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**(2015) 5 ADJ 239 : (2015) 111 ALR 1 : (2015) 3 AWC 3022 : (2015) 128 RD 572**

**Allahabad High Court**

**Case No:** First Appeal From Order No. 1867 of 2013

Ruchi Gupta

APPELLANT

Vs

Sudha Rani and Others

RESPONDENT

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**Date of Decision:** March 30, 2015

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 32 Rule 1, Order 32 Rule 32, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3

**Citation:** (2015) 5 ADJ 239 : (2015) 111 ALR 1 : (2015) 3 AWC 3022 : (2015) 128 RD 572

**Hon'ble Judges:** Krishna Murari, J; Pratyush Kumar, J

**Bench:** Division Bench

**Advocate:** B. Dayal, V. Sahai and J.J. Munir, for the Appellant; Divakar Rai Sharma, Advocates for the Respondent

**Final Decision:** Dismissed

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**Judgement**

Krishna Murari and Pratyush Kumar, JJ.

Heard Shri V. Sahai, learned Counsel for the appellant and Shri Diwakar Rai Sharma, Advocate appearing for respondents. By way of this First Appeal From Order, the defendant/appellant (hereafter referred to as "appellant") has challenged the legality of order dated 8.4.2013 passed by the Additional Civil Judge (Sr. Div.), Court No. 2, Aligarh in Original Suit No. 131 of 2013, Smt. Sudha Rani and another v. Smt. Ruchi Gupta, whereby the plaintiffs/respondents (hereinafter referred to as the respondents application under Order XXXIX Rules 1, 2 and 3, C.P.C. has been allowed and appellant has been restrained during the pendency of the suit not to sell more than her share or any specific portion of the property in dispute. She has been further restrained, during the pendency of the suit, not to interfere illegally in the use, occupation, possession and from carrying on business in the property in dispute.

2. Learned Counsel for the appellant has argued that the appellant is natural guardian of respondent No. 2, respondent No. 1 could not have filed the suit on behalf of respondent

No. 2 as next friend. He further submits that the appellant has pleaded before the Court below that she did not intend to alienate the property, therefore, there was no occasion for granting any injunction. He further submits that respondent No. 1 does not reside in the suit property, this fact has not been noticed in the impugned order. According to the learned Counsel for the appellant, in the impugned order, no finding has been recorded on the point of prima facie case, balance of convenience and irreparable loss in favour of the respondents, therefore the impugned order is illegal and deserves to be set aside.

3. In order to appreciate the aforesaid arguments, we would like to place on record the facts of the case in brief. According to the plaint averments respondent No. 1 is the mother-in-law of the appellant and respondent No. 2 is the grandson of the respondent No. 1 and son of the appellant. Piyush Gupta son of respondent No. 1 died on 23.7.2012. Appellant is his widow, all the parties of the suit being heirs of late Piyush Gupta have 1/3rd share in the property of the deceased. Details whereof has been given at the foot of the plaint. The appellant since 2nd September, 2012 is creating all sorts of problems by interfering in the respondents' joint use, occupation and enjoyment of dwelling house. On 5.1.2013 she alongwith her relatives tried forcibly to dispossess respondent No. 1 but with the intervention of the neighbors, they did not succeed, thereupon the appellant threatened to sell the entire suit property. The respondents have 2/3rd share in the suit property. The appellant is not willing for amicable partition. As a last resort, a suit for partition and prohibitory injunction has been filed. Since respondent No. 2 is minor, being grandmother, respondent No. 1, as next friend also arrayed him as co-plaintiff in the plaint. Along with the plaint, application under Order XXXIX, Rules 1 and 2 and section 151 of C.P.C. for interim injunction supported with affidavit has also been filed.

4. The appellant has filed her written statement, wherein relationship of the parties has been admitted. Rest of the averments made in the plaint have been denied. In the additional pleas, it has been stated inter-alia that she being mother, is the natural guardian of the respondent No. 2, the respondent No. 1 out of greed wants to usurp the property in suit, the appellant has never misbehaved with her. Partnership has been dissolved. Suit is bad for not including all the properties of the deceased, respondent No. 2 lives with her mother. The respondent No. 1 does not live in the said dwelling house mentioned as serial No. 1 at the foot of the plaint. The application for temporary injunction deserves to be rejected.

5. On behalf of respondents, counter-affidavit was filed, wherein averments made in the supporting affidavit were denied and facts pleaded in the written statement have been reiterated.

6. The Court below after hearing the arguments, has allowed the application for temporary injunction, the Court below has recorded a specific finding that in order to protect the interest of respondent No. 2, respondent No. 1 being next friend has a right to file the present suit for property in dispute enumerated at serial Nos. 1, 2 and 3 at the foot of the plaint, the respondents have their shares in the properties of late Piyush Gupta,

prima facie case is made out. In case of alienation by appellant not only multiplicity of suit will likely to result, but also respondents are likely to suffer irreparable loss. By granting injunction, the appellant would not put to any inconvenience whereas request for temporary injunction is denied, the respondents would be deprived of their ownership rights, therefore, balance of convenience lies in their favour thus interim injunction was granted in favour of the respondents.

7. Before dealing with the arguments advanced on behalf of appellant, we may like to observe that relationship between the parties is admitted. Ownership of late Piyush Gupta over the property in dispute is also not denied. According to the Hindu Succession Act, appellant and respondents are Class I heirs of late Piyush Gupta, therefore, they each have 1/3rd share in the property of the deceased. It is also not disputed that respondent No. 1 is an aged widowed woman and respondent No. 2 is an infant child, whereas appellant is young person.

8. So far as question of filing of suit by the next friend on behalf of respondent No. 2 by her grandmother is concerned, this has been objected on the ground that appellant being mother is the natural guardian. Filing of suit by or against the minor is regulated by Order XXXII, of the C.P.C. not by personal law of the parties. Rule 1 Order XXXII, makes it mandatory that every suit by a minor shall be instituted in his name by a person called next friend. Rule 4 provides who may act as next friend of the minor, it prescribes that such a person should be of sound mind and major, having no interest adverse to that of minor. In view of the legal position and the facts that for the custody or property of the respondent No. 2, no guardian has been appointed by any Court and respondent No. 1, having no interest adverse in the suit property to that of the minor respondent No. 2, suit has been properly instituted arraying respondent No. 2 as co-plaintiff by respondent No. 1, thus the first argument of the appellant fails.

9. The next argument for the appellant is that she has pleaded that she had no intention to alienate the property in dispute. In the plaint, this fact, i.e., intended alienation by her has been mentioned and in the written statement this fact has been denied. On affidavit, both the parties have reiterated their contention, after taking of the evidence, the Trial Court by way of final judgment would be able to conclude, which party is speaking the truth. At this stage, since ownership rights are admitted. Their alleged violation is disputed this appears to be a serious question to be tried during the trial is being co-sharer respondent No. 1 is in constructive possession on the whole of the property in dispute, therefore, other argument advanced by the learned Counsel for the appellant also appears to be without substance.

10. In the last, the Court below has categorically recorded its finding on the point of prima facie case, irreparable loss and balance of convenience while recording reasons in support thereof.

11. At this juncture, we would like to refer the observation of the Hon"ble Apex Court made in the case of [M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others](#), AIR 1995 SC 2372 : (1995) 2 ARBLR 249 : (1995) 84 CompCas 618 : (1995) 6 JT 3 : (1995) 4 SCALE 635 : (1995) 5 SCC 545 : (1995) 2 SCR 514 Supp : (1995) 2 UJ 698 . The relevant observation is quoted hereunder:

"The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the Court. While exercising the discretion the Court applies the following tests--(i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need to the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where the balance of convenience lies."

12. By these observation, the Hon"ble Apex Court has laid down the guidelines to ascertain whether prima facie case is made out, balance of convenience lies in favour of which party and who is likely to suffer irreparable loss.

13. What has been concluded earlier, if examined in the light of these observation, we find that prima facie case, i.e., a serious question to be tried during the trial has been made out. Both the respondents, one of advanced age and the other due to his infancy require protection of their interest. More so being co-sharers, in case of alienation, their interest would be adversely to be affected, therefore, balance of convenience lies in their favour, whereas due to interim injunction appellant is put to no inconvenience. The respondents dispossession from the immovable property would amount to irreparable loss, as it cannot be compensated by money.

14. In view of the above, we are satisfied that the impugned order suffers no illegality. It is well reasoned order and discretion has been judicially and soundly exercised. Arguments submitted by the learned Counsel for the appellant are not substantiated from the record and they deserve to be rejected. The impugned order does not warrant any interference, therefore, the appeal deserves to be dismissed.

15. Accordingly, the FAFO No. 1867 of 2013 is dismissed. Parties to the appeal will bear their own costs.