

Nepal Chandra Dutta Vs. Mrinal Chandra Dutta

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SooperKanoon Citation : sooperkanoon.com/857046

Court : Kolkata

Decided On : Nov-27-1979

Reported in : AIR1980Cal184

Judge : Ganendra Narayan Ray, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 115 - Order 39, Rules 1, 2, 7 and 8(3) - Order 40, Rule 1

Appeal No. : Civil Rule No. 3087 of 1979

Appellant : Nepal Chandra Dutta

Respondent : Mrinal Chandra Dutta

Advocate for Def. : Asis Ch. Bagchi, ;P.K. Sengupta, ;Parthasarathi Sengupta and ;Sidhartha Chouduri, Advs.

Advocate for Pet/Ap. : Bankim Ch. Dutt, ;Saktinath Mukherjee and ;Partha Dutta, Advs.

Disposition : Application dismissed

Judgement :

ORDER

Ganendra Narayan Ray, J.

1. This Rule is directed against order No. 3 dated Aug. 20, 1971, passed by the learned Munsif. 4th Court, Alipore in Title Suit No. 281 of 1979 allowing an application under Order 39, Rule 7 read with Section 151, Civil P. C. The defendant is the petitioner in the instant Rule and the said application under Order 39, Rule 7 read with Section 151, Civil P. C. was made by the plaintiff opposite party Sri Mrinal Chandra Dutta before the learned Munsif. 4th Court, Alipore. It appears that the said plaintiff opposite party instituted the said Title Suit No. 281 of 1979 for declaration that properties described in Schedules A and B to the plaint were the properties of the partnership, for accounts for partnership firm known as 'Pioneer Pictures' at Premises No. 95, Rash Behari Avenue, and for permanent injunction restraining the defendant and his men from interfering with the peaceful possession of the Premises No. 95, Rash Behari Avenue and removal of books of accounts, papers and vouchers etc. and causing any obstruction to inspect the same records of the business. It further appears that in the said suit the plaintiff also made an application for interim injunction under Order 39, Rules 1 and 2, Civil P. C. and the plaintiff also made an application for appointment of a Receiver under Order 40, Civil P. C. It appears that all the said applications were taken up for hearing by the learned Munsif, 4th Court, Alipore and the learned Munsif on the said application for injunction under Order 39, Rules 1 and 2, Civil P. C. directed for an ad interim order restraining the defendants and his men and agents from disturbing and/or interfering with the plaintiff's peaceful possession and occupation of the disputed premises until the disposal of the said application for a temporary injunction. The learned Munsif upon consideration of the application under Order 39, Rule 7. Civil P. C. allowed the said application ex parte and directed that a learned Advocate-Commissioner should take an inventory of Books of Accounts of the partnership firm in suit and keep the documents and books in safe custody after proper sealing to prevent tampering. It was also directed that the learned Advocate-Commissioner should inspect the actual occupation and nature of possession of the southern side of the flat, namely, the 4th floor of the building comprising Priya Cinema. So far as the application for Receiver under Order 40, Rule 1 of the Civil P. C. is concerned, the learned Munsif refused to appoint any Receiver at that stage, without prejudice to the petitioner's right to move such an application subsequent to the report of the learned Commissioner to be appointed

if so advised. As aforesaid, the defendant has moved this revisional application against the order passed by the learned Munsif on the said application under Order 39, Rule 7 of the Civil P. C. appointing a learned Advocate to cause inventory and inspection as stated hereinbefore.

2. Mr. Dutt, the learned Counsel appearing for the petitioner contended at the first place that the pre-requisite for ex parte order directing for inventory and/or inspection under Order 39 Rule 7 Civil P. C. was not fulfilled and the impugned order is bad on the face of it on that score. Mr. Dutt submitted that under the provisions of Rule 7 Order 39 the Court may on the application of any party to a Suit and on such terms as it thinks fit make an order for detention, preservation or inspection of any property which is the subject-matter of such Suit or as to which any question may arise therein and for all or any of the aforesaid purposes authorise any person to enter upon or into any lands or building in the possession of any other party to such Suit. But it has been provided in Rule 8 of Order 39 Civil P. C. that such an application for an order under Rule 6 or Rule 7 may be made at any time after the institution of the Suit either by the Plaintiff or by the Defendant But Sub-rule (3) of Rule 8 provides that before making any order under Rule 6 or Rule 7, the Court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the Opposite Party. Mr. Dutt contended that Sub-rule (3) has been added by the Amendment Act, 1976 and he submits that it is quite apparent from the provisions of Sub-rule (3) of Rule 8 of Order 39 that before making an order the Court should direct notice thereof to be given to the Opposite Party but in exceptional cases where it appears to the Court that the object of making such order would be defeated by the delay, the Court can dispense with the service of notice on the opposing party. Mr. Dutt submitted that in the instant case an ex parte order was passed on the said application under Order 39, Rule 7 made by the plaintiff and it does not appear from the impugned order that the Court considered the provisions of Sub-rule (3) of Rule 8 and came to the finding that there was urgency in the matter and the object of the order would be frustrated by the delay caused in the process of service of such notice on the opposite party. Accordingly, Mr. Dutt contended that the learned Munsif had acted illegally and with material irregularity in the exercise of his jurisdiction in passing the said ex parte order on the

application under Order 39 Rule 7 of the C. P. C.

3. Mr. Dutt next contended that the Books of Accounts are not the subject-matter of the Suit and the said Books of Accounts are only the documents which may be relied on by the parties for the purpose of substantiating their respective claims in the suit. Accordingly, Mr. Dutt contended that the provisions of Order 39, Rule 7 are not attracted to the said Books of Accounts in respect of which the impugned order for inventory was made by the learned Munsif. Mr. Dutt further submitted that it will appear from the impugned order that the learned Munsif has held that application for Receiver was premature at that stage but the Plaintiff would have the right to make such an application in future subsequent to the report of the learned Advocate Commissioner. Mr. Dutt submitted that it is not the duty of the Court to assist either of the parties to the Suit and by the impugned order the learned Munsif has in effect assisted the Plaintiff to succeed in his application for Receiver to be made in future. Mr. Dutt submitted that the effect of the impugned order was to procure evidence on behalf of the Plaintiff to be utilised in the Suit and a direction for inventory or inspection under Order 39, Rule 7 Civil P. C. for procuring evidence on behalf of a party to the Suit is illegal and on that score also the impugned order is liable to be set aside. In this connection Mr. Dutt referred to the decision of the Supreme Court made in the case of Padam Sen v. State of Uttar Pradesh reported in 0065/1960 : 1961 CriLJ322 . It appears from the said decision that a Suit was instituted for realisation of money on the basis of a promissory note alleged to have been executed by the Defendants in the said Suit in the favour of the Plaintiff. The Defendants apprehended that the Plaintiff would fabricate his Books of Accounts with respect to payments made by them and applied for the seizure of the account books of the plaintiffs and the learned Munsif passed an order for seizure of those Books of Accounts and the Commissioner appointed by the learned Munsif seized those books of Accounts and brought them to Ghaziabad. It was held by the Supreme Court in the said decision that Rule 7 of Order 39 empowers the Court, on the application of any party to a suit, to make an order, for the detention, preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein. It was held by the Supreme Court in the said case that account books of the plaintiffs were not 'property' which were the subject-matter of the suit nor such that

about them a question could arise in the Suit. The account books could, at best, have been piece of evidence, if the plaintiff or the defendant had cared to rely on them. In such circumstances, the Supreme Court held, that the learned Munsif had no power under the Code to appoint any Commissioner for seizing the Plaintiff's Books of Accounts. Mr. Dutt also referred to a decision of the Rajas than High Court made in the case of Ramswarup v. Mst. Kosar reported in AIR 1956 Raj 218. It was held in the said decision that Order 39, Rule 7 (1) (a) is primarily meant to empower the Court to make an order about the detention, preservation and inspection of the property in dispute in the suit but it further authorises the Court to pass similar orders about other property as to which any question may arise therein. This does not mean that the Court is authorised to pass an order on the application of one party to make a search of the documents which may be in the possession of the opposite party and then detain them by saying that a question may arise about them in the suit. If the books of accounts or other documents are not themselves the subject-matter of dispute in a suit, then they only serve the purpose of evidence. The Court has no authority to issue a search warrant or any order of the sort and take the documents into its custody under this Order. Mr. Dutt also referred to a Bench decision of this Court made in the case of Institution of Engineers v. Bishu Pada reported in : AIR1978 Cal296 . It was held in the said decision that under Order 39, Rule 7 no commission can be issued for the purpose of fishing out evidence for a party to the suit. Relying on the aforesaid decisions, Mr. Dutt contended that the Books of Accounts were not the subject-matter of the suit and the said order of inspection and/or inventory was made by the learned Munsif for the purpose of helping the plaintiff to collect evidence to be adduced in the suit, as such the impugned order is absolutely illegal and liable to be set aside.

4. Mr. Sengupta, the learned counsel appearing for the Plaintiff-Opposite Party submitted that the order passed by the learned Munsif is precisely for the purpose mentioned in the provisions of Order 39, Rule 7, Mr. Sengupta submitted that the decisions referred to by Mr. Dutt can be distinguished in the facts and circumstances of the case. Mr. Sengupta submitted that in the Suit the Plaintiff prayed for accounts of the Partnership Firm known as 'Pioneer Pictures' and also prayed for permanent injunction restraining the Defendant and/or his men from interfering with the peaceful possession of the Premises No. 95, Rash Behari

Avenue and also removal of any Books of Accounts, papers, Vouchers etc. Accordingly, Mr. Sengupta contended that the Books of Accounts in the instant case have become a subject-matter of the Suit. Mr. Sengupta further submitted that, in any event, the books of accounts are documents in respect of which the dispute between the parties is intrinsically linked up. In such circumstances, the learned Munsif was quite within his powers to direct for Inventory under the provisions of Order 39, Rule 7. Mr. Sengupta submitted that in the facts and circumstances of the case, the order for inventory was not passed for the purpose of fishing out evidence for the plaintiff. The reliefs claimed in the suit will make it clear that there is a serious dispute relating to the accounts of the partnership business and prayer for permanent injunction against removal of books of account has been made by the plaintiff. Mr. Sengupta further submitted that although the learned Munsif has not, in so many words, stated in the impugned order that the purpose of inventory will be frustrated if an ex parte order is not passed but if the impugned order is considered as a whole it will be quite clear and evident that the learned Munsif came to the prima facie finding that from the annexures and materials on record it appeared that the defendant had been systematically endeavouring to usurp the assets and properties of the business for his own use and benefit to the detriment of the plaintiff and wanted to evict the plaintiff, his brother, from the residential premises. The learned Munsif was also satisfied that a prima facie case of infraction of the plaintiff's substantial rights by the defendant was made out and there was every likelihood that the plaintiff would suffer irreparable damages and losses by the acts of the defendant and on such consideration the ex parte interim order was also passed by the learned Munsif. Mr. Sengupta submitted that the outward form of the order should not be taken into consideration by this Court and this Court must look to the pith and substance of the impugned order and on such consideration it should hold that the trial Court was satisfied that a case for immediate inventory under Order 39, Rule 7 was made out and the Court in reality passed the impugned ex parte order on such consideration.

5. After considering the respective submissions of the learned counsels appearing for the parties I am inclined to accept the contention made by Mr. Sengupta. It appears to me that the learned Munsif on consideration of the materials on record

was satisfied that there was a case for imminent loss and prejudice to be suffered by the plaintiff by the act of the defendant and precisely on such consideration, the learned Munsif passed an ex parte ad-interim order on application for interim injunction. It appears to me that such consideration of imminent loss and prejudice to be suffered by the plaintiff also weighed with the learned Munsif and as such he passed the impugned ex parte order under Order 39, Rule 7 Civil P. C. As the learned Munsif was considering all the three applications namely applications for injunction, application for inspection and inventory and application for Receiver in one composite order he did not separately point out the case of imminent danger and urgency for an immediate ex parte order for inspection and inventory. Apart from this it appears to me that by the impugned order of inventory and inspection, the defendant will not suffer any loss or prejudice. Under the proviso to Section 115 Civil P. C. this Court is not to exercise the revisional power under Section 115 of the Civil P. C. and interfere with the impugned order if no injustice is caused to a party even if Clause (1) of Section 115 is attracted to the facts and circumstances of a case. Accordingly, this Rule fails and is dismissed without, however, any order as to costs.

6. A prayer for stay of the operation of the impugned order has been made by the learned Counsel appearing for the petitioner but in view of the finding made by the trial Court that there is likelihood of irreparable loss and injury to be suffered by the plaintiff and in view of my own finding that the defendant will not suffer any substantial prejudice by the impugned order, such prayer is refused.