

Satya Prakash and anr. Vs. Ist Additional District Judge and ors.

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Court : Allahabad

Decided On : Mar-13-2002

Reported in : 2002(2)AWC1368

Judge : R.R. Yadav, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 151 - Order 39, Rules 1 and 2

Appeal No. : C.M.W.P. No. 40938 of 2000

Appellant : Satya Prakash and anr.

Respondent : ist Additional District Judge and ors.

Advocate for Def. : S.K. Singh, Adv. and ;V.K. Singh, S.C.

Advocate for Pet/Ap. : Rajiv Gupta, Adv.

Disposition : Writ petition allowed

Judgement :

R.R. Yadav, J.

1. The instant writ petition is directed against the order and judgment dated 29.8.2000, Annexure-1 to the writ petition, passed by 1st Additional District Judge. Etah, whereby the order and judgment dated 18.2.1999 passed by the learned trial

court granting temporary injunction in favour of the petitioners under Order XXXIX, Rules 1 and 2. C.P.C. has been set aside and appeal filed under Order XLI. Rule 1 (r). C.P.C. was allowed.

2. The factual matrix of the case necessary to be noticed for disposal of the present writ petition are that Suit No. 576 of 1998 was filed by the plaintiff-petitioners and one Smt. Har Pyari Devi (who died during the pendency of Misc. Appeal), against the contesting respondents in the Court of Civil Judge (Junior Division) Kasganj, Etah. as the contesting respondent-defendant 1st set threatened to demolish the walls AD, DE and EF which is shown in red ink in the plaint, belonging to the petitioners and defendants 1st set and in their possession to make a passage through it and also threatened to open door and window in these walls. The aforesaid suit was filed on the basis of registered sale deed dated 24.3.1933 executed in favour of their grandfather. Ayodhya Prasad and his brother. Shiv Dayal seeking relief of permanent injunction against defendant 1st set who is impleaded as respondent No. 3 in the present petition. On the same date of filing of suit, an application supported with affidavit for grant of temporary injunction under Order XXXIX, Rules 1 and 2. C.P.C. was also moved. The learned trial court granted interim injunction on the date of filing of suit.

3. The plaintiff-petitioners also applied for appointment of an Advocate Commissioner for serving the interim injunction and for preparation of spot map which was allowed on the date of interim injunction. The learned Advocate Commissioner served the injunction order and prepared the map and submitted report, Annexure-6 to the writ petition. The Advocate Commissioner during his inspection found some portion of the wall, which was part of the house of the plaintiffs-petitioners damaged and fresh foundation for raising new constructions and pillars was also found on the spot.

4. The defendant 1st set filed counter-affidavit before the trial court stating therein that his predecessors in interest had purchased adjoining part of building on 7.2.1929 and on the basis of which the walls in question are under his ownership as these walls are part of his latrine. It is further averred in the counter-affidavit that Eastern and Western walls in dispute are not part of sale deed dated

24.3.1933. A true copy of the counter-affidavit filed by defendant 1st set before the trial court is filed and marked as Annexure-7 to the writ petition.

5. The plaintiff-petitioners filed their rejoinder-affidavit before the trial court wherein it is clearly averred that predecessors-in-interest of plaintiff-petitioners constructed wall AD, DE and EF on their side lying within the boundary shown in sale deed dated 24.3.1933 whereas the wall of latrine was demolished by predecessors in interest of defendants 1st set. They averred that the height of this wall is 14' 2" which can never be height of latrine roof. The Eastern and Western walls shown in the sale deed dated 7.2.1929 were constructed of 'Kakalya bricks' of ancient time whereas the disputed walls were constructed after family settlement by late Shri Mathura Prasad with 'Gumma bricks' of recent origin, a copy whereof is filed and marked as Annexure-8 to the writ petition.

6. After hearing the learned counsel for both sides and considering material available on record, the learned Civil Judge (Junior Division) confirmed the interim injunction and disposed of the application (6-Ga) by order dated 18.2.1999. A copy whereof is filed and marked as Annexure-9 to the writ petition.

7. A bare perusal of order dated 18.2.1999, Annexure-9 to the writ petition reveals that the learned trial court found prima facie case, balance of convenience and Irreparable loss in favour of the plaintiff-petitioners. Looking into the facts and circumstances of the case, ex parte interim injunction was confirmed protecting the property in suit, i.e., walls in dispute during the pendency of the litigation and both the parties were directed to maintain status quo as on the date of suit. The learned trial court also ordered the plaintiff-petitioners to furnish security of Rs. 10,000 which was made payable to the defendant 1st set in case the suit is dismissed.

8. It is further evident from perusal of order dated 18.2.1999, Annexure-9 to the writ petition that the learned trial court while granting interim injunction, it has construed both the registered sale deeds dated 7.2.1929 and 24.3.1933 and arrived at a conclusion that prima facie there is no existence of Eastern and Western wall described in the sale deed dated 7.2.1929 and disputed walls are in existence over the portion purchased by the plaintiff-petitioners' ancestor on 24.3.1933. It is further held by the learned trial court that plaintiffs have succeeded

to prove prima facie case for granting temporary injunction and the question whether disputed walls, shown by red ink in the plaint, were constructed before execution of sale deed dated 24.3.1933 as claimed by defendant 1st set or after its execution as claimed by the plaintiff-petitioners was left open to be decided in suit after giving both the parties full-fledged opportunity to adduce their oral and documentary evidence in support of their respective claims.

9. The contesting respondents filed Misc. Appeal against the order dated 18.2.1999 in the Court of District Judge, Etah, which was transferred for disposal in accordance with law before 1st Additional District Judge, Etah. It is averred in the writ petition that on 26.8.2000 the arguments of both the sides were heard by respondent No. 1 and 2.9.2000 was date fixed for pronouncement of judgment. It is further averred in the writ petition that the aforesaid date for pronouncement of judgment was changed from 2.9.2000 to 29.8.2000 by overwriting. In support of the aforesaid averments, a certified Photostat copy of the order sheet is filed along with writ petition and marked as Annexure-11 to the writ petition. It is also averred in the writ petition that although the case was posted for pronouncement of Judgment on 2.9.2000 but the Judgment was delivered on 29.8.2000 with oblique motive since morning on 28.8.2000 the contesting respondents started to demolish the disputed walls during pendency of Misc. Appeal and continuance of injunction order. The matter was reported to S.H.O., Kasganj on the same day. A copy whereof is filed and marked as Annexure-12 to the writ petition. The aforesaid averments made in the writ petition are controverted by contesting respondents by filing counter-affidavit, but after due service, the respondent No. 2. 1st Additional District Judge, who was impleaded in person, did not turn up to controvert the aforesaid averments.

10. I have heard learned counsel for the petitioners as well as learned counsel representing contesting respondents and learned standing counsel. '

11. From the arguments advanced by the learned counsel for the parties, following questions emerge for consideration of this Court :

(1) Whether grant of temporary injunction under Order XXXIX, Rules 1 and 2, C.P.C. by trial court is a discretionary and such discretionary order cannot be

interfered with by the appellate court unless finding about prima facie case, balance of convenience and irreparable loss are held to be against settled principles of law or the appellate court found that the trial court has acted unreasonably or capriciously ignoring relevant facts?

(2) Whether parties can be put on the position of status quo ante on the date of suit pending litigation in the facts and circumstances of the given case?

For deeper and better understanding of the case on hand, I would like to deal with the aforesaid two questions separately by peeling away the varnish and uncovering the truth hidden with reference to the salient points of law.

Question No. 1

12. It is settled principle of law that discretion conferred under Order XXXIX, Rules 1 and 2, C.P.C. in granting or refusing temporary injunction is discretionary and like other cases of discretion is vested in Courts which is to be exercised in accordance with reasons and sound judicial principles. The sound judicial principles which govern the exercise of discretion conferred under Order XXXIX, Rules 1 and 2, C.P.C. upon trial courts are to the effect that a person who seeks a temporary injunction must satisfy the Court, firstly that there is a serious question to be tried in suit to dispel cloud of doubt relating to his entitlement and there is probability of plaintiff being entitled to the relief sought by him. Secondly, the Courts' interference is necessary to protect him from threatened species of injuries enumerated under Order XXXIX, Rules 1 and 2, C.P.C., which the Court considers irreparable before his legal right, can be established on trial. Lastly, the comparative inconvenience which is likely to ensue from withholding temporary injunction would be greater than that which is likely to arise from granting it. Prima facie case is not to be confused with title of the plaintiff which is to be established on evidence but it would be sufficient if substantial question at first sight needs investigation and decision whereas irreparable injury does not mean that there must be no physical possibility of compensating the injuries but it means only that injuries cannot be compensated in terms of money. In ascertaining the balance of convenience, the Courts are to weigh and compare the substantial mischief that is likely to be done to the plaintiff, if injunction is refused. It is held that while Courts

are considering balance of convenience, the Courts are also required to keep in mind the public convenience as well. It is well to remember that aforesaid three ingredients are to be proved on affidavits as envisaged under Order XXXIX Rule 1. C.P.C. The power given to Courts to act on affidavits is unfettered and it is not subject to the provisions of Order XIX Rules 1 and 2. C.P.C.

13. It is further to be imbibed that all of the three conditions precedent must co-exist for granting temporary injunction under Order XXXIX. Rules 1 and 2. C.P.C. If any of them is missing, then temporary injunction applied for is to be rejected. It would be expedient to mention here that in a peculiar facts and circumstances of a case in rarest of rare cases if interest of justice so demands that property in dispute deserves to be preserved in its present condition till clouds of doubt are dispelled by deciding the suit on merit, in such cases, temporary injunction can also be granted under Section 151, C.P.C. which provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of Court to make orders necessary in the ends of justice. The inherent power has not been conferred upon the Court but it is inherent in the Court by virtue of its duties to do justice between the parties. Therefore, in those cases where granting of temporary injunction is found to be imperative in the interest of justice even if any of the conditions precedent mentioned hereinabove is missing, the Court can grant temporary injunction in exercise of its power under Section 151, C.P.C. It is held that even if an application for temporary injunction under Order XXXIX, Rules 1 and 2, C.P.C. is rejected, even then the plaintiff can move fresh application under Section 151, C.P.C. with a distinction that in case temporary injunction is granted under Order XXXIX, Rules 1 and 2, C.P.C.. then Misc. Appeal is maintainable under Order XLIII, Rule 1. C.P.C, but if an injunction is granted under Section 151, C.P.C., then no Misc. Appeal would be maintainable, only revision would be entertainable under Section 115, C.P.C.

14. Coming to second limb of question No. 1 as to under what circumstances, an appellate court can interfere with the order granting or refusing temporary injunction, it is held that the appellate court has no jurisdiction to substitute its discretion in place of trial court unless the order passed by trial court is found unconscionable, perverse or opposed to sound principles of law and practice.

15. An Identical question came up for consideration before Privy Council in the case of *Rehmatunnissa Begum and Ors. v. Price and Ors.* AIR 1917 PC 116, wherein it is ruled that it is opposed to sound practice for an appellate court to substitute its discretion for that of the Court from which an appeal has been preferred. It is to be noticed that in case of *Rehmatunnissa Begum (supra)* where the lower appellate court had substituted its discretion for that of the trial court, the Privy Council found that the discretion exercised by the trial court was more sound, hence the discretion of the trial court was restored.

16. The aforesaid proposition of law propounded by Privy Council in case of *Rehmatunnissa Begum (supra)* shall continue to be the law of the land within the meaning of Article 372 of the Constitution unless overruled by Supreme Court. The learned counsel for respondents fails to bring to my notice that the aforesaid proposition of law propounded by Privy Council in case of *Rehmatunnissa Begum (supra)* has been overruled by Supreme Court. Therefore, the aforesaid proposition of law still holds water relating to jurisdiction of appellate court to substitute its discretion for that of the trial court from which an appeal is preferred.

17. The aforesaid question in different context came up for consideration before Supreme Court in the case of *Uttar Pradesh Cooperative Federation Ltd. v. Sunder Brothers, Delhi* : AIR 1967 SC249 . wherein it is held that if discretion has been exercised by the trial court reasonably and in a Judicial manner. the fact that the appellate court would have taken a different view may not justify such interference with the trial court's exercise of discretion. For ready reference, the relevant excerpt of the aforesaid judgment is reproduced herein below :

'In dealing with the matter raised before it at the appellate stage, the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage, it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not Justifyinterference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial

Judge, but if it appears to the appellate court that exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion. This principle is well established ; but. as has been observed by Viscount Simon, L.C., in *Charles Osenton and Co. v. Johnston*. 1942 AC 130 at 138 : The law as to the reversal by a Court of appeal of an order made by a Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well-settled principles in an individual case.'

18. The aforesaid question also came up for consideration recently before a learned single Judge of Punjab and Haryana High Court in the case of *Guru Nanak Education Trust (Regd.). Model Town. Ludhiana and Ors. v. Sh. Balbir Singh and others* , wherein it is held that appellate court has no jurisdiction to interfere with the order of trial court granting temporary injunction unless the findings about prima facie case, balance of convenience and irreparable loss reached by the trial court are held by the appellate court to be against settled principles of law or perverse.

19. The aforesaid proposition of law was propounded by learned single Judge in case of *Guru Nanak Education Trust (supra)* after surveying almost all judgments on the subject of different High Courts as well as Supreme Court with which I respectfully concur. I do not propose to burden the judgment on the subject referring other decisions which are cited before me and have already been considered by learned single Judge in the case of *Guru Nanak Education Trust (supra)*.

Question No. 2 :

20. Coming to question No. 2, I would like to refer the decision rendered by learned Judges constituting Division Bench of this Court in case of *Hari Nandan Agrawal and Anr. v. S.N. Pandit and Ors.* : AIR1975 All48 , on the subject. It would be expedient to quote paragraph 22 of the aforesaid judgment which reads thus :

'If a person has been dispossessed by wilfully disobeying an order of injunction, the Court which issued the order of injunction, can after considering the circumstances of each case and the conduct of the parties, always pass such an order, in the ends of justice, as would undo the wrong done to the party in whose favour the order of injunction had been issued. The exercise of this inherent power vested in the Court is based on the principle that no part can be allowed to take advantage of his own wrong.....'

21. Similarly, in the case of *Dorab Cawasji Warden v. Coomi Sorab Warden and others* : [1990]1SCR332 , the co-owners not in possession sold their undivided share in the house. The sale deed itself was hurriedly executed in a hush-hush manner keeping the entire transaction secret from the appellant. The purchasers were also inducted in the premises in a manner which clearly suggests that the vendors were attempting to forestall the situation and to gain an undue advantage in a hurried and clandestine manner defeating the appellants' attempt to go to Court for appropriate relief. In such circumstances, the Supreme Court in paragraph 27 held that it is but just and necessary that a direction should go to the respondents to undo what they have done.

22. In *Joynarain Sarogi v. Brojendra Nath Misra and Ors.* AIR 1951 (38) Pat 546. where the defendant taking advantage of the order of trial court vacating the order of ad interim injunction and the delay in filing appeal, hastened with construction, the Patna High Court directed the demolition of the constructions so made so as to put the parties on the position of status quo ante on the date of suit pending litigation. In the aforesaid case, entire case law including English cases and the various cases on the subject of Indian Courts were discussed in detail which I do not consider expedient to re-consider as I am in full agreement with the proposition laid down in the case of *Joynarain* (supra).

23. Similarly, in the case of *State of Bihar v. Usha Devi* : AIR 1956 Pat 455 , where in spite of order of injunction, possession of plot was taken by defendant petitioner, order of trial court regarding redelivery of possession was upheld to bring back the party to a position where it originally stood.

24. In *Balwant Yadneshwar v. Srinivas Appaji*, AIR 1959 Mys 244, where one of the owner without the permission of adjoining owner, raised structure over the wall between two adjoining plots, wall was directed to be restored to its original position by mandatory injunction.

25. In *Durg Transport Company u. R. T. A.. Raipur* : AIR 1965 MP142 , the Division Bench observed that an injunction is granted to restore the status quo but it is never granted to establish a new state of things differing from the state which existed on the date when proceedings were initiated.

26. Let us apply the aforesaid proposition of law discussed herein above under question Nos. 1 and 2 in preceding paragraphs of this order to the facts and circumstances of the case on hand. A close scrutiny of the order dated 18.2.1999, Annexure-9 to the writ petition, reveals that learned trial court after recording positive findings on the question of prima facie case, balance of convenience and irreparable loss granted temporary injunction to the petitioners whereas the learned appellate court with close mind without addressing itself to any of the ingredients for granting or refusing temporary injunction, interfered with the order impugned setting aside the order passed by learned trial court and allowed the appeal. The learned appellate court has not reversed the finding about prima facie case, balance of convenience and irreparable loss recorded by the learned trial court which shall be deemed to be confirmed by necessary implication. I am of the view that unless findings about prima facie case, balance of convenience and irreparable loss reached by the learned trial court in the present case are held by the learned appellate court to be against principles of law or perverse, he had no jurisdiction to set aside the order passed by the learned trial court granting temporary injunction in favour of the petitioners.

27. It is Inferable from perusal of the order impugned. Annexure-1 to the writ petition dated 29.8.2000 passed by appellate court that It was under wrong legal notion that before granting temporary injunction under Order XXXIX. Rules 1 and 2, C.P.C. the plaintiff-petitioners were required to establish their full fledged title over the walls in dispute shown by red ink in the plaint and learned trial court has no jurisdiction to grant temporary injunction to them merely on the ground that

there was a serious question to be tried in the suit to dispel cloud of doubt relating to their title of the walls in dispute and there was probability of plain tiff-petitioners to get relief sought by them after proving that walls shown in the sale deed dated 7.2.1929 was dismantled by the vendor of defendant 1st set respondent No. 3 and walls in dispute shown by red ink were constructed by father of plaintiff-petitioners within 10 feet 1-1/2 inch inside the boundary of the house purchased through registered sale deed dated 24.3.1933. The learned 'trial court after recording the aforesaid finding of fact in the light of Advocate Commissioner's report, Annexure-6 to the writ petition has committed no error in leaving this serious question as to whether the disputed walls shown by red ink in the plaint were in existence on the date of registered sale deed dated 7.2.1929 as claimed by defendant 1st set or these walls were constructed later on after execution of sale deed dated 24.3.1933 as claimed by plaintiff-petitioners open to be decided in suit after affording full fledged opportunity of adducing evidence in respect of their respective claims.

28. I am of the view that since in the present case, the lower appellate court has ignored the well established principles of law which govern the exercise of jurisdiction qua order passed by the learned trial court granting temporary injunction in favour of the petitioners, the order impugned passed by learned appellate court is liable to be set aside. In the present case, the error committed by the learned appellate court is apparent on face of record and as such, (his Court has no alternative except to set aside the order passed by the learned appellate court under Article 226/227 of the Constitution.

29. It is true that the learned lower appellate court while setting aside (he order passed by learned trial court was not required to meet all the reasons given by the learned trial court granting temporary injunction in favour of the petitioners but what was necessary for the learned lower appellate court was that the reasons given by the learned trial court ought to have been analysed with reference to the salient points of law dealing with as to when and how an order passed by the trial court granting temporary injunction can be interfered with in appeal. In my considered opinion, in the facts and circumstances of the given case, the learned appellate court has Transgressed its jurisdiction in substituting its own discretion in place of trial court's discretion which is opposed to sound principles of law and

practice for appellate court to substitute its discretion for that of trial court from which an appeal was preferred. In my humble opinion in the given case, the discretion exercised by the trial court is more sound than that of discretion exercised by the learned appellate court, therefore, in view of the decision rendered in the case of Rehmatunnissa Begum and Ors. (supra), it would be expedient in the interest of justice for this Court to restore discretion of the trial court granting temporary injunction and the argument contrary to it is not palatable to me and is hereby repelled.

30. Coming to the applicability of second point of determination formulated to the facts and circumstances of the present case, it is evident from material available on record that the contesting respondents have no respect for rule of law. Even after full knowledge of interim injunction by Advocate Commissioner, the contesting respondents demolished the disputed walls and opened new door and window. In the present case, final argument was indisputably heard on 26.8.2000 and it is inferable that 2.9.2000 was date fixed for pronouncement of judgment, but by overwriting, date of pronouncement was changed which is apparent from perusal of certified Photostat copy of the order sheet. Annexure-11 to the writ petition, which is indisputably prepared by mechanical process. Judicial restraint does not permit me to elaborate except making observation to the effect that straying normal standard of maintaining order sheet dated 26.8.2000, in the case on hand is giving room for aberration leading to erosion of public confidence. Be that as it may, the contesting respondents cannot be allowed to reap the fruits of their high handedness in demolishing the disputed wall and opening of door and window and also a new passage on the side of the petitioners in hurried and clandestine manner. I am of the view that if the contesting respondents are given benefit of their wrongful act, it would tantamount to travesty of justice and fair play. In the given facts and circumstances of the case, it is held that it would be just and fair in the interest of justice to direct the contesting respondents to undo the wrong done to the petitioners by demolishing the construction made during the pendency of litigation and both the parties deserve to be relegated on the position of status quo ante on the date of passing of temporary injunction by trial court on 18.2.1999. pending litigation. The defendant 1st set arrayed as respondent No. 3 in the present petition cannot be permitted to ridicule the temporary injunction granted by

trial court on 18.2.1999. Annexure-9 to the writ petition in the facts and circumstances of given case discussed herein above.

31. Upshot of , the aforesaid discussion is that instant writ petition is allowed. The order dated 29.8.2000. Annexure-1 to the writ petition, passed by 1st Additional District Judge. Etah. is hereby quashed and the order passed by trial court dated 18.2.1999. Annexure-9 to the writ petition, is restored and mandatory injunction is issued directing the contesting respondent No. 3 to demolish constructions made on the spot and both the parties are to be put on the position of status quo ante which existed on 18.2.1999. on the date of passing of temporary injunction by the learned trial court, pending litigation. The learned trial court is to ensure the compliance of the order passed today with police assistance forthwith after receipt of a certified copy of this order.

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