

(2013) 07 GAU CK 0003
In the Gauhati High Court
Case No : M.A. (F) No. 4(K) of 2012

State of Nagaland

APPELLANT

Vs

Thilixu "B"

RESPONDENT

Date of Decision : 29-07-2013

Acts Referred:

Citation : (2014) 2 GLT 829

Hon'ble Judges : Nishitendu Chaudhury, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Nishitendu Chaudhury, J.—By this appeal under Rule 43, Rule 1 (r) of the Code of Civil Procedure, the defendant Nos. 1 to 5 (the State of Nagaland and others) have challenged the order dated 24.4.2012 passed by the Civil Judge (Senior), Dimapur in Civil Misc. Case No. 2/2012 arising out of Civil Suit No. 3/2009 whereby prohibitory injunction restraining the present appellants was granted. The sole opposite party (Thilixu B village) represented by its head Gaonbura filed the aforesaid Civil Suit in the Court of the learned Civil Judge (senior), Dimapur praying for declaration of right, title and interest and recovery of possession. It was stated in the said plaint that pursuant to an agreement entered into with original Thilixu village on 16.9.2000, the plaintiff village was established on 16.1.2001 upon the land donated by the said Thilixu village and this is why the plaintiff village was named as Thilixu B village. It was pleaded that about 29 families inhabited the said village but the Chief Wildlife Warden, Rangapahar Wildlife Sanctuary (defendant No. 5) took forceful possession of the said Thilixu B village and thereafter, the Addl. Deputy Magistrate promulgated an order u/s 144 Cr.P.C. there on subsequently on 214/2005. Under the aforesaid circumstances and having failed to get possession otherwise, the plaintiff instituted the suit for declaration of right, title and interest over schedule A land which has been described in the plaint. The said schedule A land as described in the plaint is reproduced below:--

SCHEDULE-A

Land measuring approximately 1000 Acres under the Thilixu-B Village (Thilixu-B) which is bounded by;-

North:--Forest land (Now Touluzoma Village)

East:--Rangapahar Forest Road

South:--Doyapur Road

West:--Dhansiri River.

2. Along with the said plaint, the plaintiff appear to have filed an injunction petition as well praying for injunction for restraining the present appellants from entering and carrying out developmental and construction work of any nature till the suit was decided. The said injunction petition was registered as Civil Misc. (J) Case No. 10/2009. The appellants who were defendant Nos. 1 to 5 submitted written statement as well as objection against the injunction prayer made in Civil Misc. Case 10/2009 and the learned trial Court after hearing the parties on 17.7.2009 rejected the injunction prayer in M.C. No. 10/2009 on 4.8.2009. This order attained finality and no appeal was preferred. The said order dated 4.8.2009 is a part of record being Annexure-K to the memo of appeal.

3. Subsequently, the present opposite party (plaintiff) filed another application for injunction by filing Misc. (J) Case No. 2/2012 and thereby prayed for prohibitory injunction restraining the present appellant Nos. 4 and 5 from disturbing the peaceful possession of the plaintiff over Schedule B land which is a part of Schedule A land as disclosed in the prayer of the Misc. case itself. The schedule B and schedule A land have been described in the injunction petition. It appears that schedule A land as described in the petition is the same schedule A as referred to above i.e. in the plaint of the main suit. The appellants/defendant Nos. 1 to 5 submitted their written objection in Misc. (J) case No. 2/2012 wherein it was specifically mentioned in paragraph 1 that an earlier prayer for prohibitory injunction by the same Court in the same suit with respect to the schedule A land had been rejected on 4.8.2009. But this time by a cryptic order dated 24.4.2012, the same Judge allowed the prayer for injunction however, restraining the petitioner of the Misc. Case also from making any developmental work and construction on the schedule B land. It is against this order the present appeal has been preferred.

4. I have heard Mr. K. Sema, learned Addl. Advocate General, representing the appellant Nos. 1 to 5 and Mr. N.K. Luikham, learned counsel for the sole respondent.

5. The learned Addl. Additional Advocate General has made the following submissions criticizing the impugned order of injunction dated 24.4.2012.

First, the same learned Court having rejected the prayer of prohibitory injunction of the same petitioner in the same suit on an earlier occasion by judgment and

order dated 4.8.2009 and there being no change of circumstances, the subsequent order dated 24.4.2012 is hit by principles of res judicata inasmuch as any order passed at the anterior part of a judicial proceeding acts as a bar of res judicata on the subsequent part of the same proceeding.

Secondly, the first order dated 4.8.2009 passed by the same Court in the same suit in Misc. Case 10/2009 having contained a finding of fact to the effect that the plaintiff petitioner in the said Misc. Case had already been evicted from the suit land, namely, 1000 acres of land described in schedule A to the plaint, the subsequent injunction petition claiming to be in possession of a part of said land, namely, schedule B is not entertainable as the prayer of the suit itself is recovery of khas possession in view of their dispossession from the suit land. The foundation of Misc. (J) case No. 2/2012 that the petitioner were harassed by appellant Nos. 1 to 4 while making developmental work on the schedule B land is unacceptable and as such on the face of it, the plaintiff does not have any prima facie case, not to speak of strong prima facie case, forgetting injunction.

Thirdly, the schedule A land having being claimed by the plaintiff to be a gift from the Thilixu village and by filing written statement, the said Thilixu village having denied that the suit land was not donated to the plaintiff at any point of time, the foundation of claim of the plaintiff is proved non-existent prima facie and as such, the learned Court committed error in granting injunction.

Fourthly, the case of defendant Nos. 1 to 5 (appellants herein) is that the suit land is a pari of Rangapahar Wildlife Sanctuary and even at the time of admission of the appeal, the petitioners submitted photographs to show that the plaintiff are nothing but rank encroachers in the Government land and as such public interest is involved in the matter. The learned trial Court having failed to consider this aspect of the matter while granting injunction in favour of the plaintiff, the impugned order dated 24.4.2013 has been vitiated.

Fifthly, the impugned order dated 24.4.2012 cannot be an order of injunction in the eye of law in view of the fact that it does not contain necessary ingredients like finding as to prima facie case, observation as to the element of balance of convenience as well as irreparable loss of injury and lastly, the consequence of granting or refusing injunction vis-?-vis public interest.

6. On all these five submissions, the learned Addl. Advocate General challenges the impugned order and prays that the impugned order be set aside. The learned Addl. Advocate General further relies on Order XLI Rule 24 of the CPC and submits that the materials available on records are sufficient to arrive at a finding that the plaintiff does not have a prima facie case to get injunction when earlier same prayer of injunction on the same materials was refused by the same trial Court in the same case and there is no finding in the subsequent order as to why the learned trial Court took a different stand from what was taken earlier on 4.8.2009. According to the learned Addl. Advocate General therefore, this Court is entitle to decide this appeal in exercise of powers u/s 107 of the CPC without

remanding the case after setting aside the order impugned.

7. Per contra, Mr. Luikham, learned counsel for the sole respondent submits that the earlier prayer of injunction was only to restrain the defendants from entering into the suit land while latter injunction prayer was for restraining them from disturbing peaceful possession of the petitioner. On the face of a pointed question, the learned counsel for the respondent candidly admitted that the land covered by schedule B land with respect to which a prayer for injunction has been made in Misc. (J) case No. 2/2012 was a part and parcel of the land covered by schedule A land with respect to which injunction prayer was rejected in earlier Misc. (J) case No. 2.2010 on 4.8.2009. However, there is no explanation as to how the plaintiff could make their entry into the suit land after having filed the suit for recovery of khas possession.

8. Admittedly, as on the date of institution of the suit the plaintiffs were not in possession. That is why it was necessary for the plaintiff to file the suit, inter alia, for recovery of khas possession after appropriate declaration of right, title and interest on the schedule A land measuring about 1000 acres. The inescapable inference is that the petitioners must have forced their entry into a part of the schedule land after filing the suit. If that be the case, the petitioners took law in their hands and as such they have forfeited their right of making prayer for discretionary relief like that of injunction. Unfortunately, this aspect of the matter was not taken into consideration by the learned trial Court.

9. After having considered the submissions advanced by the learned counsel for the parties and upon perusal of the materials on record, I find that the same Court had earlier rejected the prayer for prohibitory injunction made by the same plaintiff at the beginning of the civil suit. The said rejection order dated 4.8.09 is on record and discloses that it was passed after hearing the parties and on perusal of the materials available to the learned trial Court. It is apparent from the said order that the petitioners of the said Misc. Case, namely, plaintiff were not in possession when the order dated 4.8.09 was passed and one of the reasons for which the learned trial Court refused to grant injunction to the plaintiff was that being not in possession, they do not have prima facie case for getting injunction. Fact remains that no appeal was preferred by the plaintiffs against the order and consequently it attained finality.

10. It is a settled law that if an adjudication is made at one part of the judicial proceeding, the same operates as res judicata for subsequent part of the same proceeding. This occurs in explanation VIII of Section 11 of CPC. It is necessary to mention here that para 1 of the objection submitted by defendant Nos. 1 to 5 in Misc. (J) case 2/2012 makes a mention of earlier order and as such there is no reason as to why the learned trial Court failed to take into consideration the said aspect of the matter when the impugned order dated 24.4.2012 was passed. The impugned order, therefore, suffers from vice of non application of mind as well as non consideration of the relevant materials available on record.

11. Undisputedly, the impugned order dated 24.4.2012 is an order granting injunction under Order XXXIX Rule 1 and 2 of the CPC. It needs no mention that the Court while considering the prayer of injunction is duty bound to decide three essential principles, namely, whether a strong prima facie case for getting injunction exists, whether balance of convenience tilts in favour of the petitioner and as to whether there is any apprehension of irreparable loss and injury if injunction is refused to the claimant. Subsequently, the fourth dimension of public interest has been found to be a relevant consideration while deciding claim of injunction in appropriate case. Obviously, the claimants of injunction here are opposing public interest. The Government purportedly has been protecting Rangapahar Wildlife Sanctuary from encroachers. Whether the plaintiffs are encroachers or not would be decided in course of trial but undoubtedly the question of public interest appears relevant in the present case. The learned trial Court has not considered even the said aspect of the matter. The one page judgment granting injunction against the Government and that, too, against purported protection of Wild Life Sanctuary without there being necessary ingredients referred to above cannot be in any way be upheld. The impugned order dated 24.4.2012 lacks necessary ingredients for being a judgment at all. The learned trial Court not having framed the point for determination in such an important issue involving public interest and thereafter not having objectively decided the same, the impugned order has been vitiated. On totality of circumstances, the impugned order dated 24.4.2012 is liable to be rejected.

12. Accordingly, this appeal is allowed and the order dated 24.4.2012 is set aside. Before parting, it is mentioned that observation made in this judgment in regard to status of the plaintiff and the claim of the contesting parties are only tentative in nature and as such the same shall not be binding on the learned trial Court while deciding the main suit on merit.