (3) the mischief or inconvenience likely to arise from the withholding of injunction is greater than by granting it. It has to be stated in this case that the subordinate courts did not consider the case in the light of the ingredients Nos. 2 and 3 specified above. The case was disposed of only on the

basis that the plaintiff made out a prima facie case. However, it is contended that even if the prayer for temporary injunction is not covered by Order XXXIX, Rule 1, still the inherent power of court by virtue of Section 131, Civil P. C. can be invoked to grant an injunction. There can be no dispute that the inherent power of court u/s 157., Civil P. C., can be invoked in suitable cases. But, still the question is whether the Court is bound to consider not only that the applicant has a prima facie case, but also the other two ingredients, which were set forth above. In *Mathura Rai Vs. Mt. Marachoo Kuer*, it is stated that in order to obtain an interlocutory injunction, it is not enough for the plaintiff to show that he has a prima facie case. He must further show the following ingredients:

- (1) In the event of withholding the relief of temporary injunction he will suffer an irreparable injury;
- (2) in the event of his success in the suit in establishing his alleged legal right, the encroachment whereof is complained against, he will not have the proper remedy in being awarded adequate damages.
- (3) in taking into consideration the comparative mischief or inconveniences to the parties, the balance of convenience is in his favour, or in other words, that his inconvenience in the event of withholding the relief of temporary injunction will in all events exceed that of the defendant in case he is restrained. This condition can, under circumstances, be so adjusted as not to deprive either party of the benefits he is entitled to in the event it turns out that the party in whose favour the order is made shall be in the wrong, by imposition of forms on one party or the other as condition of either granting or withholding the injunction;
- (4) lastly, the plaintiff must show a dear necessity for affording immediate protection to his alleged right or interest which would otherwise be seriously injured or impaired.

5. In this regard, I may point out the manner of exercise of the power relating to the grant of temporary injunction and the circumstances to be taken into consideration in exercise thereof. At page 101 of "the Law relating to Injunctions" (12th Edn. by Woodroffe) the following observation is made:

"The power which the Court possesses of granting injunctions whether interlocutory or perpetual (however salutary), should be very cautiously exercised, and only upon clear and satisfactory grounds; otherwise it may work the greatest injustice. An application for an injunction is an appeal to the extraordinary power of the Court, and the plaintiff is bound to make out a case showing a clear necessity for its exercise; it being the duty of the Court rather to protect acknowledged rights than to establish new and doubtful ones. Moreover, a temporary injunction is a restrictive or prohibitory process designed to compel the party against whom it is granted to maintain his status merely until the matters in dispute shall by due process of the Courts be determined. As such, an injunction is in its operation, somewhat like judgment and execution before trial; it is only to be resorted to from a pressing necessity, to avoid injurious

consequences which cannot be repaired under any standard of compensation."

6. So, before a temporary injunction is granted the court must be satisfied that the applicant has a prima facie case: protection is necessary from irreparable injury before legal right can be established and the mischief or inconvenience is likely to arise from withholding of the injunction is greater than by granting it. In elucidating the points to be considered in an application for temporary injunction, the following observation of the Andhra Pradesh High Court reported in *Mall Suranna Vs. Kalla Somulu and Others*, is relevant.

"It is no doubt true that under Order 39, Rule 1, Civil P. C., it is in the discretion of the Court to issue or refuse to issue an injunction, and the appellate Court would not normally interfere in the exercise of the discretion. The discretion should however like other cases of discretion vested in the Courts, have to be exercised in accordance with the reason and on sound judicial principles. The grant of injunction is a serious matter and Courts should always take good care to grant an injunction in cases only where such an injunction is essential. The three things which must necessarily go into consideration, while considering the question of granting or refusing an injunction are now fairly well known. The prima facie existence of a right and its infringement, irreparable injury and the balance of convenience are the three things which must necessarily be properly considered. I have already said that the matter of issuing injunction is discretionary. What must therefore follow is that even if these three things exist, in a proper case, the Court can refuse even then to issue an injunction. The rule is fully established that in cases where the facts are already established and the injury is real and the plaintiff acts promptly upon his acquired knowledge of the defendant's acts a preliminary mandatory injunction may be granted although the act complained of was fully completed before the suit or the appeal was actually filed or preferred. Nevertheless as stated earlier, exceptional circumstances have to be made out by the appellant in order to entitle him to the issue of a mandatory injunction particularly when the trial court has gone against him on all the issues."

7. It is, therefore, clear that the temporary injunction cannot be granted only on the basis that the plaintiff has made out a prima facie case, but the plaintiff must show to which side the balance of convenience lies. On this point, the following observation in *Hemraj Kapoor Vs. Seventeen Textile Traders (India) and Others*, may be seen. It is as follows:

"But the circumstances that the plaintiff has a prima facie case does not necessarily mean that an order of injunction must follow. The Court must also consider on which side lies the balance of convenience, In the case of *Brajendra Nath Ghosh and Others Vs. Sm. Kashi Bai and Others*, , their Lordships have laid down that in order to obtain an interlocutory injunction it is not enough for the plaintiff to show that he has a prima facie case. He must further show that (1) he will suffer an irreparable injury if the relief of temporary injunction is not granted; (2) in the event of his success he will not have the proper remedy in

being awarded adequate damages; (3) the balance of convenience will in all events exceed that of the defendant in case he is restrained; and (4) lastly, he must show a clear necessity for affording immediate protection to his alleged right or interest which would otherwise be seriously injured or impaired. Their Lordships have further laid down that temporary injunction can only be granted where award of compensation and damages will not be a full and complete remedy to the person applying for the same."

8. The lower Courts did not consider the question as to the balance of convenience between the parties if the injunction is allowed or refused. The question as to whether the plaintiff is likely to suffer any damage which could not be compensated by other means also was not considered by the subordinate Courts. When the petitioner was conducting a tutorial college wherein more than 500 students were educated and large number of lecturers and others were employed, the grant of a mandatory injunction in the form in which it is couched would really put an end to the educational activity of the petitioner. In an almost similar case it is held in *A. R. Gangadhara & Co. v. Finn P.M. Rajeswar & Co.* AIR 1902 A P 510 that where the question is who is entitled to the property, whether the plaintiffs or the defendants, an order of injunction restraining the defendants to carry on business is not a proper one to be passed. In such cases, the balance of convenience does not require the issue of an order of injunction which in effect would destroy the entire business of the defendants. This aspect of the question has not been considered by the courts below, it is true that the respondent is the owner of the site in which the buildings are erected. It is also true that the petitioner agreed to demolish the building and give the vacant site to the owner whenever he returns from Penang. But, at the same time, he executed Ext. P3 as a rent deed in favour of the 4th defendant, who is an agent of the respondent. The injunction was issued at the stage when the petitioner did not even file his written statement in answer to the plaint. The petitioner did not so far put forth his contentions in the suit. It is argued that the petitioner must be given a chance to establish his case on the basis of the rent deed Ext. P3 and other provisions of law as to how he would be able to continue in possession of the buildings. Before the entire evidence is placed before the subordinate Courts, they have practically put back the buildings into the possession of the respondent. The relevant part of the trial court's order is to the effect that the possession of the respondent over the property shall not be interfered with by the petitioner. That would amount to the respondent entering upon the property forthwith and make use of the buildings by himself under the guise of the order of injunction. The agreement by the petitioner is to pay Rs. 400 a year as ground rent to the 4th defendant in respect of the property in question. So, if the rent was paid as agreed, the petitioner would be able to conduct the tutorial college until a decree is passed against him as prayed for in the suit. But, if a temporary injunction is allowed, it would cause irreparable loss to the petitioner. But, the ultimate loss to be accrued to the respondent could be estimated in damage. The respondent would be entitled to get either the rent or the mesne profits if a

decree against the petitioner is passed in the final analysis of the case. So, on the two questions as to whether protection is necessary from the injury known as irreparable before legal right can be established or the mischief or inconvenience is likely to arise from withholding of injunction is greater than by granting it have never been considered by the courts below. Balance of convenience in the circumstances of the case is to withhold the injunction until a decree is passed in the suit. It is, however, contended that u/s 115 of the CPC this court has no jurisdiction to disturb the finding of fact arrived at by the courts below. On this question, the Section 115 may be seen. It reads as follows:--

"The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

9. The right to interfere in revision u/s 115, Civil P.C. is considered in Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav, which made the following observation:

"The High Court cannot while exercising its jurisdiction u/s 115, correct errors of fact, however gross they may be, or even errors of law. It can only do so when the said errors have relation to the jurisdiction of the Court to try the dispute itself. It is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. Points of law may arise which are related to questions of jurisdiction. A plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party which raises them would oust the jurisdiction of the Court. An erroneous decision on these pleas, therefore, can be said to be concerned with questions of jurisdiction falling within the purview of Section 115 of the Code. But an erroneous decision on a question of law having no relation to questions of jurisdiction will not be corrected by the High Court u/s 115."

10. The above observation shows that in case where a subordinate court exercised a jurisdiction not vested in it by law or it failed to exercise a jurisdiction so vested, or has acted in the exercise of the jurisdiction illegally or with material irregularity the revisional jurisdiction of the High Court can be properly invoked. In some cases, points of law may arise which are related to questions of jurisdiction. In the instant case, points of law have arisen with regard to the propriety of granting injunction. The provision of law is that in granting injunction the court is bound to follow certain well laid down principles.

Of these principles, the subordinate courtly failed to consider two of the important conditions. One is irreparable loss which can be compensated in damages if an injunction is refused, and the other is the balance of convenience. When the subordinate court failed to consider this important question of law, it can be said that they failed to exercise jurisdiction which is vested in it. If there is such a failure to exercise jurisdiction on a question of law, evidently Section 115, Civil P. C. comes into play. I may, in this connection, point out that in a similar case, it was held by this court in *Rajalekshmi Amma and Another Vs. Kunjipillai Amma and Others*, that it comes within the ambit of Clause (c) of Section 115, Civil P. C. On that question as well as the other questions regarding the grant of injunction, the relevant observation of Kumara Pillai, J. may be seen in paragraph 8 of the decision which reads as follows:---

"It was also contended by the respondent" counsel that this was not a case in which the revisional jurisdiction u/s 115, Code of Civil Procedure, can be exercised, especially in view of the concurrent findings of the courts below that the plaintiffs have a prima Facie case as regards title to the land. But, as pointed out in *Kalyanpur Lime Works v. State of Bihar* AIR 1934 Pat 220 the fact that the plaintiffs have made out a prima facie case does not necessarily mean that a temporary injunction can be issued. Before issuing such an injunction the court must consider and satisfy itself whether the effect of the injunction would be to preserve or alter the status quo during the pendency of the litigation and whether irreparable or serious injury would be caused to the plaintiff if the injunction is not issued. If the effect of the injunction would be to alter the status quo during pendency of the trial and no irreparable injury would be caused to the plaintiffs by preserving the status quo it is not a fit case for issuing a temporary injunction which is a remedy which should be sparingly resorted to, since it would often result in giving to the plaintiffs the remedy they seek in the suit even before the contentions of the contending parties are properly tried. As the courts below have omitted to consider these essential aspects and have only considered the question of prima facie title to the land, it cannot but be held that they have acted with material irregularity in the exercise of their jurisdiction. The case, therefore, clearly falls under Clause (c) of Section 115 of the CPC and attracts the exercise of the revisional jurisdiction of this court."

11. So, on analysis of the entire case, I am of the opinion that this is a fit case for refusing temporary injunction to the respondent. If an injunction is allowed, the entire educational activity conducted by the petitioner would completely be stopped. On the other hand, if the petitioner is allowed to continue in possession until the disposal of the suit, the injury caused to the respondent could be compensated in damages. The subordinate courts were not correct in putting the respondent back in possession of the property when the questions as to the contention of the petitioner regarding his right to be in possession were not fully considered and the consideration of the same can be made only after hearing both sides with the documentary and oral evidence placed before the court. It is, therefore, clear that the balance of convenience requires that the petitioner is

allowed to be in possession until the decree is passed in the suit. However, I may direct the Munsiff to take up the suit for trial and dispose of the same as quickly as possible after the summer recess.

12. In the result, I allow the civil revision petition, set aside the orders of the courts below and dismiss the application for in function, however, subject to the direction that the defendants shall not erect any new sheds pending the suit. No costs. The trial court will dispose of the suit as quickly as possible after the summer recess.