

(2019) 08 CAL CK 0061

In the Calcutta High Court

Case No : Civil Order/Misc.Cas (CO) No. 2941 Of 2018

Swapan Kumar Debnath

APPELLANT

Vs

Indian Oil Corporation & Ors

RESPONDENT

Date of Decision : 21-08-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 39 Rule 2(A) Constitution Of India, 1950 — Article 227

Citation : (2019) 08 CAL CK 0061

Hon'ble Judges : Subhasis Dasgupta, J

Bench : Single Bench

Advocate : Kushal Chatterjee, Sudarson Halder, Rudranil Mitra, Soumava Mukherjee

Final Decision : Disposed Off

Judgement

Subhasis Dasgupta, J

The impugned order dated 7th May, 2018 passed by learned Additional District Judge, 3rd Court, Alipore, South 24-Parganas, passed in Misc. Appeal No. 149 of 2011 thereby affirming the order of the learned Civil Judge (Junior Division), 2nd Court, Alipore, in Misc. Case No. 27 of 2004, under Order 39 Rule 2(A) of C.P.C., arising out of Title Suit No. 168 of 2002 and further allowing the cross objection of the respondent in connection with CIS Misc. Appeal No. 291 of 2016, is the subject of challenge in this Revisional Application, under Article 227 of the Constitution of India.

Petitioner/appellant instituted Title Suit No. 168 of 2002, impleading opposite parties/respondents as defendants. In connection with such suit an ad interim order of injunction was granted against the defendants on 28.06.2002, directing both the parties to the suit to maintain status quo in respect of the suit property and not to change its nature and its character and further not to transfer the same to the third party.

It was also alleged by the petitioner that in spite of the ad interim order of injunction granted in this case, the opposite parties, namely Indian Oil Corporation Ltd. committed deliberate breach of the injunction order and violating the injunction order forcibly dispossessed the petitioner/appellant on 12.01.2004 in order to start I.O.C.L. retail outlet for selling petroleum products in the suit property. Since the opposite parties deliberately committed breach of the ad interim order of injunction, petitioner proceeded to take out an application under Order 39 Rule 2 (A) of C.P.C. alleging violation of injunction order, which was registered in connection with the Misc. Case No. 27 of 2004. The opposite party No. 1 filed affidavit in opposition in connection with the said Misc. Case, admitting that the possession of the suit property had been taken with help of the local administration, when the High Court granted stay of all further proceedings in connection with C.O. No. 1059 of 2003, filed by opposite party No. 1, challenging the order No. 10 dated 13th March, 2003, rejecting the plaint. The court below disposed of the Misc. Case on 18.02.2011 disbelieving the alleged violation of injunction order on the ground that breach, if there be any, was done under bona fide belief that there subsisted no ad interim order of injunction pursuant of interim order of stay being granted in C.O. No. 1059 of 2003, but even after disbelieving violation of injunction order, the learned court below proceeded to pass an order, directing opposite parties namely respondent No. 1 to restore possession of dispossessed land in favour of the petitioner/plaintiff within a period of 30 days from the date of order.

The petitioner/appellant preferred Misc. Appeal being aggrieved by and dissatisfied with the order, passed by the Trial Court in connection with Misc. Case No. 27 of 2004. It was alleged in the appeal that appellant only prayed for detention of the respondent in civil presence and alternatively for attachment of the properties of the respondent No. 1, but the court below of its own motion proceeded to pass an order directing restoration of possession, which was not even prayed for.

It was further challenged in the appeal that learned court below erroneously reached to a decision disbelieving violation of injunction order even after admission of the opposite party No. 1 stating to have taken possession of the suit property with the help of police, when the High Court had granted stay of all further proceedings of the pending suit in connection with C.O. No. 1059 of 2003.

The opposite party No. 1 filed cross objection to the appeal of the appellant/petitioner in order to challenge that part of the order, given by the Trial Court directing restoration of possession of the suit property to the petitioner/appellant. It was challenged by the cross objector that since there was no finding regarding possession of the suit property, when the ad interim order of injunction was passed, there could not be any order directing restoration of possession. The cross objector specifically challenged that the petitioner had no possession over the suit property and, therefore, there could not be any order, directing restoration of possession.

The learned First Appellate Court though allowed cross objection of the opposite party No. 1, but dismissed the appeal affirming the order of the learned court below. The Appeal court specifically reached to a finding that in the absence of any specific finding reached by the court below, while granting ad interim order of injunction, it would be very difficult for the court to ascertain the alleged violation of the condition of injunction order. The 1st Appeal court further concurred the view of the Trial Court, as regards committing breach of the condition of the ad interim order of injunction holding therein, that there was no willful disobedience caused to the order of injunction.

The petitioner/plaintiff/appellant having lost the Misc. Appeal, proceeded to challenge again the order passed by the learned First Appellate Court invoking the jurisdiction of the Article 227 of the Constitution of India by filing the instant revisional application.

The learned advocate for the petitioner submitted that the learned First Appellate Court exceeded its jurisdiction by going deep into the matter, and proceeded to consider unnecessarily the merits of the injunction application, what was not at all needed for deciding a Misc. Appeal, wherein violation of the condition of the ad interim order of injunction was only challenged. Learned advocate for the petitioner further submitted that the Trial Court having considered a case, what was not even specifically pleaded and subsequently being concurred by the learned First Appellate Court, there developed a situation leading to a gross miscarriage of justice, requiring intervention by this court in application of provision under Article 227 of the Constitution of India. Reliance was placed by the petitioner on this issue on decision reported in AIR 2009 SC 1103 delivered in the case of Bachhaj Nahar Vs. Nilima Mandal and Ors. wherein, it was held that when there was no prayer for a particular relief and no pleadings to support such a relief, and when defendant had no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice.

Learned advocate for the opposite party/I.O.C.L submitted refuting the submission, raised by the petitioner, that one Banipati Ghosh was appointed as retail outlet dealer in the year 1988, to carry out business of petroleum products under the name and style of "Ashwini Agro Services". Baninpati Ghosh subsequently constructed petrol pump in the suit property taking bank loan for the purpose. Subsequently, Banipati Ghosh failed to repay the loan of bank and also negligent in paying off dues payable to I.O.C.L. For the recovery of the bank loan, the bank contemplated to proceed against Banipati Ghosh, when Banipati Ghosh entered into an agreement of sale with defendant No. 1 to sell out the said land against a consideration of Rs. 7,00,000/-, out of which the bank loan amounting Rs. 3,43,000/- would be paid back to bank, while the remaining balance amount of Rs. 3,53,000/- would be adjusted over dues of Banipati Ghosh, payable to I.O.C.L. A sale deed was accordingly executed by Banipati Ghosh and registered on 06.03.1996. Admittedly, Banipati Ghosh left this world

on 23.03.2002. Plaintiff/petitioner was appointed as executor to a Will, left behind by Banipati Ghosh on 17.03.2002. The petitioner/plaintiff being executor to the Will without getting the Will probate, proceeded to institute the suit against the defendants including defendant No. 1, claiming right, title and interest in the suit property.

It was the further case of opposite party No. 1 that after the settlement of the accounts with bank and the I.O.C.L, Banipati Ghosh was again appointed as retail outlet dealer afresh over the same site in category "A" on 10.08.1998. Banipati Ghosh, however, committing breach of the agreement of I.O.C.L. entered into a partnership firm for operating a retail outlet inducting four other partners therein, without obtaining permission from concerned authority. The I.O.C.L then terminated the dealership agreement of Banipati Ghosh, and the retail outlet had to be closed. Subsequently, I.O.C.L. applied before the District Magistrate, Nadia for cancellation of license of Banipati Ghosh and grant of fresh license.

The seminal point to be addressed by this court is whether the order impugned is sustainable or not.

The settled proposition of law is that relief cannot be accorded to; what is exactly not prayed for and pleaded for the purpose.

Admittedly, the court below disbelieved the alleged violation of the ad interim order of injunction on the ground that violation, if be any, was done under bona fide belief, presuming that there subsisted no ad interim order of injunction by reason of the stay order being granted in connection with C.O. No. 1059 of 2003 of High Court, but proceeded to pass an order what was not even prayed for, directing opposite parties to restore possession of the dispossessed land to the petitioner/plaintiff within a stipulated period of time.

Order 39 Rule 2 (A) of C.P.C. has taken care of the consequence for having caused disobedience or breach to the order of injunction by prescribing attachment of the property of the person making violation of the injunction order and further also for civil detention for a term not exceeding three months. So, attachment/civil detention for 03 months is the ultimate punishment provided for having made violation of the injunction order. There is however, no other punishment or eventualities even contemplated consequential to the order of attachment/civil detention, if any. Learned advocate for the appellant rightly pointed out that there could not be any order recorded by the court, what was neither pleaded nor prayer for.

Since the basic prayer of the petitioner/appellant in connection with Order 39 Rule 2 (A) of C.P.C. was for attachment and/or civil detention of person causing violation of condition of the injunction order, what was supposed to be given in a case upon fulfillment of the condition mentioned in Order 39 of Rule 2 (A) of C.P.C itself, therefore, proof of condition, embedded in Order 39 of Rule 2 (A) of C.P.C, is sine qua non to the determination of issue.

The one of the prime conditions is that there must be clear, intentional, deliberate, purposeful violation of the condition of injunction order, so as to be covered by the mischief, engrafted in Order 39 Rule 2(A) C.P.C. When the First Appellate Court concurred the view of the learned court below, that violation, if there be any, had been done under a bona fide belief of the opposite party presuming that there subsisted no order of injunction, such concurrent findings being based on evidence, in the considered view of this court, would go unaltered, keeping in view that there had been no specific finding reached by the learned court below regarding possession of the suit property, while granting an interim order of injunction. The superior court would seldom interfere with an order, when discretion in the matter of disbelieving the fact of alleged violation of interim order of injunction was rightly exercised most judiciously, reasonably and rationally also. There left nothing in the impugned order that learned First Appellate Court, while concurring the finding of learned Trial Court, exercised its discretion in a whimsical or capricious manner. As such the findings of learned First Appellate Court, being product of appropriate exercise of discretion would remain undisturbed.

Though, there had been discussion by the learned First Appellate Court regarding some of the merits of the injunction application, but it could not be construed to have gone deep into question touching merits of the case, on the simple premise that it was extremely needed incidental to the determination of the issue requiring decision by the First Appellate Court in Misc. Appeal 149 of 2011, and the cross objection being No. 291 of 2016.

The argument raised by petitioner that there had been miscarriage of justice for having exceeded the authority by the First Appellate Court by going deep into the matters and touching the merits of the injunction application in the given said facts, would not be an acceptable argument.

In the absence of any error or ill-legality committed by the learned First Appellate court occasioning thereby a gross failure of justice, the findings reached by the First Appellate Court, while dismissing the Misc. Appeal and simultaneously allowing cross objection cannot be described to be an outcome of error or omission paving the way for miscarriage of justice, as proposed by the petitioner.

The revisional application fails being without any merits.

The findings reached by the First Appellate Court would thus go unaltered.

With this observation, the Revisional Application stands disposed of. Urgent certified copy of this order and judgment, if applied for, be given to the appearing parties as expeditiously as possible upon compliance with the all necessary formalities.