

(1984) 01 GAU CK 0027
In the Gauhati High Court
Case No : M.A. (F) 72 of 1983

Smti. Benani Chatterjee

APPELLANT

Vs

Sri. Sawarmal Agarwalla and Another

RESPONDENT

Date of Decision : 09-01-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1, Order 40 Rule 1(2), Order 43 Rule 1

Citation : (1984) 1 GLR 128

Hon'ble Judges : T.C. Das, J;K. Lahiri, J

Bench : Division Bench

Advocate : K. Sarma and F. Khataniar, for the Appellant; N.M. Lahiri, G.N. Sahewalla, M.K. Dewan and N. Sarma, for the Respondent

Final Decision : Allowed

Judgement

K. Lahiri, J.—This is an appeal under Order 43 Rule 1(s) of the Code of Civil Procedure, for short "the Code", directed against an expert order appointing a receiver.

2. On 27.6.83, Money suit No. 2 of 1983 was instituted in the Court of the Assistant District Judge, Goalpara. Along with the plaint an application under Order 43 Rule 1 of "the Code" was filed by the Plaintiff. The suit was valued at Rs. 16 lakhs and odd based on a pro note for Rs. 12 lakhs. We do not concern ourselves to scrutinize whether the application under Order 40 Rule 1 was supported by valid affidavit or the affidavit was sworn by a competent person or not. However, we find that on 26.6.83, the next day of the institution of the suit, learned District Judges Goalpara at Dhubri, withdrew the suit to his file without assigning any reason and passed the following order:

The suit is withdrawn to my file. Register it. Heard Sri Dey, Perused the Xerox copy of the promissory note issued by Swapan Chatterjee. Perused also the affidavit sworn by Gopal Sarma. I have also gone through the ruling in N. CT. N. VR. Veerappan Chettiar and Another Vs. Cholachi Achi and Others, The prayer is

allowed. Sri. Ashok Sarkar son of Sri. Sukendu Sarkar of Sevak Road, is appointed as receiver in respect of the Siliguri Rolling Mills. Summon the Defendants and issue notice on them to show cause if any, against the order of appointment of Receiver fixing 6.8.83.

Sd/- G.S. Choubey, District Judge, Goalpara, Dhubri.

3. A bare perusal of the order makes it clear that there was no foundation or base for making such a drastic order of removal of the Defendants from the possession or custody of a valuable property, namely, the Siliguri Rolling Mills and to hand it over to an unknown person by appointing him as receiver. There is no bar to pass an ex-parte order appointing receiver and such an order is not without jurisdiction, but such extraordinary power can be exercised only when there is an emergency or likelihood of irreparable injury to the Plaintiff. Indeed, the Court can pass an order appointing a receiver when it appears to it "just and convenient". However, the expression "just and convenient" is governed by certain basic principle which are by and large followed by all the Courts in India. Amongst others on the basis of the following 5 principles, a Court can appoint a receiver:

(i) the Court can appoint a receiver for the purpose of protecting the rights of the parties as well as the subject matter of the suit. There must be material to the effect and it must be reflected in the order to show that the impugned order was passed in order to protect the subject matter of the suit. In the instant case there is no indication to the effect in the Impugned order;

(ii) the Court should not appoint a receiver unless upon proof by the Plaintiff that prima facie, he has a very strong case and excellent chance of success in the suit. This governing principle was also not before learned District Judge while rendering the impugned order;

(iii) there must be some extraordinary or emergent circumstances to dispossess a party from possession as well as custody of a valuable property. Some extraordinary emergency or some material to show that there existed an imminent danger of the property being damaged, destroyed or transferred to avoid the result of the suit which would deprive the Plaintiff to obtain the fruit of his litigation. There must be some indication that such immediate or drastic action was necessary and desirable. In the instant case we do not find any inkling of the nature in the impugned order;

(iv) the order appointing a receiver will not be made where it effects in depriving the Defendant of a de facto possession or custody of property vide Order 40 Rule 1 Sub-rule (2) of "the Code". However, the principle may not be applicable where the property is in *medic* i.e. not in the enjoyment of any of the parties and/or there is every likelihood of irreparable loss about to be committed by the party in possession of the property in question;

(v) the Court must look to the conduct of the parties, more particularly the

conduct of the Plaintiff, in making the prayer. It is more or less an equitable relief and a party applying for relief must come with clean hands.

4. We are at a loss as to why and how the impugned order could be rendered by learned District Judge, without considering the aforesaid principles governing grant of an order under Order 40 Rule 1 of "the Code". We also fail to see why such an emergent and drastic order was made when appropriate relief of inducing the Defendant not to dispose of the property or to transfer it or in any way encumber it in any form could have been passed by the learned Judge. Similarly, the property could have been attached before judgment under Order 38 of "the Code". Why instead of so many protections this action of taking over possession and custody of a running business should have been resorted to by the learned Judge, is beyond our comprehension. However, this may not be treated as our conclusion. The trial Court has exclusive jurisdiction to make an order under Order 40 Rule 1 of the Code if it acts within the limitations set forth above.

5. For the foregoing reasons, we have no hesitation in reaching the conclusion that the act of withdrawing the case, making an experts order on the very same date and without keeping before the relevant principles on the basis of which the order under Order 40 Rule 1 could have been passed, clearly show that the impugned order should be set aside the matter be remitted back to the trial Court, namely, the Assistant District Judge, Goalpara at Dhubri who shall bear both the parties and thereafter may make any order as it considers "just and convenient" on the facts and circumstances of the case, which we do hereby.

6. However, we must take precaution to see that further proceedings in the matter might not be nullified by the Defendant in disposing of the property during the interregnum period. Accordingly, we order that the order of the appointment of receiver shall come to an end only after Defendant No. 1 gives an undertaking to the trial Court, namely, the Court of the Assistant District Judge at Dhubri that he shall not transfer, sale, mortgage or in any way encumber and/or dispose of the property in question namely, the Siliguri Roiling Mills at Siliguri, either wholly or in part and/or do anything to defend the claim of the Plaintiff or cause delay in recovery of the decretal amount which may ultimately be passed in favour of the Plaintiffs until the disposal of the proceeding arising out of the application under Order 40 Rule 1 of "the Code". Only upon giving such undertaking. Defendant No. 1 shall be entitled to get back possession and/or custody of the property from the Receiver and shall continue to enjoy possession and/or custody of the property unless prohibited by the trial Court by an order. Upon giving the undertaking as set forth above the trial Court shall direct the Receiver to hand over possession of the property. The trial Court may also ask the Receiver to produce the account and the amount received by the Receiver into the trial Court. On submission of the accounts and/or the money, learned Assistant District Judge at Dhubri shall make necessary orders as to the accounts and the money while disposing of the application of the Plaintiffs under Order 40 Rule 1 of the Code.

7. In the result, the appeal is allowed. However, there will be no order as to cost. Learned District Judge at Dhubri shall forthwith transmit the records of the case to the Assistant District Judge, Goalpara, Dhubri, who shall dispose of the question of appointment of receiver under Order 40 Rule 1 of "the Code" within a month from the date of furnishing the necessary undertaking by Defendant No. 1.