(2010) 05 MP CK 0008

In the Madhya Pradesh High Court

Case No : Writ Petition No. 5408 of 2009

Tilak Pradhan APPELLANT

Vs

Smt. Ranjana Pradhan and Others RESPONDENT

Date of Decision : 19-05-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, Order 43 Rule 1, 151

Constitution of India, 1950 — Article 227

Citation : (2010) ILR (MP) 39 : (2011) 1 JLJ 217 : (2011) 1 MPJR 218 : (2010) 3 MPLJ 392

Hon'ble Judges : Anil Kumar Sharma, J;Abhay M. Naik, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Abhay M. Naik, J.

This petition under Article 227 of the Constitution of India has been preferred by one of the Defendants against an order dated 6.10.2009 (Annexure P-1), passed by the Court of Eighth Civil Judge Class II, Gwalior in Civil Suit No. 25-A/09.

Short facts relevant for the purpose of this petition are that Plaintiffs-Respondents No. 1 to 4 and the Defendants are from a common ancestors. Plaintiffs-Respondents No. 1 to 4 instituted a suit for declaration of title and perpetual injunction in respect of various pieces of agricultural land described in paragraph 2 of the plaint with a prayer that it be declared that the Plaintiffs are Bhumiswamis and occupant of undivided 1/3rd share of the property. Suit is being opposed by certain Defendants on the ground that the Plaintiffs have already sold their shares by registered sale-deeds. Alternatively, the Plaintiffs would be entitled, at the most, to the extent of 1/7th undivided share. Few of the Defendants have also submitted counterclaim alongwith written statement.

Plaintiffs, simultaneously, submittted an application for temporary injunction under Order 39 Rules 1 and 2 CPC with allegations that partition of the suit property has not taken place and the Defendants, therefore, have no right to alienate the suit property or any part thereof, in specific. Though, the prayer was opposed, it was allowed vide order dated 22.7.2008. Consequently, learned trial Judge injuncted the Plaintiffs as well as Defendants from alienating the suit property and from creating any change over it during pendency of the suit. Admittedly, this order has attained finality.

On 20.8.2009, Defendant-Petitioner submitted an application that he is heart patient with ailments of blood pressure and diabetes. He suffered heart attack in the month of May, 2002. His wife is also a patient of diabetes. She is also a patient of TB having infected vertebra and is unable to move. Treatment of the Petitioner is going on and he is required to visit Escorts Hospital, Delhi for his regular medical check-up. His wife is also receiving treatment. Thus, they are facing acute shortage of money and are in dire need of it for medical aid. They have also raised loan from relatives and market for this purpose. They submitted that the Plaintiffs may choose the best 1/3rd portion from the suit property, which may be kept reserved for protecting their interest. Further, the Defendant-Petitioner may be permitted to alienate/transfer his share in the remaining property so that he may be able to raise money for obtaining necessary medical treatment.

Plaintiffs-Respondents No. 1 to 4 opposed the said application by refuting its contents They, inter alia, stated that the order of temporary injunction dated 22.7.2008 has already attained finality and the same cannot be varied or modified during pendency of the suit.

Additionally, it was submitted that the Defendants No. 4 to 6 had submitted an application under Order 39 Rule 4 CPC which was dismissed by the trial Court on 15.7.2009. This being so, the application of the Defendant-Petitioner was also opposed as untenable being based on mala fide.

Learned trial Judge vide impugned order dated 6.10.2009 dismissed the application captioned under Sections 90 and 151 CPC on the ground that there is a dispute about extent of share in the suit property. Therefore, no part of the property can be released from the effect of order of temporary injunction which has attained finality. Aggrieved by it, present petition under Article 227 of the Constitution of India has been preferred.

Shri Vivek Khedkar, learned Counsel for the Petitioner and Shri P.C. Chandil, learned Counsel for the opposite party made their respective submissions whereas Shri Anil Bansal and Shri Kamal Jain, learned Advocates gave their consent on behalf of Respondents No. 5 to 8 that they have no objection in allowing the application in question, and consequently, the writ petition.

It has been submitted on behalf of the Petitioner that he is in acute need of money for obtaining medical treatment for himself and wife. Therefore, he may be permitted to raise money from the part of the suit property after protecting the Plaintiffs'' interest.

Aforesaid has been countered by Shri PC. Chandil, learned Counsel appearing for Plaintiffs-Respondents No. 1 to 4 on the ground that order of temporary injunction dated 22.7.2008 has already attained finality up to the stage of decision of the suit since application under Order 39 Rule 4 CPC submitted by other Defendants has already been dismissed on 15.7.2009. This being so, the order of temporary injunction cannot be legally discharged or varied or set aside under Rule 4 of Order 39 Code of Civil Procedure. Since, specific provision for discharging, varying or setting aside the order of injunction is contained in Rule 4 (supra), provision of Section 151 CPC cannot be legally invoked. Even when the application in question is treated under Order 39 Rule 4 Code of Civil Procedure, the impugned order would be appealable under Order 43 Rule 1 (r) CPC and the present writ petition is untenable. This apart, there being no jurisdictional error, extra-ordinary powers under Article 227 of the Constitution of India cannot be legally invoked.

We have considered the aforesaid submissions in the light of the material on record and the law governing the situation.

At the outset, we would like to reiterate that the object of grant of temporary injunction is to protect the interest of the Plaintiff by directing the parties to maintain status-quo, as it existed on the date of institution of the suit.

It is clear from the aforesaid that the learned trial Judge while allowing the application under Order 39 Rules 1 and 2 CPC vide order dated 22.7.2008 found that there was a triable issue raised by the Plaintiffs-Respondents No. 1 to 4 and if the temporary injunction for protection of the Plaintiffs'' right was not granted, they would suffer an irreparable loss. More so, the effect of granting temporary injunction would be to protect the interest so that in case of success of the suit on merits, Plaintiffs may reap the fruits of the decree. Entire suit property is 8.225 hectare, in area. Plaintiffs, according to averments contained in the plaint, have 1/3rd share, which comes to little less than 2.742 hectare. If this much land is kept reserved for protecting the interest of the Plaintiffs, the object of order of temporary injunction dated 22.7.2008 stands achieved. An order of injunction is always equitable in nature. Though, it is issued to protect the interest of the applicant, Court is also required to see that the same shall not cause undue harm to opposite party. If the order of temporary injunction may be worded/issued in a manner that it would serve the purpose of the applicant and would equally relieve the opposite party from ill-effects, it would always be encouraged. It is the duty of the Court to see that while granting injunction to a party, opposite party should not be put to an unnecessary loss. Court should always make an effort that while granting an order of injunction, the opposite party should not be put to a loss which may be avoided despite maintaining the order of injunction. Present case is to be viewed from such an angle because the Defendant-Petitioner has, firstly, stated with support of an affidavit that he is heart patient and has already undergone angiography. He is also a patient of blood pressure and diabetes. Various medical papers are on record which include the prescription on the letter head of International Cardiac Surgeon like, Dr. N. Trehan wherein Echo and heart failure therapy has been advised. Thus, there is absolutely no reason to disbelieve the statement made in the application that the Petitioner is in need of money for medical treatment. Moreover, the contention of the Petitioner about ailment of himself and his wife has not been found untrue even by the trial Court while passing the impugned order. Plaintiffs-Respondents No. 1 to 4 were and are not in a position to controvert the medical papers submitted by the Defendant-Petitioner in support of his application. Thus, we hold that in view of various medical papers placed on record, the Defendant-Petitioner is in extreme need of money for medical treatment and the learned trial Judge while imparting justice was obliged to take this factor into consideration for the ends of justice.

At this juncture, we may refer to Section 94 of the Code of Civil Procedure, which provides that in order to prevent the ends of justice, the Court may make such other interlocutory orders as may appear to the Court to be just and convenient, if it is so prescribed. Needless to say that while passing any interlocutory order, it is the duty of the Court of law to keep in view that the rights of the parties are not jeopardized and the ends of justice are not defeated. Hon''ble Supreme Court of India in the case of Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, has clearly held that the Court has inherent jurisdiction by virtue of Section 151 CPC to pass an interlocutory order in the circumstances which are not covered by specific provision of the Code of Civil Procedure. It has been observed:

It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislatue is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them.

Effect of the expression "if it is so prescribed" employed in Section 94 of CPC has been further explained by the apex Court in following words:

The effect of the expression "if it is so prescribed" is only this that when the rules prescribe the circumstances in which the temporary injunction can be issued ordinarily the Court is not to use its inherent powers to make the necessary orders in the interest of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court''s exercising that the jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power.

Thus, the application in question, may be well considered u/s 151 of CPC and the relief prayed in it may be granted provided that such relief is not opposed to any specific provision contained in the Code.

Shri P.C. Chandil, learned Counsel submits that Rule 4 of Order 39 CPC debars the Court from exercising the powers u/s 151 CPC from discharging, varying or setting aside an order of injunction granted earlier.

At the cost of repetition, we reiterate that the object of order of temporary injunction dated 22.7.2008 was to protect the interest of the Plaintiffs and to enable them to reap the fruits of the decree in case of success on merits and nothing more. Nevertheless, it could not have the object or purpose of putting the opposite party to a loss. If protection to the Plaintiff''s right is achieved by an order of injunction the Court of law should not impose any other condition which may be troublesome to the Defendants whose rights are also liable to be taken care of. It has been offered by the application in question that since the Plaintiffs are claiming 1/3rd share in the suit property, they may be asked to choose the best 1/3rd of the suit property which may be kept reserved for protection of their rights and interest so that they may be able to reap the fruits of the decree in case of success. All the Defendants have undertaken that in case if the Plaintiffs succeed to the extent of 1/3rd share, Defendants shall not claim any right, title or interest in such 1/3rd specific share and shall settle their claim amongst themselves from the remaining suit property.

Learned Counsel for the Plaintiffs-Respondents No. 1 to 4 has been unable to demonstrate that how such a relief will prejudice his client and would defeat the purpose of the existing injunction order or the suit. On the contrary, it is observed that such an order would fully protect the interest of the Plaintiffs and will equally take care of the Defendant-Petitioner, who is in dire need of money for obtaining medical treatment which is necessary for his survival. This obviously would serve the ends of justice. Plaintiffs even in case of success would not be entitled to more than 1/3rd in the suit property. Thus, if they choose the best 1/3rd specific share in the suit property for being kept reserved for protection of their interest, which would enable them to execute the decree if passed, it would rather serve the true purpose of system of justice. Such type of relief, even if granted to the Defendant-Petitioner will not substantially have the effect of discharging, varying or setting aside the order of injunction which is virtually maintained by this Court for protection of the alleged 1/3rd share of Plaintiffs in the suit property. Thus, the relief sought by the Defendant-Petitioner by the application in question, does not amount to seek discharge, variation or setting aside of the order of injunction in substance because the same is virtually kept intact to the extent of the alleged 1/3rd share of the Plaintiffs. So long as the order of injunction granted vide dated 22.7.2008 is maintained by keeping 1/3rd specific share reserved for Plaintiffs exclusively, we observe that the order of injunction dated 22.7.2008 is not substantially discharged, varied or set aside rather we direct that the Plaintiffs in case of success to the extent of 1/3rd would alone be entitled to such specific 1/3rd share and the Defendants would stand precluded from claiming any right, title or interest in such 1/3rd specific share.

It is true that inherent powers are to be exercised in very exceptional circumstances. We feel that the case in hand, is one of the said cases wherein inherent powers u/s 151 CPC is required to be exercised keeping in view the dire need for money of Defendant-Petitioner for medical treatment and consequent survival. Since the interest of the Plaintiffs is being well protected in the aforesaid manner, we have no hesitation to hold that the application in question ought to have been considered in the exercise of powers u/s 151 CPC and the relief could have been granted to the Defendant-Petitioner without causing prejudice to the Plaintiffs in the aforesaid manner.

In a recent judgment, Hon''ble Supreme Court of India in the case of M. Gurudas and Others Vs. Rasaranjan and Others, , has observed that the Court while making endeavours to find out a prima facie case for the purpose of injunction could take into consideration the extent of Plaintiff''s share in the property, if any.

In case of M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, it has been observed in the matter of injunction:

.... Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings.

Aforesaid analogy may apply clearly to the Defendant-Petitioner. His conduct in seeking relief vide application in question could not be demonstrated by the Plaintiffs as unfair or dishonest. His mere contention is that the right of the Plaintiffs claimed in the suit may be protected, but he may be simultaneously permitted to deal with the remaining property. Looking to the need for survival, all the members from a common ancestors except the Plaintiffs, have joined in extending hands to him for making arrangement of money which is needed for medical treatment.

It has already been held as settled law that u/s 151 Code of Civil Procedure, the Court has got inherent powers to protect the rights of the parties, pending suit. We may profitably refer to the Supreme Court decision in the case of 1996 I AD 1002 (SC) .

In the case of Vareed Jacob Vs. Sosamma Geevarghese and Others, it has been held that the Court in fact can exercise its inherent powers u/s 151 CPC where circumstances do not fall under any of rules prescribed. Since the is no provision in law which in the absence of partition may enable the Defendant to compel the

Plaintiff to confine his claim to specified undivided share, we feel that the Defendant-Petitioner is well within his rights to invoke Section 151 CPC more so, when such a right is being exercised with due care to protect the Plaintiff''s interest.

Reliance placed by Shri Chandil, learned Counsel for the Respondents on 1981 JLJ 639 (Balmukand v. State of M.P. and Anr.), is of no help to him because the application in question, as discussed above, is being treated u/s 151 CPC and not under Order 39 Rule 4 Code of Civil Procedure.

It has. been brought into the notice of this Court that the order of temporary injunction dated 22.7.2008 was passed against Defendants No. 4 to 6 without hearing them. Therefore, they preferred Miscellaneous Appeal No. 10/09 which has been allowed by the Court of 13th Additional District Judge, Gwalior on 24.10.2009 and the trial Court has been directed to re-decide the application for temporary injunction against Defendants No. 4 to 6. In the light of the concession granted by Defendants No. 4 to 6 through their advocate that the Plaintiffs may be directed to choose 1/3rd share out of the suit property for protection of their rights agitated in the suit, we observe that temporary injunction granted vide order dated 22.7.2008 would also bind the Defendants No. 4 to 6 to the extent of 1/3rd specific share to be chosen by the Plaintiffs and the trial Court shall be within its rights to pass a fresh order in the light of the aforesaid.

Lastly, it is submitted that there being no jurisdictional error within the meaning of Article 227 of the Constitution of India, no interference in the impugned order is warranted.

Aforesaid is highly misconceived submission because the learned trial Judge while passing the impugned order has not at all taken into consideration the scope of Section 151 CPC as well as the attending circumstances. It has been already observed above that the trial Court has committed an illegality in passing the impugned order without taking into consideration the scope of Sections 94 and 151 of Code of Civil Procedure. The Court while passing an order shall not be ignorant of the rights of the opposite party and shall equally carry an obligation that its order though shall grant protection to the applicant but the same may be achieved simultaneously by taking care of the interest of the opposite party. Impugned order having been passed ignoring the aforesaid, is not sustainable in law and the same is therefore hereby set aside. Article 227 of the Constitution of India may be well invoked in the present case since the same is causing manifest injustice.

In the result, the impugned order marked as (Annexure P-1) is hereby set aside. The trial Court is expected to decide the suit expediously preferably by the end of the year 2010. Accordingly, the writ petition stands allowed with the following directions:

(1) Plaintiffs within three days or within such further reasonable time as granted

by the trial Court, shall inform the trial Court the specific 1/3rd share of the suit property which may be kept reserved for protection of their 1/3rd share claimed in the suit;

(2) After the reservation in the aforesaid manner, all the Defendants No. 1 to 6 shall submit their affidavits in writing that in case if the Plaintiffs succeed to the extent of 1/3rd or less share, they shall allow the Plaintiffs to reap the fruits of the decree from the share so reserved and they shall not claim any right, title or interest in share so reserved to the extent of Plaintiff''s success. In such a situation, the Defendants No. 1 to 6 shall get settled their interest only from the remaining suit property;

(3) If any of the Defendants, out of Defendants No. 1 to 6, fails to submit affidavit in the aforesaid manner, present petition would be treated as dismissed automatically;

(4) After reservation of 1/3rd specific share in the suit property and receipt of affidavits in the aforesaid manner, learned trial Judge shall obviously allow the Defendants No. 1 to 6 to deal with the remaining suit propery. In case of dispute between Defendants No. 1 to 6 or even between the purchasers from Defendants No. 1 to 6, the Plaintiffs shall have no responsibility and in no case, Defendants No. 1 to 6 or their purchasers shall be entitled to claim any kind of adjustment from 1/3rd specific share reserved by the Plaintiffs;

(5) This order is being passed without prejudice to the allegations or counter allegations of the parties to the suit and it would not enlarge the right, title or interest of any of the parties;

(6) This order is also being passed without prejudice to the allegations or counter allegations made in any pending dispute between the parties. However, it is observed that in case of success of Plaintiff in the present litigation, Defendants No. 1 to 6 or their successors shall not be entitled to have any right, title or interest in 1/3rd share reserved in the property merely on account of other pending litigation:

(7) If the Plaintiffs do not choose/select 1/3rd specific share in the aforesaid manner, the Defendant-Petitioner may move an application for discharge/ variation/setting aside of the order of temporary injunction dated 22.7.2008 which may be considered in accordance with law keeping in mind this order.

Petition stands accordingly allowed in the aforesaid manner.

No order as to costs.

