

(1962) 11 GUJ CK 0018
In the Gujarat High Court

Case No : Civil Revision Application No. 789 of 1961

Zandaram Joitaram and Another

APPELLANT

Vs

Prahladrao Vithalrao

RESPONDENT

Date of Decision : 22-11-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Specific Relief Act, 1877 — Section 53

Citation : AIR 1963 Guj 160 : (1963) 4 GLR 587

Hon'ble Judges : V.B. Raju, J

Bench : Single Bench

Advocate : B.J. Shelat, for the Appellant; G.C. Patel, for the Respondent

Final Decision : Allowed

Judgement

V.B. Raju, J.—The opponent filed a suit, being Suit No. 1147 of 1951, for a declaration that he was a lawful sub-tenant of the defendants and for a perpetual injunction restraining the defendants from disturbing the plaintiff's possession of a cabin. An interim injunction was granted but was vacated, it was vacated on the ground that the plaintiff did not make out a prima facie case to show that he ever occupied the suit premises as the defendants' tenant. After the temporary injunction was vacated, it appears that the cabin was removed by the defendants. Against the order vacating the temporary injunction, an appeal was filed and in appeal the learned Assistant Judge, Ahmedabad, ordered that In the interests of justice an injunction should be issued against the respondents that they should not obstruct the appellant-plaintiff in occupying the said "Ota" or putting up a cabin on the said "Ota". A prayer for a mandatory injunction which was also made in the appeal was not pressed and was not considered by the appellate Court. The order of the appellate Court granting a temporary injunction against the respondents (defendants) restraining them from obstructing the appellant (plaintiff) from occupying the said "Ota" is now challenged in revision.

2. The suit was for a permanent injunction to restrain the defendants from

obstructing the alleged possession of the plaintiff of the "Ota" and the cabin on it. It was the case of the plaintiff that he was in possession of the "Ota" and the cabin and was a sub-tenant of the defendants. He prayed that the defendants should be restrained from disturbing his possession from the "Ota" and the cabin. When the suit is for a permanent injunction of a particular kind, an interim injunction of the same kind can be issued but not of a different kind unless there is provision for such a thing in Order 39 C. P. Code. The suit is for a permanent injunction to restrain the defendants from interfering with the alleged possession of the plaintiff but as the appellate Court granted an interim injunction, without stating whether it was temporary or permanent, to restrain the defendants from obstructing the plaintiff from occupying the said "Ota" in other words, from taking possession of the "Ota", The suit was not one for possession; and in the guise of a temporary injunction a party cannot be assisted in tailing possession which at the time of the order was not with him. There is no finding of the appellate Court that the appellant (plaintiff) was in possession of the "Ota" in question. There is no finding of the appellate Court whether the cabin which existed at the time of the suit had been put up by the plaintiff or by the defendants.

3. Under Order 39, Rule 1 C. P. Code an interim injunction can be issued to restrain an act of the type mentioned in Order 39, Rule 1 or to make such an order for the purpose of staying and preventing the waste, damage, alienation, sale, removal or disposition of the property. In the instant case, it is not the case of either party that the order passed by the appellate Court was for the purpose of staying and preventing waste, damage, alienation, sale, removal or disposition of any property.

4. Order 39, Rule 1 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."

5. Order 39, Rule 2, reads as follows:

"(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to

restrain the defendant from committing the breach of the contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account giving security, or otherwise as the Court thinks fit."

Under this rule, the Court may grant a temporary injunction to restrain the defendant from committing a breach of contract or injury complained of or any breach of contract or injury of a like kind arising under the same contract or relating to the same property or right. The breach or injury may be of a like kind relating to the same property. Disturbance of possession of a person of a property is of a different kind from obstructing him from taking possession of such a property. In a suit for a permanent injunction" to restrain the defendant from disturbing the possession of the plaintiff, it is not open to the Court to give a temporary injunction restraining the defendant from obstructing the plaintiff from taking possession of the property. The two are of different kinds. In the first, it is assumed that the plaintiff is in possession and has a right to continue in possession; whereas in the second, unless it is decided that the plaintiff has a right to occupy, he would not be entitled to take possession anew. In the first it is only the right to continue in possession; whereas in the second the question is of the right to take possession.

6. The learned appellate Judge also granted an injunction to restrain the defendants from obstructing the plaintiff from putting up a cabin on the said "Uta". By this, he was allowing the plaintiff to put up a cabin without deciding the question whether the cabin which had been removed by the defendants had been previously put up by the plaintiff or by the defendants and whether the plaintiff had a prima facie case to require the defendants to put up a cabin which they had removed. The learned appellate Judge did not consider the question of prima facie case at all; whereas the trial Court held that the plaintiff had no prima facie case of sub-tenancy. In the absence of a finding about the prima facie case, the learned appellate judge was wrong in interfering with the finding of the trial Court vacating the injunction on the ground that the plaintiff did not make out a prima facie case. It is, therefore, clear that the learned appellate Judge committed two irregularities (1) to grant a temporary injunction of a different type from the type claimed in the suit for permanent injunction; and (2) to grant a temporary injunction without considering the question of prima facie case and in the face of the finding of the trial Court that the plaintiff had no prima facie case of sub-tenancy, upon which the suit was founded.

7. The learned counsel for the opponent relies on the case of Nandan Pictures Ltd. Vs. Art Pictures Ltd. and Others, . There at page 430 it was observed 38 FOLLOWS:

"It would appear that if a mandatory injunction is granted at all on an

interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state which existed at the date when the suit was instituted. The one case in which a mandatory Injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff's suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issued in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had" arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiff's suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit. As far as I have been able to find, even such an order has been made only when the application for an ad interim injunction pending the disposal of the suit is finally disposed of and not during the pendency of the application itself as made in the present case. Here an ad interim injunction of a restrictive character was in fact granted on the 7th of March pending the disposal of the application and what was done on the 12th of March was to make another order of the nature of an injunction by way of implementing what was thought to have been the ad interim order made on the earlier date. The order was not made on the basis of anything done by the appellants since the institution of the suit and with notice of the plaintiff's claim and, therefore, the basis on which ad interim injunctions of a mandatory character are generally granted under the approved practice was lacking".

8. The learned Judges of the Calcutta High court were dealing with a mandatory injunction of a peculiar kind and in any case there the learned Judges held that no such injunction of a mandatory character should have been granted. The observations of the learned Judges of the Calcutta High Court may be justified by the following words found in Order 39, Rule 1, viz.,

"make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property."

The Calcutta case related to certain films and therefore the question of damage might come in. But the instant case is not a case where the above words of Order 39 could have applied.

9. If a suit is filed for a permanent injunction restraining the defendant from building on a particular site, and continuing to build on the same site, simply because the suit is filed, there is no duty on the defendant to stop building, unless an injunction is granted. It is only if an injunction is granted that he should stop further building. If an injunction is not granted or if the injunction is vacated, there is no duty on the defendant to stop the building operations. Similarly if a plaintiff files a suit to restrain the defendant from disturbing the possession of the plaintiff and to restrain him from growing crops on a particular

land, there is no duty on the defendant to stop growing crops on the lands simply because the suit has been filed unless an interim injunction has been granted. If an interim Injunction is not granted or if the injunction granted has been vacated he is at liberty to grow crops on the land. Hence it is not open to the appellate Court to pass an order that he should remove the crops and put the land in the same position as it was on the date of the suit.

10. In the instant case, the defendants did not admit the right of the plaintiff to be in possession or occupation of the "Ota" or the cabin. What they merely admitted was that the defendants had permitted the plaintiff to sit on the "Ota" with a kettle. There is no finding either of the trial or the appellate Court that the plaintiff has made out a prima facie case of being entitled to be in possession or to occupy the "Ota" or the cabin. In the absence of such a finding the plaintiff is not entitled to any temporary injunction. The appellate Judge should not, therefore, have granted a temporary injunction of any type, and in particular, of the type granted by him. *****

11. The revision application is, therefore, allowed and the order passed by the appellate Court is set aside.

12. No order as to costs.