

Nanasaheb Vs. Dattu and Others

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Court : Mumbai

Decided On : Dec-19-1990

Reported in : AIR1992Bom24; 1991(3)BomCR548; (1991)93BOMLR775; 1991(1)MhLj689

Judge : N.P. Chaplagaonker, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 10, 94, 115 and 151 - Order 9, Rules 7 and 13 - Order 20, Rule 1 - Order 39, Rules 1 and 2 - Order 43; [Specific Relief Act, 1963](#) - Sections 41

Appeal No. : Civil Revision Application No. 877 of 1990

Appellant : Nanasaheb

Respondent : Dattu and Others

Advocate for Def. : Mr. S.A. Kulkarni, Adv.

Advocate for Pet/Ap. : Mr. P.F. Patni, Adv.

Judgement :

ORDER

1. A question of general importance has been raised in this revision application as to whether a defendant in a suit for injunction filed by the plaintiff can be granted injunction restraining the plaintiff from obstructing his alleged possession and

enjoyment of the property.

2. It is the case of plaintiff that he has purchased 2 Acres area out of Block No. 196 which in all measured 16 Acres and 28 Gunthas situated at village Nipani, Taluka & District Aurangabad, from defendant No. 5 under a registered sale-deed dated 5-9-1986. Along with this land he has purchased half share in the water of the well located in the land purchased by the plaintiff. It is his case that the defendant Nos. 1 to 4 have no share in the well and since they are obstructing plaintiff's right to get the water from the said well, he was constrained to file the suit for perpetual injunction. He applied for a temporary injunction restraining the defendants from obstructing plaintiff's enjoyment of the well water to the extent of the share purchased by him. Ad interim injunction was granted ex parte in favour of the plaintiff which came to be vacated later on and a Misc. Appeal arising therefrom was also dismissed by the Addl. District Judge, Aurangabad, on 21-8-1987. On 6-12-1989, defendant Dattu, submitted an application praying for a temporary injunction restraining the plaintiff from disturbing peaceful enjoyment of the defendant in the suit well. On 22-12-1989, learned Jt. Civil Judge (J.D.), Aurangabad, directed the parties to maintain status quo and on 23-1-1990 he was pleased to grant the prayer of the defendant and clamped an injunction against the plaintiff restraining him from disturbing peaceful possession and enjoyment in the suit well till the disposal of the suit. Misc. Civil Appeal No. 18/1990 filed by the plaintiff in the District Court also came to be dismissed by the Illrd Addl. District Judge, Aurangabad, on 8-6-1990. This order is being challenged in this revision application.

3. Shri P. F. Patni, learned Counsel appearing for petitioner, submitted that the defendant No. 1 Dattu does not own any share in the well or in the land purchased by the plaintiff in which the well situates. Therefore, both the Courts below erred in granting an injunction in favour of defendant when he cannot be said to be in lawful possession of the property, the enjoyment of which is alleged to be obstructed. He further submitted that in a suit for injunction filed by the plaintiff, the Court had no jurisdiction to grant injunction in favour of the defendant restraining plaintiff from obstructing the alleged possession and enjoyment of the defendant of the same property. Shri Patni submits that Order 39, Rules 1 and 2 of the Code

authorizes Civil Court to grant an injunction in favour of the plaintiff only and injunction in favour of the defendant can be granted only in respect of the circumstances listed in Order 39 Rule 1(a). Injunction prayed for by the defendant is not to prevent waste, damage or alienation and, therefore, orders of both the Courts below are without jurisdiction and need to be quashed.

4. Shri S.A. Kulkarni, learned counsel appearing on behalf of the respondent, submitted that an injunction can be granted in favour of the defendant even when the case is not covered by provisions of Order 39 of the Code. In this respect, he further submitted that the provisions u/S.94 and S. 151 of the Code of Civil Procedure, 1908, invest sufficient powers to the Court to grant an injunction in favour of the defendant.

5. Relevant part of provisions of S. 94 of the Code is reproduced below:--

'94. In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed.-

(a) & (b).....

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold.'

It is the submission of Shri Patni that the power granted by S. 94(c) to grant temporary injunction is to be exercised by the Court as in the manner prescribed. In submission of Shri Patni, 'the manner prescribed' means as laid down by the rules framed under the Code. He, therefore, submits that the power u/ S. 94(c) is circumscribed by the limitation imposed on this power by the provisions of Order 39 Rules 1 and 2. Therefore, unless a case is covered by Order 39 Rule 1 or 2, a Court cannot grant a temporary injunction to a party. As against this, Shri Kulkarni, learned Counsel appearing for Respondent, submits that the Order 39 Rules 1 and 2 are not exhaustive but they are illustrative. Order 39 Rules 1 and 2 being the rules, will not override the generality of the power bestowed upon Civil Court u/S. 94(c). He further submitted that even apart from generality u/S. 94 (c), the provisions of S. 151 would enable the Court to grant an injunction in cases which

are not covered by Order 39 Rules 1 and 2. Section 151 of the Code reads thus :

'151. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.'

Stressing on the opening clause in S. 151 that 'Nothing in this Code shall be deemed to limit or otherwise affect', Shri Kulkarni further submits that neither of the limitations, assuming if any, in Order 39 Rule 1 or even S. 94(c) will limit the powers of the Court to grant any injunction, if it is so expedient to the Court, by exercising powers u/S. 151.

(6) Firstly, we will have to consider that under which of the clauses of Order 39 Rules 1 and 2 the prayer to restrain the plaintiff from obstructing in the enjoyment of the suit well would be covered. Order 39 Rule 1 of the Code is quoted below for ready reference:--

'(1). 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 defrauding his creditors,

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,

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 (or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit) as the Court thinks fit, until the disposal of the suit or until further orders.'

Rule 2 of Order 39 deals with the cases wherein the breach of contract or injury of any kind is apprehended. Provisions of Rule 1(a), 1(b) and 1(c) are intended to meet

different situations and different purposes. Rule I(a) speaks about the injunctions when the property is in danger of waste, damage or alienation. Whereas Rule I(b) speaks about threatening removal or disposal from the property with a view to defraud his creditors and Rule I(c) speaks about threatening dispossession or any other injury in relation to the property. Prayer for injunction restraining other party from obstructing enjoyment of well water would be covered by Rule I (c) of Order 39.

7. Mischief to be prevented by the temporary injunction in respect of situations under Clauses (b) and (c) of Rule 1 and under Rule 2 should be that of the defendant. However, mischief to be prevented by the temporary injunction in situations under Clause (a) of Rule 1 can be from either of the parties. A clear distinction appears to have been deliberately made in framing this rule by authorizing in respect of the situations listed in Clause (a) of Rule 1 on one hand and Clauses (b) and (c) of Rule 1 and Rule 2 on the other hand. In respect of situations covered by the first clause, injunction can be granted in favour of either of the parties whereas in respect of situations covered by other clauses injunction can be granted only in favour of the plaintiff and not in favour of the defendant. It is the submission of Shri Kulkarni that since inherent powers as are declared u/ S. 151 and the general powers specifically given u/S. 94(c) are not limited by Order 39 Rules 1 and 2, trial Judge was competent to grant an injunction in favour of the defendant restraining the plaintiff from obstructing the enjoyment of the suit well. Shri Kulkarni mainly relied on the judgment of the Supreme Court in the case of *Manohar Lal Chopra y. Rai Bahadur Rao Raja Seth Hiralal*, : AIR 1962 SC527 . Noticing the difference of opinion between the various High Courts on the question whether Court can issue an order of temporary injunction if the circumstances do not fall within the provisions of Order 39 of the Code, Supreme Court held that there is no prohibition in S. 94 to issue a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code. Supreme Court observed (at page 532):--

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

the procedure for them. 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 interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of S. 94 were not there in the Code, the Court could still issue temporary injunctions, but it could be that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that 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 S. 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power.'

Relying on its own observations in the case of *Padam Sen v. State of Uttar Pradesh* : 1961 CriLJ322 it went on to observe further:--

'These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in S. 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature. This restriction, for practical purposes, on the exercise of those powers is not because those powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justice.'

Thus, Supreme Court, in this case was of the opinion that the provisions of the Code of Civil Procedure are not exhaustive and the Court has an inherent power to grant an injunction in circumstances which are not covered by the provisions of Order 39 of the Code of Civil Procedure . It was of the opinion that inherent powers of the Court which are merely declaration by S. 151 are not controlled by any of the provisions of the Code as has been specifically stated in the section itself. But those powers are to be exercised only when such an exercise is not in conflict with what has been expressly provided by the Code. J. C. Shah, J. who

held a minority view and gave a dissenting judgment was of the opinion that :--

'Power to issue an injunction is restricted by S. 94 and O. 39, and it is not open to the Civil Court which is not a Chartered High Court to exercise that power ignoring the restrictions imposed thereby, in purported exercise of its inherent jurisdiction.'

In respect of the exercise of inherent powers Shah, J. further observed:--

'Inherent jurisdiction of the Court to make orders *ex debito justitiae* is undoubtedly affirmed by S. 151 of the Code, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive.'

So far as the exercise of inherent jurisdiction is concerned, the limitation that it should not be in conflict with or to nullify what has been expressly provided for was the view shared by majority judgment. There were no divergent views on this point. The difference of opinion was in respect of point whether temporary injunction can be granted in respect of cases not covered by Order 39. The majority view was that a temporary injunction can be granted by the Court even in circumstances which are not covered by provisions of Order 39 and the dissenting view was that it cannot do so.

8. In *Cotton Corporation of India Limited v. United Industrial Bank Limited*, : [1983]3SCR962, Supreme Court' held' that inherent powers of the Code cannot be invoked to nullify a statutory provision like S.41(b) of the [Specific Relief Act, 1963](#).

9. Therefore, it is now settled that Court has power to grant injunction even in circumstances not covered by Order 39 and it is also well settled that inherent powers of the Code can be utilised for issuing temporary injunctions but it should not be either to nullify a statutory provision or to by-pass what is expressly provided. It is true, as was reminded by the Supreme Court in *Manohar Lal Chopra's case* (cited *supra*) that the provisions of the Code are not exhaustive for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for

providing the procedure for them. Therefore, the situations which are not dealt either expressly or impliedly by the provisions of the Code, the Court is not rendered powerless and inherent powers as declared u/S. 151 of the Code can always be resorted to meet the situation and ends of justice. The question would be whether a situation is dealt by the provisions of the Code or not. If the situation is dealt by the provisions of the Code, then the orders will have to be passed keeping in mind the provisions of the Code and if the situation is not dealt by the Code then resort to S. 151 can always be had.

10. In a case decided by this Court, parties to a contract had agreed to have the jurisdiction to decide disputes arising out of the contract at Bombay. However, one of the parties filed a suit in Calcutta High Court in respect of the same cause of action. Subsequently, the defendant in the suit in Calcutta High Court filed a suit in Bombay High Court and plaintiff in Bombay case filed an application before the single Judge of Bombay High Court praying for injunction against the defendant not to proceed with the earlier suit which he had filed before the Calcutta High Court. The Division Bench of this Court consisting of Chagla C. J. and Shah, J. in the case of Ram Bahadur Thakur and Co. v. Devidayal (Sales) Limited : AIR1954 Bom176 , ruled that the situation which the Court is required to deal with is not arising out of S. 10 of the Code and, therefore, it can be dealt with u/S. 151 and an injunction can be issued restraining the defendant from proceeding with earlier suit which could not have been normally done under S. 10 of the Code. It observed at page 178 (of AIR) :

'In our opinion S. 10 has no application when a suit is instituted which constitutes an abuse of the process of the Court. If a suit is filed in order to forestall a suit which would be filed subsequently in another Court, or if a suit is filed which is vexatious and frivolous, or if a suit is filed in violation of contractual obligation to have the matter adjudicated upon in another Court, such a suit would constitute an abuse of the process of the Court. In such a case, the Court will have to deal with the situation which arises not under S. 10 but u/S. 151 of the Civil Procedure Code, and in dealing with S. 151 the Court issues an injunction preventing the defendant from proceeding with the earlier suit, taking the view that to allow that suit to go on would constitute an abuse of the process of the Court.'

11. Shri Kulkarni further submitted that there is no express prohibition in Clauses (b) and (c) of Rule 1 or in Rule 2 that no injunction can be granted in favour of the defendant if the mischief stated in these clauses is by the plaintiff. Had it been the intention of the Legislature in framing such a rule that either of the parties could be granted a temporary injunction for the purposes mentioned in all of these clauses, there was no occasion to expressly use the term 'defendant' as the author of the mischief could be prevented, particularly when in Clause (a) of Rule 1 there is no such mention of 'defendant'. Therefore, purposefully the ambit of Clause (a) of Rule 1 was kept wider than the ambit of Clauses (b) and (c) of Rule 1 and provisions of Rule 2. The intention appears to be to restrict the power of grant of injunction in the circumstances mentioned in later clauses in favour of the plaintiff only. The difference between the circumstances under Clause (a) and other clauses of Rule 1 is distinctive and important. The purpose of any interim relief is always to maintain the status quo in respect of the subject matter and the suit so as to enable the Court to pass a fruitful decree after the hearing is completed. Therefore, waste, damage or alienation of the property by any party will result into disturbance in the status quo of the property and, therefore, even when an injunction is granted in favour of the defendant, it is really to protect the present state of the property in dispute and, therefore, from this angle can be considered to be an injunction in favour of the plaintiff, if he is honestly interested in getting the decree of protection of the property as it is on the day of the filing of the suit. Injunctions in respect of disposal or removal of the property and particularly the injunctions in respect of protection of the possession are totally on different footing. Plaintiff comes to the Court for protection of his possession and enjoyment of the property. If the apprehended mischief by the defendant is proved prima facie, injunction is granted in his favour. If final relief cannot be granted in favour of a party, normally no question would arise to grant an interim relief in favour of that party so far as possession and enjoyment of property is concerned. It is in this view the Legislature must have made a distinction between the persons entitled for relief under these different provisions. If the Legislature omits to grant a power to the Court in respect of a party and grants power in respect of other party, then it will have to be presumed that the exercise of the power in respect of the first party is barred by implication. In *Commissioner of Sales Tax, Uttar Pradesh, Lucknow V.*

m/S Parson Tools and Plants, Kanpur, : [1975]3SCR743 , Supreme Court held (at page 1043):--

'If the legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation, by analogy or implication, something what it thinks to be a general principle of justice and equity. To do so, would be entrenching upon the preserves of the Legislature, the primary function of a Court of law being jus dicere and not jus dare.'

12. While framing the Rules 1 and 2 of Order 39, the Legislature has dealt with the circumstances of threatened waste, damage and alienation of the property; threatened removal or disposition of the property with intent to defraud his creditors; and threatened dispossession of the property as apprehended breach of contract for granting interim injunctions. Therefore, so far as these circumstances are concerned, the question having been dealt expressly by the Code, the power to grant injunction is limited by Order 39 itself, and in situations which are not dealt in Order 39, Court can have a resort to S. 151 read with S. 94(c) and grant injunctions in favour of any party. Needless to say, that there is also a difference in respect of the remedies which can be resorted to. If the power is exercised under O. 39, then an appeal has been provided under Order 43. However, if S. 151 is resorted, then no such remedy is provided. In the instant case, injunction asked for is in respect of the enjoyment of the well water from the well situated in the land possessed by the plaintiff and, therefore, it is in effect for continuation of the possession over the well and restraining other party from causing an injury in relation to that property. Therefore, this would be a circumstance which is covered by Clause (c) of Rule 1 and a grant of this relief temporarily would be guided by the Rules of Order 39.

13. Order 9 Rule 7 deals with the situation wherein the hearing of the suit ex parte is adjourned and the defendant, at or before, such hearing, appears and assigns good cause for his previous non-appearance and authorizes Court that he can be

heard in answer of the suit by condoning the absence on the previous date. In a suit evidence was recorded ex parte and the case was posted for judgment only and on that day the defendant appeared and wanted to show a good cause for his absence on the previous dates. Question arose before the Supreme Court whether it is permissible for the Court to exercise jurisdiction u/S. 151 and examine whether defendant has good cause and condone that absence and allow him to appear in the suit. Supreme Court in Arjun Singh v. Mohindra Kumar, : [1964]5SCR946 held that (at page 1003):--

'If the entirety of the 'hearing' of the suit has been completed and the Court being competent to pronounce the judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under O. XX R. 1, there is clearly no adjournment of 'the hearing' of the suit for, there is nothing more to be heard in the suit.'

Therefore, Order 9 Rule 7 could not be resorted to and since the exercise of the power under Order 9 Rule 7 in the said circumstance is barred application of the defendant for condoning of the absence allowing him to appear in the matter could not be allowed resorting to the inherent powers of the Court u/S. 151 of the Code. Supreme Court went on to observe (at page 1003):--

'If there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates.'

If the Code makes a provision for condoning the absence of the defendant and allowing him to appear in the matter when the suit is proceeding ex parte, then the power will have to be exercised accepting limitation put in by the Code itself, though it can be argued that same cause, sufficient or good, will have to be shown in an application under Order 9 Rule 7 and in an application under O.9, R. 13. Nevertheless, S. 151 cannot be resorted to cut short the proceeding and allow the

application of the defendant. If the law deals with particular circumstances and grants restricted power to the Court, Court cannot assume greater powers. When the apprehended mischief by the defendant only can be prevented by grant of an injunction, no injunction can be granted preventing an apprehended mischief by the plaintiff in respect of the same circumstances.

14. Allahabad High Court, in the case of Firm Bichchha Ram Babu Ram v. Firm Baldeo Sahai Suraj Mal : AIR1940 All241 took a view that the Court has power to issue injunction restraining plaintiff from proceeding with an another suit in another Court in respect of the same cause of action. In Suganda Bai v. Sulu Bai AJR 1975 Karnataka 137, the learned Chief Justice ' of the Karnataka High Court sitting singly, took the view th'at (para 3) :--

'A defendant can move for a temporary injunction against the plaintiff without filing a counter-claim only when and where the relief claimed arises out of plaintiff's cause of action or is incidental to it.'

In that case, the application filed by the defendant is seeking protection to her possession, question whether such an injunction can be granted u/S. 151 was not specifically considered and the application of the defendant was rejected on the ground that the cause of action of the plaintiff is a threatened dispossession in the year 1970 and the cause of action alleged by the defendant is that of 1973. In effect, this judgment is of no avail to Shri Kulkarni and does not support his contention. In Dr. Ashis Ranjan Das v. Rajendra Nath Mullick : AIR1982 Cal529 , Calcutta High' Court took a view that the defendant can ask for an interlocutory injunction restraining the plaintiff from making any construction over the plot in dispute. Such an injunction would come within the purview of Clause (a) of Rule 1 since the construction, in cases, would be a damage to the property as is the subject matter of the suit.

15. Shri Kulkarni also relied on a judgment of Patna High Court in the case of Smt. Indrawati Devi v. Bulu Ghosh : AIR1990 Pat1 . In this case, the learned single Judge of the Patna High Court, holding that a defendant may claim interlocutory mandatory injunction, observed (at page 4):--

'In the exercise of its inherent powers, the Court can in exceptional circumstances not covered by the situations envisaged under O.XXXIX Rules 1 and 2 of the Code of Civil Procedure grant temporary injunction, which includes not only a prohibitory but also a mandatory injunction and in the exercise of its inherent powers, no distinction can be drawn on the ground that such an order is passed at the instance of the plaintiff or the defendant.'

Similar view has been taken by Kerala High Court in the case of B. F. Varghese v. Joseph Thomas AIR 1957 T C 286 that under inherent powers of the Court in exceptional circumstances, mandatory injunction on interlocutory application can be granted even in favour of the defendant.

16. Thus, it would be seen that cases cited by Shri Kulkarni are in respect of the circumstances which are not dealt under O. 39 Rule 1 or 2. As already observed, the prayer in the instant case by the defendant is in respect of his enjoyment of the well water which is covered by sub-clause (c) of Order 39 Rule 1. Since the circumstance of injury to the property in dispute in a suit or threatened dispossession is dealt by Order 39, recourse to Section 115 and exercise of the inherent powers will not be available and, therefore, the application of the defendant will have to be rejected. The contentions raised by Shri Kulkarni about the defendant's right to take well water therefore, need not be considered.

17. In the result, Civil Revision Application No. 877/1990 is allowed. The order passed by learned Civil Judge (J. D.), Aurangabad, on 23rd of January, 1990, in Regular Civil Suit No. 930/1986, granting application Exhibit 29, filed by defendant No. 1; and confirmed in Misc. Civil Appeal No. 18/1990 by the IIIrd Addl. District Judge, Aurangabad, on 8th of June, 1990, are both quashed. Application Exhibit 29 of defendant No. 1 in the Court below, is rejected. Hearing of Regular Civil Suit No. 930/1986 be expedited. There be no order as to costs of this revision application.

18. Revision allowed.