
Tazmul Ali and others Vs Md. Ulairaja

Civil Revision No. 8 of 1973

Court: Gauhati High Court

Date of Decision: May 11, 1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Section 115, 151, 94#Constitution of India, 1950 â€”
Article 133#Criminal Procedure Code, 1973 (CrPC) â€” Section 145, 147, 151

Citation: AIR 1978 Guw 56

Hon'ble Judges: N. Ibotombi Singh, J; M. Sadananda Swamy, J; K.M. Lahiri, J; D. Pathak, J;
Baharul Islam, J

Bench: Full Bench

Advocate: B.K. Das, for the Appellant; C.R. De, for the Respondent

Final Decision: Allowed

Judgement

M. Sadanandaswamy, J.

The petitioners brought a suit for a declaration that the final decree passed in Title Suit No. 12 of 1968 in the

Court of the District Judge, Cachar is void and inoperative. They alleged that the appointment of the Amin Commissioner and apportionment of

shares were all done behind their back, that the final decree for partition has not been engrossed on proper stamp paper and therefore not existent

in the eye of law and inoperative. The suit was numbered as Title Suit No. 35 of 1970 in the Court of the Assistant District Judge, Cachar, Silchar.

The petitioners prayed for an ad interim injunction against the defendants restraining them from executing the said decree. The defendants filed their

objections. The learned Assistant District Judge heard both the parties and came to the conclusion that there was no valid and proper final decree

in Title Suit No. 12 of 1968 as it was not drawn up on the requisite stamp paper. He held that the petitioners have established a prima facie case

and are entitled to an injunction and that irreparable injury would be caused to them if the decree is allowed to be executed. He also held that great

inconvenience would be caused to the petitioners if injunction is not granted. He, therefore, ordered that the ad interim injunction issued earlier in

favour of the petitioners should continue. The respondent preferred an appeal against the said order. The Lower Appellate Court relied on the

decision of this Court in ILR (1952) 4 Ass 160: (AIR 1963 Ass 104) (Abdul Hamid Khan v. Tridip Kumar) wherein it has been held that the

execution of a decree does not amount to an injury and that an injunction cannot be issued restraining the decree-holder from executing the decree,

even though hardship may be caused to the judgment-debtor. In view of this decision injunction was vacated. Against this order a Misc. Appeal

was filed by the present petitioners. When the appeal came up for hearing before a learned Single Judge he was of the opinion that the appeal

should be heard by larger Bench in view of conflicting decisions of this Court itself on the question as to whether the execution of a decree

obtained in a previous suit can be stayed by an injunction in a subsequent suit where the decree of the previous suit was challenged on the ground

of fraud. The appeal thereafter came up before a Division Bench. It was conceded before the Division Bench that the Misc. Second Appeal is not

competent against the Appellate Order, but it was submitted by the present petitioners that an alternative revision application had been filed. The

Division Bench, therefore, ordered that the matter may be heard as a Revision Petition, When the Revision petition again came up before the

Division Bench it noticed that there were several Single Bench decisions to the same effect as AIR 1953 Ass 104 (Abdul Hamid Khan v. Tridip

Kumar) but that there was an unreported decision of a Division Bench of this Court in Misc. Appeal (F) No. 23 of 1956 (Ganeshilal Khaitan v.

Kshitish Chandra Kar) rendered on 19-5-1958 wherein this Court held that O. 39, R. 2 was attracted when a temporary injunction was sought for

against the execution of a decree in a suit challenging the validity of the decree on the ground of fraud. It was also held that in any event a

temporary injunction could be granted under S. 151 C.P.C. The Division Bench, therefore, was of the opinion that this is an important question of

law which should be decided by a Special Bench. That is how it has come up before this Bench.

2. In ILR (1952) 4 Ass 160: (AIR 1953 Ass 104) (Abdul Hamid Khan v. Tridip Kumar) two minors instituted a suit for a permanent injunction

restraining the defendants from executing the decree alleging that there was no service on them, their guardian was not properly appointed, their

interests were not looked after and that the decree had been obtained against them by the defendants by fraud. Following the decisions in V.

Thirumalachariar Vs. Athimoola Karayalar and Others, ; Ayyamperumal Nadar and Others Vs. Muthuswami Pillai, ; AIR 1949 Mad 104 and

Ambaji Balwantrao Mane Vs. Hanmantrao Bajirao Deshmukh, the learned single Judge held that a rightful execution of a decree cannot be

prevented by a temporary injunction since executing a decree is an act in the exercise of a legal right and could not amount to an injury caused to

the plaintiff under Rule 2 of Order 39 of the Civil Procedure Code.

3. In Misc. Appeal (F) No. 23 of 1956 (Assam) (Ganeshilal Khaitan v. Kshitish Chandra Kar) the plaintiff brought a suit for declaration that the ex

parte decree for ejectment against him was obtained by fraud and not binding on him. It was held that the subject-matter of the suit itself was the

decree which is sought to be executed and that under those circumstances the case is covered by O. 39, R. 2 C.P.C. (wrongly typed as O. 39, R.

1). It was further observed that in any view of the matter the court below had jurisdiction apart from O. 39, R. 2 to issue an injunction under S.

151 of the Civil Procedure Code. This decision was followed by a learned Single Judge in Civil Revn. No. 56 of 1961 (Bhagawan Devi v, Mrs.

Noda Mary Rodborne) decided on 4-12-1961 (Assam). In that case the plaintiff alleged that her landlord colluded with her adopted son in order

to oust the plaintiff from the house and brought a Title Suit in which the plaintiff was not impleaded and obtained a decree. The suit was, therefore,

brought for a declaration that the decree was not binding on her and for an injunction restraining the execution of the decree. In Civil Revn. No. 96

of 1966 (Sri Renu Kar v. Sri Subhas Chandra Paul) decided on 25-3-1968 (Assam) a learned Single Judge of this Court held that the Court has

inherent powers under S. 151, C.P.C. apart from O. 39 to grant the relief of injunction to a party. In Civil Revn. No. 37 of 1971 (Arati Rani Bass

v. Prafulla Kumar Deb) decided on 3-11-1971 (Assam) the Single Bench decisions of this Court in AIR 1953 Ass 104, AIR 1955 Ass 174,

(1970) LR Ass 272: (AIR 1971 A&N 95), (1971) LR Ass 254: (AIR 1971 Ass 151) wherein it has been held that the execution of a valid

decree is not an injury within the meaning of O. 39, R. 2 were followed. The plaintiff in that suit had prayed for a declaration that the sale deed

executed in favour of the opposite party is invalid and inoperative and that the plaintiff had acquired valid title by the sale deed in her own favour.

She had not applied for a temporary injunction restraining the opposite party from executing the decree. She simply prayed for an injunction

restraining him from disturbing her possession. The learned Single Judge held that since the plaintiff had not challenged the decree in the form of a

suit on the ground of fraud or on any other ground, the decisions in Misc. Appeal (First) No. 23 of 1956 and Civil Revn. No. 56 of 1961 (Assam)

did not appeal to the facts of that case.

4. In Firm Ishar Das Devichand and Another Vs. R. B. Prakash Chand and Another, an eviction order of the Rent Controller had been obtained

by the defendant against the plaintiff. The plaintiff brought a suit for permanent injunction restraining the defendant from taking possession of the

premises in execution of the eviction order. The plaintiff filed an application under O. 38, Rules 1 and 2 and S. 151 of the C.P.C. for grant of

temporary injunction. The Trial Court dismissed the application holding that no prima facie case had been made out and that liability to be evicted

in execution of a valid order could not be said to be ""injury"" within the meaning of O. 39 R. 2. The question to be decided was whether the said

order was appealable. The Lower Appellate Court had held that the order of the Trial Court was passed under S. 151 C.P.C. and not under O.

39, Rules 1 and 2 and that therefore, no appeal lay. The order of the Lower Appellate Court and order of the High Court affirming that view were

held to be erroneous by the Supreme Court. The order of the Trial Court was held to be one under O. 39, R. 2 itself since it decided that what the

plaintiff was complaining of was not an injury within O. 39, R. 2. On merits the Supreme Court held that the plaintiff had not made out a prima

facie case and that the Trial Court had come to the conclusion that the balance of convenience was more in favour of the defendant than in favour

of the plaintiff. Since in their opinion the Trial Court had not exercised its discretion capriciously or arbitrarily it was held that it was not a case for

interference in appeal. But the question whether the liability to be evicted in execution of a valid order could be said to be an injury within the

meaning of O. 39, R. 2 was not decided by the Supreme Court. Incidentally, it may be noticed that the decision laid down that the scope of

interference in appeal with the discretion exercised by the Trial Court for granting or for refusing a temporary injunction under O. 39 is limited to

cases where the Trial Court has exercised its discretion capriciously or arbitrarily.

5. In AIR 1955 Ass 174 (Mt. Ladi Agarwallani v. Keolraj Sethi) the defendant had obtained an eviction decree against the firm of which the

plaintiff claimed to be a partner. The plaintiff had not been impleaded in that suit and challenged the validity of the decree. It was held by a learned

Single Judge of this Court, following AIR 1953 Ass 104, that the plaintiff was not entitled to an order or temporary injunction. In AIR 1955 Ass

156 (Kripa Natha Chakravarty v. Rup Chand Lunawat) the defendants had secured an order in their favour under S. 147 Cr. P.C. to use a

particular path or to have the right of way over it. It was held by a Division Bench of this Court that the defendants cannot be said to commit any

wrong or to cause any injury to the plaintiff by the exercise of the right conferred on them under the order passed u/s 147 Cr. P.C. It was,

therefore, held that no order of temporary injunction could be issued under O. 39, R. 2. This decision has been overruled by a Special Bench in

AIR 1960 Ass 111 (Brojendra Kumar v. Jitendra Chandra).

6. In AIR 1971 A&N 95 (Upendra Chandra v. Nabin Chandra) the defendant obtained a decree for eviction against some persons other than

plaintiffs. The plaintiffs claimed to be occupancy tenants in respect of a part of the land covered by that decree, alleged that an ex parte decree had

been obtained fraudulently and prayed for a declaration that the decree obtained by the defendant was not binding on or executable against the

plaintiffs, who were not parties in the former suit. It was held by a learned Single Judge, following Anisetti Venkanna alias Venkateswara Rao and

Another Vs. Rimalapudi Venkata Rao and Another, , that the execution of a lawfully obtained decree could not cause an injury within the meaning

of O. 39, R. 2 of the C.P.C. and temporary injunction was refused.

7. In AIR 1971 A&N 151 (Mira Rani Das v. Forman Ali) the defendants obtained a decree for possession. The plaintiffs claimed to be in

occupation of the land relating to the decree as tenants and claimed to have acquired occupancy right over the same They prayed for a declaration

of their jote right over the suit land and for perpetual injunction against the defendants restraining them from taking possession in execution of the

decree obtained by them. It was held by a learned Single Judge of this Court, following AIR 1955 Ass 174 and AIR 1971 A&N 95, that the

execution of a lawful decree cannot be restrained by a temporary injunction under Rules 1 and 2 of O. 39 of the C.P.C. In both these decisions the

Division Bench decision in Misc. Appeal (First) No. 23 of 1956 (Assam) was not noticed.

8. In 1976 Ass LR 224 (Kanai Das v. Mukteswar Rai) the plaintiffs prayed for a declaration that the decree obtained by the defendants against

the plaintiff in an earlier suit was obtained by fraud and collusion and that the said decree be declared void. He also prayed for a permanent

injunction restraining the defendants from executing the decree. The learned Single Judge distinguished the decision in AIR 1971 A&N 95

(Upendra Chandra v. Nabin Chandra) and AIR 1971 A&N 157 (Mira Rani Das v. Forman Ali) on the ground that in those cases it was held that

the execution of a lawfully obtained decree cannot be restrained by a temporary injunction and that if the allegation is that the decree was not

lawfully obtained the Court must consider whether the said allegation has any foundation and whether there is a prima facie case to go for trial, it

was observed that under these circumstances if it is found by the Court that there are allegations of fraud or that the decree was obtained

unlawfully or illegally then the provisions of O. 39 would be attracted. The decisions in Civil Revn. No. 56 of 1961 and Misc. Appeal (First) No.

23 of 1956 (Assam) were followed, and it was held that in any case S. 151 C.P.C. would apply. The orders of the Lower Courts refusing

temporary injunction were set aside and the case was remanded to the Trial Court to consider whether temporary injunction sought for could be

granted on the facts and circumstances of the case.

9. In AIR 1957 M.B. 95 (Hemant Kumar v. Ayodhya Prasad) it has been held, following two unreported decisions of the same court, that no

order of temporary injunction can be made under O. 39, R. 1 or R. 2 or under S. 151 of the C.P.C. to restrain a decree-holder from executing the

decree in his favour so long as it stands, and that merely because a plaintiff institutes a suit for declaration that the decree is not binding on him and

that he hopes to succeed In the suit, it cannot be held that the execution of a decree would amount to committing an injury. But it is also to be

noticed that even on the facts of that case it was not a fit case for grant of temporary injunction. The Court came to the conclusion that the decree

which had been obtained by the defendant on the basis of a mortgage executed by the plaintiff's father would be binding on the son even if the

mortgage was neither for legal necessity nor for payment of an antecedent debt. It was not the case of the plaintiff that the debt in respect of which

the mortgage was executed by his father was for an immoral or illegal purpose.

10. In AIR 1949 Mad 104 (Subramanian v. Seetarama Aiyar) the defendant had obtained a decree for possession in a suit for partition which was

a compromise decree. One of the plaintiffs was the wife and the other plaintiffs were the minor sons of the managing member of the joint family at

the time, who was a party to the partition suit. The contention that the decree was not binding on the plaintiffs because they were not parties was

held to be unsustainable. It was also observed that no authority had been cited to show that proceedings in execution of a compromise decree

which has not been set aside would amount to committing an injury. It was, therefore, held that in executing the decree the defendant cannot be

said to be committing any injury as contemplated by R. 2 of O. 39. This decision was followed by a learned Single Judge in Mangai Achi Vs. S.

Asokan and Another, .

11. In Anisetti Venkanna alias Venkateswara Rao and Another Vs. Rimalapudi Venkata Rao and Another, the suit was filed for a declaration that

the promissory note on the basis of which the defendant had obtained an ex parte decree against the father of the plaintiff was not binding on the

minor plaintiff as the debt under the promissory note was tainted with immorality and illegality and therefore the shares of the minors plaintiffs could

not be proceeded with in execution of the decree. Under Cl. (c) which was added by the Andhra Amendment Act to O. 39, R. 1 an injunction can

be granted if ""the defendant threatened to dispossess the plaintiff or otherwise caused injury or loss to the plaintiff."" It was held that the Clause is

inapplicable to cases of decree-holder who are executing their decrees. It was also observed that it was not a fit case for interference since relief

under O. 39 could be granted only in appropriate cases. The scope of the said cl. (c) of O. 39, R. 1 fell for consideration before a Full Bench in

Datla China Appalanarasimha Raju Vs. Nadimpalli Seethayamma Garu and Others, , The defendant in that case purchased two items of property

in execution of a decree obtained by him and applied for delivery of possession of the same. The plaintiffs' suit was for a declaration of title in

respect of the said items and for a permanent injunction restraining the defendant from taking delivery of the same. The suit was dismissed and

against the decree of dismissal the plaintiffs preferred an appeal to the High Court. Pending the appeal, they prayed for a temporary injunction

restraining the defendant from taking delivery of the said properties. It was not disputed before the Full Bench that the Court has no power to grant

temporary injunction in that case under O. 39, R. 1 and R. 2, but it was contended that cl. (c) added by the Andhra High Court enabled it to do

so. The decision in Aniseti Venkanna alias Venkateswara Rao and Another Vs. Rimalapudi Venkata Rao and Another, was approved and it was

held that a temporary injunction cannot be issued to restrain the defendant from seeking delivery of possession in execution of the decree obtained

by him. It was suggested that in appropriate cases the party can ask for appointment of a Receiver to take charge of the property pending the

settlement of the dispute.

12. In Gaumont Kali Private Ltd. Co. Vs. Badri Prasad Jaiswal, the decision in AIR 1949 Mad 104 and Hemant Kumar Vs. Ayodhya Prasad,

were followed. It is to be noticed that on the facts also the Court felt that it was not a proper case in which a temporary injunction could be granted

in favour of the plaintiff. That was a case in which the plaintiff prayed for a declaration that the decree obtained by the defendant was fraudulent.

13. As against this there are decisions of other High Courts which take the contrary view. In Umapati Choudhuri and Others Vs. Subodh Chandra

Choudhuri and Others, a Division Bench held that the widest interpretation to the word "injury" should be given for doing justice between the

parties while considering a prayer for temporary injunction under O. 39, R. 2 and that there is no reason to exclude the injury which the plaintiff is

likely to suffer if the defendant executes the decree from the meaning of that word under Order 39, Rule 2. In Surendra Singh and Others Vs. Lal

Sheoraj Bahadur Singh and Others, it has been held that since "injury" is harm or damage to the right of a person or property, a decree which

prima facie appears to be illegal or void can also be construed as causing injury to the person affected by it. It was observed that the very object of

granting a temporary injunction is to maintain status quo while the rights of the parties are being litigated and thus preventing injustice from being

done while the litigation goes on. This object would be defeated if the Court was to shut its eyes to the patent facts brought to its notice by the

party seeking the injunction merely because the other party has by hook or crook managed to obtain a decree or order in his favour. It was also

observed that merely because a party chooses to file a suit challenging the decree or order would not suffice to destroy the presumption in favour

of a decree-holder and that a heavy burden would lie on the applicant to produce strong and cogent evidence to satisfy the Court that the grounds

on which the decree or order is challenged are fairly strong and that there is a reasonable possibility of success in the suit.

14. In AIR 1959 Mys 75 (Kittamma v. Subba Rai) the suit was for a declaration that the order of eviction passed under the Rent Control Act was

without jurisdiction and a nullity and for an injunction restraining the defendants from taking possession of the suit house. The plaintiffs also prayed

for a temporary injunction restraining the defendants from executing the order of eviction. It was held that if a person seeks to execute a totally

invalid order, the person against whom such execution is sought has the right to say that he shall not be made to suffer the consequences of an

invalid order and, therefore, to take action either to prevent such execution or to repair the damage caused by such execution by approaching a

competent Court for relief. On the facts of the case it was held that the plaintiffs had a prima facie case. It was also held that there was a fair and

substantial question to be decided between the parties as to whether the order under the Rent Control Act was or was not without jurisdiction. It

was, therefore, held that the plaintiffs would be entitled to an order of temporary injunction if the Court was satisfied as to the other two

requirements for grant of temporary injunction, namely, irreparable injury and balance of convenience,

15. The three principles which govern the grant of a temporary injunction are--(1) Whether there is a prima facie case in favour of the applicant,

(2) Whether any irreparable injury would be caused to the applicant if the injunction is not granted, and (3) Whether the balance of convenience is

in favour of granting a temporary injunction. The question is whether relief under O. 39, R. 2 is excluded in cases where the defendant has obtained

a decree or order and is executing it and the plaintiff alleges that the decree or order is void or is not binding on him.

16. The plaintiff may allege that the decree has been obtained fraudulently or that the decree is not binding on him, either because he was not a

party to the suit in which the decree was obtained or for other reasons. It cannot be said that the plaintiff can never succeed in such a suit.

Supposing the plaintiff succeeds in such a suit after trial. The plaintiff in such a case might suffer irreparable injury due to the failure to obtain an

order of temporary injunction in his favour during the pendency of the suit. The plaintiff may be a minor challenging the validity of the decree or its

binding nature on the ground that there was gross negligence or fraud on the part of his guardian in the suit in which the defendant has obtained a

decree. The plaintiff may be a junior member of a joint Hindu family challenging the decree based on an alienation by the manager as not binding on

him. The decree may be challenged on the ground that it was fraudulently obtained. These are illustrative and not exhaustive of the cases in which

the plaintiff may-succeed in establishing that the decree obtained by the defendant is void or not binding on the plaintiff. In such cases injustice may

result if the plaintiff is not granted temporary injunction and the status quo maintained. Temporary injunction may also be necessary to prevent

multiplicity of proceedings.

17. The decree itself may have been obtained by the defendant as part of the fraud to deprive the plaintiff of valuable rights or to cause other injury

to the plaintiff. If the plaintiff ultimately succeeds in establishing that the decree is void or is not binding on him the execution of such a decree may

have caused irreparable damage to the plaintiff in the meanwhile before the suit is finally decided. In such cases the execution of the decree would

be the execution of a void decree or a decree not binding on the plaintiff and cannot but be termed as unlawful or wrongful. Therefore, the

execution of the decree in such cases will certainly amount to "injury" under O. 39, R. 2.

18. Hence, if the plaintiff establishes that he has a prima facie case i.e., that he prima facie is likely to succeed in the suit then in such cases it means

prima facie that injury is likely to be caused to him as contemplated under O. 39, R. 2, if the decree is allowed to be executed. It is true that the

existence of a decree is a very important circumstance against the plaintiff. Hence, it is more onerous for the plaintiff to establish a prima facie case

where there is a decree in existence than in other cases. But it has to be remembered that the existence of a decree in favour of the defendant is

only one of the circumstances, though an important one, to be considered by the Court while deciding whether a prima facie case is made out or

not. If the plaintiff in such a case establishes a prima facie case for the grant of a temporary injunction, even in spite of the existence of a decree in

favour of the defendant, there is no reason why relief by way of temporary injunction should be refused just because there is a decree in existence

in favour of the defendant. Of course, the Court has to consider the other requirements, namely, the likelihood of irreparable injury and the balance

of convenience also. In most of the cases which take a contrary view the Court came to the conclusion on facts that a prima facie case had not

been made out or that it was not a fit case for grant of temporary injunction.

19. Thus, there" is no reason to deny relief by way of temporary injunction if the conditions requisite for the grant of the same are satisfied just

because there is in existence a decree in favour of the defendant. There cannot be any difference in the application of the principles for the grant of

temporary injunction just because there is a decree in favour of the defendant. The circumstance that there is a decree in favour of the defendant

only makes it more difficult for the plaintiff to establish prima facie case. But if he does so and also satisfies the Court as to the likelihood of

irreparable injury and as to the balance of convenience in favour of granting temporary injunction, then there can be no difference between such a

case and a case in which there is no decree already in existence.

20. It is also to be remembered that the existence of a decree is no bar to the grant of temporary injunction under O. 39, R. 1 or to an order of

stay of execution under O. 21, R. 29 of the C.P.C. We are, therefore, of the opinion that the word injury in O. 39, R. 2 of the C.P.C. does not

exclude the execution of a decree or order or the exercise of any rights under a decree or order.

21. In Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, it has been held that the inherent powers of the Court under S. 151 C.P.C.

are to be exercised in very exceptional circumstances for which the Code lays down no procedure. In Arjun Singh Vs. Mohindra Kumar and

Others, it is held that the inherent power of the Court cannot override the express provisions of the law, in other words, 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. It is further held that 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. In Union of India (UOI) Vs. Ram Charan and

Others, it has been held that the inherent powers under S. 151 C.P.C. cannot be invoked for the purposes of impleading the legal representatives

of a deceased respondent, if the suit had abated and the Court is not satisfied that there was sufficient cause for not impleading them in time. in

Ramkarandas Radhavallabh Vs. Bhagwandas Dwarkadas, it has been held that Rule 4 of Order 37 expressly gives power to a Court to set aside

a decree passed under the provisions of that order and that there is no scope to resort to S. 151 C.P.C. setting aside such a decree. The principles

laid down in Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, referred to hereinabove were cited with approval, In Nain Singh Vs.

Koonwarjee and Others, it has been held that the inherent jurisdiction of the Court under S. 151 C.P.C. should not be invoked if there are specific

provisions in the Code which would meet the necessities of the case by way of remedy.

22. In view of the fact that there is specific remedy provided under O. 39, R. 2 when a person seeks temporary injunction against the execution of

a decree or order against the exercise of the rights under a decree or order, the inherent powers of the Court under S. 151 C.P.C. cannot be

invoked in such cases.

23. The Lower Appellate Court has vacated the order of temporary injunction on the sole ground that the Court has no jurisdiction to grant

temporary injunction under O. 39, R. 2. This amounts to failure to exercise the jurisdiction vested in it under O. 39, R. 2 C.P.C. The Revision

Petition is allowed and the order of the Lower Appellate Court is set aside and the appeal is remanded to the Lower Appellate Court for fresh

disposal according to law.

24. Parties will bear their own costs in this Revision Petition.

Baharul Islam, J.

25. This application under S. 115 of the C.P.C. is by the plaintiffs numbering 12. They Instituted Title Suit No. 35 of 1970 in the Court of the

Assistant District Judge, Cachar, out of which this application arises, for a declaration that the final decree passed in Title Suit No. 12 of 1968 by

the District Judge, Cachar had been obtained by fraud perpetrated by the defendant. Title Suit No. 12/68 aforesaid, had been for partition. The

plaintiffs" (petitioners herein) allegation was that they were defendants in Title Suit No. 12/68 and the opposite party herein was the plaintiff. For

allotment of plots of land of that suit an Amin Commissioner was appointed for apportionment of shares, but without any notice to the petitioners,

in the suit they also prayed for a decree for a perpetual injunction restraining the defendant from executing the final decree in Title Sui No. 12/68 of

the Court of the District Judge aforesaid,

26. Along with the plaint they also filed an application for a temporary injunction. The Assistant District Judge granted an ad interim injunction, The

learned Assistant District Judge, after hearing the parties, made his order ad interim injunction absolute, having, held that the plaintiff were ""entitled

to an injunction against the execution of the decree passed in Title Suit No. 12, 68."" He further held: ""The execution of decree lawfully obtained

cannot be restrained by an injunction. But here in this present case, the final decree obtained by the defendant does not prima facie appear to be a

valid and lawful one.

27. The defendant (opposite party herein) preferred an appeal, being Misc. Appeal No. 7 of 1970 before the District-Judge, Cachar at Silchar.

Relying on a Single Bench decision of this Court in the case of Abdul Hamid Khan v. Tridip Kumar, reported in ILR (1952) 4 Ass 160: (AIR

1953 Ass 104) the learned District Judge set aside the order of injunction passed by the Assistant District Judge, holding:

..... unless the plaintiff's case is covered under O. 39 Rules 1 and 2 C.P.C. no injunction restraining the defendant can be legally granted.....it has

been settled beyond doubt that the provisions of O. 39 Rules 1 and 2 C.P.C. cannot be resorted to, to restrain a decree holder from executing the

decree even though hardship may be caused to the judgment debtor.

28. This order of the District Judge has been challenged by the plaintiffs by the present application.

29. The matter came up for hearing before a Division Bench of this Court The Division Bench found that then was a conflict of opinion of this

Court the case reported in AIR 1053 Ass 104 (supra) and a Division Bench unreported decision of this Court in the case of Ganeshilal Khaitan v.

Kshitish Chandra Kar: M.A. (F) No. 23 of 1956 disposed of on 19-5-1958 (Assam). At the latter case has not been reported the subordinate

courts have been following the Single Bench decision reported in AIR 1953 Ass 104 (supra) The Division Bench also found the there were ""certain

decisions of other High Courts taking a contrary view to the view expressed in the above Division Bench decision (M.A. (F) No. 23 of 1956

(Assam))."" So the Division Bench has referred the case to a Special Bench. The case came up for hearing before a Special Bench consisting of

three learned Judges, but in view of the importance of the point involved the Special Bench has referred it to a Full Bench. This is how the matter

has come up before this Full Bench.

30. In AIR 1953 Ass 104 (supra) Ram Labhaya, J. sitting singly observed (at p. 105):

The decision of the question obviously turns on the interpretation of the word "injury" occurring in R. 2 of O. 39, It is a question whether taking

execution of a subsisting decree which is the subject-matter of a litigation or which is being challenged by the plaintiff in a case amounts to an injury

of the kind contemplated by R. 2 of O. 39.....But, it seems to me that a person may not be prevented from executing a decree obtained by

him on the ground that it causes injury to the plaintiff. The execution of a decree is in the exercise of a legal right and it cannot be placed on a par

with the breach of a contract or injury to property or the disturbance of other rights vesting in a particular individual.

31. Sub-rule (1) of R. 2 of O. 39, which is the relevant rule, and which falls for our interpretation is in the following terms: (material portion only)--

2. Injunction to restrain repetition or continuance of breach.--(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 injury

complained of.....

32. The question turns on the interpretation of the expression ""the injury complained of"", in other words whether execution of a decree amounts to

"injury" within the meaning of sub-rule (1) of R. 2 of O. 39.

33. The meaning of the word "injury" is a wrong or "damage" (see Chambers"s Dictionary). "Injury", therefore, is an act of a party which is

wrongful ~ that is wrongful in the eye of law, and not a legitimate act of a person which under the law he is entitled to do.

34. The term "injury" also means an omission contrary to the law and involves infringement of any right vested in some person. A lawful exercise of

a right cannot, therefore, be called an "injury".

35. No doubt the execution of a decree may, actually, and, in fact, result in some damage to the judgment-debtor but it will not be an injury in law

as the decree-holder has a right to execute the decree. "Decree" has been defined under the Civil P.C. as meaning ""formal expression of an

adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the

matters in controversy in the suit and may be either preliminary or final."" A decree formally passed by a court is a decree within the definition.

Decree may be of three kinds: (i) a decree lawfully obtained, in other words, a valid decree, (ii) a decree fraudulently or collusively obtained

against the judgment-debtor, and as such, not binding on him, or (iii) a decree otherwise valid but not binding on a third party who was not a party

to the suit in which the decree was passed. The judgment-debtor in the first two cases, and the third party in the third case, may file a suit for

declaration that the decree was invalid as against him and for its cancellation and may also pray for an injunction. If a decree of the first category is

executed against the judgment-debtor, no injury can be said to be caused against him, inasmuch as the decree-holder has a legal right to execute

the decree against the judgment-debtor. If a decree of the second or third category is executed, and its execution is not stayed by a temporary

injunction, injury will be caused to the plaintiff, in case he ultimately wins the suit.

36. In order, therefore, that execution of a decree may fall within the mischief of the term "injury" under sub-rule (1) of R. 2 of O. 39 it must be a

decree which is prima facie not binding on the plaintiff, such as a decree obtained by fraud or collusion against him, against a minor, not properly

represented in the suit and the like. Execution of a valid decree against a plaintiff who was a party to the suit and prima facie binding on him cannot

be said to be an injury within the meaning of sub-rule (1) of R. 2 of O. 39, C.P.C.

37. In AIR 1953 Ass 104: (ILR (1952) 4 Ass 160) Ram Labhaya, J. (sitting singly) observed (at p. 105 of AIR):

A person cannot be prevented from executing a decree obtained by him on the ground that it causes injury to the plaintiff. The execution of a

decree is in the exercise of a legal right and it cannot be placed on a par with the breach of a contract or injury to property or the disturbance of

other right, vesting in a particular individual.

38. Relying on the above decision, another learned single Judge in the case of Ladi Agarwallani v. Keolraj Sethi, reported in AIR 1955 Ass 174,

held the same view.

39. The proposition that ""a person cannot be prevented from executing a decree obtained by him on the ground that it causes injury to the plaintiff"" ,

has been expressed in very wide terms. The above two decisions, in my respectful opinion, have not laid down the correct proposition of law. In

the case of Upendra Chandra v. Nabin Chandra, reported in AIR 1971 A&N 95 , another learned single Judge, relying on Firm Lalchand

Nathmal and Others Vs. Firm Balaram Rameshwar and Others, and Anisetti Venkanna alias Venkateswara Rao and Another Vs. Rimalapudi

Venkata Rao and Another, :

..... the injury contemplated in the provision of O. 39, R. 2 would exclude the execution of a lawfully obtained decree. In the eye of law no injury

would be caused by the execution of a lawful decree.

40. The same view has been expressed by another learned single Judge of this Court in the case of Mira Rani Das v. Forman Ali, reported in AIR

1971 A&N 157 in which his Lordship held (at p. 159):

I hold that execution of a lawful and subsisting decree cannot be restrained by a temporary injunction under R. 1 or 2 of O. 39 of the C.P.C.

In the above case his Lordship has referred to, and relied on, the decision reported in AIR 1971 A&N 95 (supra). The same view has also been

taken in the decision in Civil Revn. No. 37 of 1971 (Assam), Arati Rani Das v. Prafulla Kumar Deb, disposed of on 3-11-1971 by yet another

learned single Judge of this Court.

41. Similar views were expressed in the following cases:

In Gaumont Kali Private Ltd. Co. Vs. Badri Prasad Jaiswal, , which has been cited before us, the Patna High Court held (at p. 243):

An order of temporary injunction cannot be made under O. 39, R. 2 to restrain the decree-holder from executing an ex parte decree in his favour

so long as the decree stands and merely because the plaintiff institutes a suit for declaration that the decree obtained by the decree-holder is

fraudulent without praying for setting aside the ex parte decree it cannot be held that the execution of the decree amounted to committing an injury.

This decision relied on AIR 1949 Mad 104 and Firm Lalchand Nathmal and Others Vs. Firm Balaram Rameshwar and Others, . In the Patna case

(supra) injunction was refused on the ground that the alleged fraudulent decree was not sought to be set aside and, as such, it could be executed

against the plaintiff and for that reason injunction was refused.

42. The Madras High Court in the case of Mangai Achi Vs. S. Asokan and Another, held:

Where a decree-holder has lawfully obtained a decree, he commits no illegal injury by executing the decree. Consequently no injunction against

decree execution can be granted.

43. Injunction was refused as execution of a ""lawfully obtained decree"" was not an injury.

44. The Madhya Pradesh High Court in the case of Surendra Singh and Others Vs. Lal Sheoraj Bahadur Singh and Others, held that if a decree or

order is obtained by fraud or otherwise not binding or enforceable against the plaintiff an injunction could be granted under O. 39 restraining the

decree-holder defendant from executing the decree.

45. In the case reported in AIR 1976 J & K 72, Jaswant Singh, C.J. (as he then was) held (at p. 76):

..... execution of a decree which is an exercise of a valid legal right cannot constitute commission of an injury within the meaning of sub-rule (1) of

R. 2 of O. 39 of the Code.

46. The above decisions have examined only one aspect, namely, the execution of a lawfully obtained decree and not the other aspect, namely, the

execution of an unlawfully obtained decree or a decree not binding on the plaintiff. The decisions so far as they go, have expressed the correct law,

but in my respectful opinion, have not laid down the complete proposition of law.

47. In the case of Ganeshilal Khaitan v. Kshitish Chandra Kar (Misc. Appeal (F) No. 23 of 1956) disposed of on 19-5-1958 (Assam), a Division

Bench of this Court observed that execution of an ex parte decree obtained by fraud was not binding on the plaintiff and, as such, a temporary

injunction could be granted under "O. 39, R. 1" (sic) (it should be R. 2) of the C.P.C.

48. The above decision was relied on by another learned single Judge in the case of Bhagawan Devi v. Mrs. Noda Mary Rodborne, Civil Revn.

No. 56 of 1961, disposed of on 4-12-1961 (Assam).

49. These two decisions, by implication, have laid down that execution of an unlawfully obtained decree can be restrained under O. 39, R. 2,

C.P.C.

50. In a later decision, in the case of Kanai Das v. Mukteswar Rai, reported in 1976 Ass LR 224, a more accurate view has been expressed by a

learned single Judge of this Court. It was held:

In my view, the mere existence of a decree by a party does not disentitle a Court to restrain him from executing the decree. If the decree is

obtained by playing fraud on the Court, the decree cannot be said to be lawfully obtained decree.

It has been further observed:

If the Court finds that the decree was a lawful and existing decree, in my view, the Court cannot and should not issue any injunction against the

decree-holder, but when grave allegations are made, such as fraud and collusion and the Court finds that an affidavit in support of the allegations

are prima facie sustainable or at least should go for a trial, I am of the opinion that there cannot be any bar to exercise the jurisdiction of the Court

under Order 39 against such a decree-holder.

51. In my view, as indicated earlier, the execution of a decree obtained by fraud or collusion or a decree arising out of a suit to which the plaintiff in

the subsequent suit was not a party, and as such not binding on him, amounts to injury within the meaning of sub-r. (1) of R. 2 of O. 39 of the

C.P.C. and, an injunction, in an appropriate case, may be granted restraining the defendant from executing the decree. In other words the

execution of a decree prima facie valid and binding on the plaintiff is not an injury and cannot be restrained by an injunction under O. 39, R. 2(1)

C.P.C, while the execution of a decree prima facie invalid and not binding on the plaintiff amounts to an injury and can be restrained by an

injunction under O. 39, R. 2(1) C.P.C.

52. For the view taken above, the other submission of learned counsel that if the case is not covered by O. 39, R. 2(1), injunction can be issued

under S. 151 of the C.P.C. need not, in my opinion, be examined.

53. In the instant case the learned District Judge taking an erroneous view of the law committed an error in holding that no injunction can at all be

granted restraining the defendant from executing a decree. His impugned order is set aside and the case is remanded to him for disposal of the

appeal in accordance with law.

54. The petition is allowed. The Rule is made absolute. For the reasons given above, I agree with the order proposed by my learned brother

Sadanandaswamy, J. that the impugned order be set aside, and Misc. Appeal No. 7 of 1970 be remanded to the learned District Judge, Cachar,

for disposal according to law. Parties to bear their own costs.

Pathak, J. (For himself and on behalf of Lahiri, J.)

55. We entirely agree with the conclusion reached by our learned brothers that the petition be allowed. We are only adding a few lines in support

of that conclusion. The facts leading to the present proceedings are fully set out in the leading judgment and we do not like to resuscitate the same.

56. The crucial question for consideration is whether a disputed decree and the execution thereof is an "injury" within the meaning of R. 2 of O. 39

C.P.C. There is no quarrel that the existence of a decree in favour of the decree-holder gives him a right to execute the same and in such execution

it cannot be said to be an "injury" within the meaning of R. 2 of O. 39 C.P.C. But in order to have validity of the above proposition, the decree in

that context, is understood to be lawfully passed by a Court of competent jurisdiction following the procedures laid down by law and which is not

a nullity on any known principle of law nor obtained by fraud.

57. However, a different consideration would arise when a plaintiff files a suit in order to set aside the disputed decree on the allegation of fraud

which is prima facie made out and in that suit an injunction is sought for restraining the defendant decree-holder from executing the decree. It is

true, where the application is to restrain the exercise of an alleged right, the plaintiff should show that there are substantial grounds for doubting the

existence of the right, It requires a very strong case indeed to induce the Court to interfere with an admitted right upon an alleged equity, The

plaintiff must also be able to show that an injunction until the hearing, is necessary to protect him from irreparable injury.

58. Where the plaintiff is asserting a right, he should show a strong prima facie case at least in support of the rights he asserts; but the mere fact that

there is a doubt as to the existence of such a right, is not sufficient to prevent the Court from granting an interlocutory injunction although it is a

matter of serious consideration.

59. In cases of interlocutory injunction in aid of the plaintiff's right, all that the Court usually has to consider is whether the case is so clear and free

from objection on equitable grounds that it ought to interfere to preserve property without awaiting for the right to be finally established. It is not

necessary for the grant of interlocutory injunction that the Court should find a case which would entitle the plaintiff to relief at all events; it is quite

sufficient if the Court finds a case which shows that there is substantial question to be investigated, and that matters ought to be preserved in status

quo until the question can be finally disposed of. (1915 AC 750 (760)): (AIR 1915 PC 106 (2) at p. 110). In our view when a plaintiff shows a

prima facie case on the allegation of fraud challenging the disputed decree, to refuse injunction would in effect be granting a charter to the

defendant-decree-holder to perpetrate fraud. In such a case if as a consequence of refusal of injunction, the decree is executed, it would be clearly

an injury within the meaning of R. 2 of O. 39 C.P.C.

60. In our opinion, the widest interpretation to the word "injury" should be given for doing justice to the parties while considering a prayer for

temporary injunction under O. 39, R. 2 C.P.C. We do not find any reason to exclude injury from the meaning of that word under O. 39, R. 2

which the plaintiff is likely to suffer if the defendant is allowed to execute the disputed decree. The expression "injury" takes in its sweep "harm" or

"damage" to the right of a person or property. So, a decree which prima facie appears to be illegal or void can also be considered as causing

injury to the person affected by it.

61. The object of the grant of temporary injunction is to maintain status quo while the parties are trying for the adjudication of their rights and

thereby to prevent injustice from being visited while the suit is proceeding. This salutary object will be defeated if the Court becomes oblivious to

the prima facie case brought to its notice merely on the ground that the other side has obtained a decree in his favour by means fair or foul.

62. If the disputed decree which becomes a subsequent subject-matter of a suit and temporary injunction prayed for is refused, on such refusal the

decree is executed but eventually if the suit is decreed by setting aside the earlier decree, then it will have two-fold reactions. First, the plaintiff will

suffer great hardship in deprivation of the suit property during the interregnum, and secondly he will be driven to approach the Court again for

declaration of khas possession thereby entailing multiplicity of proceedings which is avowedly the aim of the Court to obviate.

63. In our view, the execution of a decree alleged to have been obtained by fraud is an "injury" within the meaning of R. 2, O. 39 and in

appropriate case injunction may issue. This being our firm opinion, we do not feel ourselves to be called upon to express any opinion whether

provision of S. 151 of the C.P.C. is attracted or not to issue injunction in the case in hand.

N. Ibotombi Singh, J.

64. I agree that this revision should be allowed; and I would like to say a few words on the question as to whether the Court has discretionary

power under sub-rule (1) of R. 2 of O. 39 of the Civil P.C. to pass temporary injunction, restraining execution of a decree impeached on the

ground of fraud, either at the instance of the judgment-debtor or of a third party to such a decree.

65. The learned counsel on both sides have, with admirable industry, carried out research into the case laws on this important question. A number

of decisions of this Court, reported and unreported and those of other High Courts, in support of their respective contentions, were cited at the

bar.

66. There is divergence of opinions of this Court also on the question. One view is that execution of a decree which has not been set aside by a

competent court, is in exercise of legal right; it cannot amount to "injury" within the meaning of sub-rule (1) of R. 2 of O. 39 of the Code; and as

such, the court has no jurisdiction to grant temporary injunction under the said Rule, restraining execution of a decree which is impeached on the

ground of fraud. On the other hand, a contrary opinion has been expressed. An extreme opinion has been taken in some cases that apart from O.

39 of the Code, the court has no jurisdiction to grant temporary injunction in exercise of the inherent power under S. 151 of the Code, even in

cases not falling within the purview of the said Rules.

67. The extreme view finds its support from the expression prescribed in S. 94 of the Code, which provides as follows:—

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

...

(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.

The word "prescribed" as defined in S. 2, Cl. (16) of the Code, means, prescribed by rules under the Code. According to this view, the provisions

relating to grant of temporary injunction contained in R. 1 and R. 2 of O. 39 of the Code are exhaustive, and the powers of the court are

circumscribed by the said Rules: Courts, therefore, cannot enlarge their powers by resort to their inherent jurisdiction under S. 151 of the Code.

68. The extreme view, in regard to the exercise of inherent power in the matter of granting a temporary injunction, can no longer prevail, as it has

been settled by their Lordships of the Supreme Court in *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, that such a power can be

exercised in appropriate cases not falling within the purview of the said rules, in the view that the Rules cannot control the inherent power, by

limiting or otherwise affecting it.

69. The controversy, however, on the above question, namely, the discretionary power of courts to pass temporary injunction under the said Rule

restraining execution of a decree impeached on the ground of fraud, still survives.

70. Provisions of O. 39, R. 2 of the Civil P.C. which are relevant are reproduced below:—

Rule 2; (1) In any suit for restraining the defendants 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 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.

71. It may be mentioned that O. 39, R. 2 of the Code empowers the court, in any suit for restraining the defendant from committing, "other injury

of any kind", to issue a temporary injunction to restrain the defendant from committing "injury complained of. The interpretation and scope of the

word "injury" appearing in R. 2 has been the subject-matter of consideration by several High Courts.

72. The meaning and scope of the word "injury" in R. 2 came up for consideration for the first time before a Single Bench of this Court, in *Abdul*

Hamid Khan v. Tridip Chandra, AIR 1953 Ass 104. In that case, the two minor plaintiffs along with several other members were defendants in the

previous ejectment suit, in which a decree ex parte was passed in favour of the defendants 1 to 3. The two minor plaintiffs brought a suit

impeaching the decree on the ground of fraud, and prayed for a permanent injunction to restrain the defendants from executing the decree. They

also prayed for a temporary injunction to the same effect. It was alleged that there was no service on them, their guardian was not properly

appointed, their interests were not looked after, and the decree had been obtained by fraud. The Learned Judge, on the facts and circumstances of

the case, was of the view that a lawful exercise of a right vested in a person could not be legally restrained by the Court under O. 39, R. 2 C.P.C.

and it was held that execution of a subsisting decree could not amount to "injury" within the meaning of the said Rule. At page 105, it was

observed:

It is a question whether taking execution of a subsisting decree which is the subject matter of litigation or which is being challenged by the plaintiff in

a case amounts to an injury of the kind contemplated by R. 2 of O. 39. An infringement of a copyright or of a trade mark or an obstruction to a

right of property or threatened acts of waste would be admittedly injuries which may be prevented by the grant of temporary injunction. It seems to

me that a person may not be prevented from executing a decree obtained by him on the ground that it causes injury to the plaintiff. The execution

of a decree is in the exercise of a legal right and it cannot be placed on a par with the breach of contract or injury to property or the disturbances

of the other rights vesting in a particular individual.

73. In *Kripanatha Chakravorty v. Rupchand Lunawat*, AIR 1955 Ass 156 a Division Bench of this Court had the occasion to examine the scope

of the word "injury" occurring in the said rule; and taking the same line of reasoning in *Abdul Hamid Khan*, AIR 1953 Assam 104 (supra), this

Court held that the Civil Court had no power to pass a temporary injunction under O. 39 R. 2 C.P.C. to restrain exercise of the right declared by

an order in the proceeding under S. 147 Cr. P.C. In that case, the party, who was aggrieved by the order made under S. 147 Cr. P.C. concerning

dispute for a right of way over a certain land, challenged the said order in a suit, and also prayed for a temporary injunction under O. 39 R. 2 C.

P.C. to restrain the defendant from exercising the right under the order made in his favour under S. 147 Cr. P.C. In that context, the learned single

Judge, Ram Labhaya J. (as he then was) speaking for the Court, at page 157 observed:

Injury can result from some wrong. A lawful exercise of rights cannot be described as an injury. So long as the party is acting in the exercise of a

right which the law recognises, it cannot be said that the party is committing any wrong leading to any injury. When as a result of the enquiry in the

suit, it is found that the party has not got the particular right, the position would be different but if on the date of the suit, the party has got the legal

rights to do a certain act, that act cannot be regarded as a wrong in the law nor would its result be regarded as injury.

The words "other injury of any kind" in R. 2 have been the subject matter of interpretation in several cases.

The expression "injury" connotes according to these decisions an act or omission contrary to the law involving infringement of any right vested in

some persons. Instances of such cases are infringement of a copyright or of a trade mark, or an obstruction to a right of property or of a right of

public worship etc. All wrongs covered by the expression "tort" would be within the scope of the expression but there has to be an injury and that

injury would necessarily be a result of the wrong. It is not possible to say that a party who has secured an order in his favour under S. 147 Cr.

P.C. to use a particular path or to have the right of way over it, commits any wrong or it causes injury to any one by exercising the right which the

order under S. 147 Cr. P.C. recognises.

74. In *Mt. Ladi Agarwallani v. Keolraj Sethi*, AIR 1955 Assam 174, the learned single Judge also agreed with the view expressed in the case of

Abdul Hamid Khan (AIR 1953 Assam 104) (supra). There the decree was challenged by the plaintiff, who was not a party in the previous suit.

75. It may be noticed that in *Brojendra Kumar v. Jitendra Chandra*, AIR 1960 Assam 111 (SB), which was a case arising out of an order under

Sec. 145 of the Code of Criminal Procedure, a Special Bench of this Court, consisting of C.P. Sinha Chief Justice and H. Deka, Mehrotra JJ.

reconsidered the correctness of the principle of law laid down in *Kripanath Chakraborty*, AIR 1955 Assam 156 (supra). The Court was not

inclined to accept the earlier view holding that the proposition of law stated therein was too wide, and was also of the opinion that merely because

an order was passed under S. 147 Cr. P.C. declaring a party to have the right to use a certain land as pathway, which had been closed by the

other party, or declaring a party to be deemed to be in possession under S. 145 Cr. P.C. it did not fetter the discretion of the Civil Court under

provisions of O. 39 R. 1 or R. 2, as the case may be. The Court, however, refrained from expressing its view on the correctness of the proposition

of law laid down in earlier two cases, AIR 1953 Assam 104 and AIR 1955 Assam 174 in the view that the cases had no relevancy on the

question before the Court.

76. In *Upendra Chandra v. Nabin Chandra*, AIR 1971 A&N 95; *Mira Rani Das v. Forman Ali*, AIR 1971 A&N 157, the learned single Judges

took the same view expressed in the case of *Mt. Ladi Agarwallani*, AIR 1955 Assam 174 (supra) and the learned single Judge in *Upendra*

Chandra Barman, AIR 1971 A&N 95 (supra) was also in agreement with the view taken in *Venkanna v. Varka Rao*, AIR 1957 A&P 453 and

Firm Lalchand Nathmal and Others Vs. Firm Balaram Rameshwar and Others, . A decision of the Division Bench of this Court in *Ganeshilal*

Khaitan v. Kshitish Chandra Kar, Misc. Appeal No. 23 of 1956 (Assam) (unreported), in which a contrary view was taken, it appears, was not

brought to the notice of the learned Judges in those cases. In the subsequent case, *Arati Rani Das v. Prafulla Kr. Dev*, Civil Revn. 37 of 1971 of

this Court (unreported), my learned Brother B. N. Sarma J. noticed the decision, but distinguished the case from that of the Division Bench, and

refused to grant temporary injunction on merits,

77. In *Ganeshilal Khaitan v. Kshitish Ch. Kar*, Misc. Appeal No. 23 of 1966 (Assam) (supra), this Court in a Division Bench, as stated above,

took the contrary view. In that case, the plaintiff impeached the ex parte decree for ejectment on the ground of fraud obtained against him by the

defendant, and asked for a permanent injunction to restrain the defendant from executing the decree. He prayed for a temporary injunction to that

effect. The learned Judge, Mehrotra, speaking for the Court, observed:

It was argued by the counsel for the appellant that injury contemplated by O. 39 R. 2 is not one caused by execution of decree. Here the suit itself

was for a declaration that the decree was obtained by fraud and for a mandatory injunction restraining the present appellant from executing his

decree. The subject matter of the suit itself thus was the decree, which is sought to be executed. Under those circumstances the case is covered by

Order 39 Rule 2, Civil Procedure Code, in any view of the matter, the Court below had jurisdiction under Order 39 Rule 1 to issue temporary

injunction or under Sec. 151, C.P.C.

78. In *Bhagwan Devi v. Mrs. Mada Mari Redborne* Civil Revn. No. 56 of 1961 (Assam) the learned single Judge followed the decision of the

Division Bench in *Ganeshilal Khaitan* (Misc. Appeal (F) No. 23 of 1956 (Assam)) (supra). In *Renu Kar v. Subesh Chandda Paul* "(Civil Revn.

No. 96 of 1966) (Assam), the learned single Judge noticed the decision above of the Division Bench of this Court, and held, however, that as the

decree was not proved to have been obtained by fraud, no injunction under O. 39 of the Code could be passed, although the Court, in

appropriate cases, might consider, in exercise of the inherent power whether a temporary injunction could be granted or not.

79. In *Kanhai Das v. Mukteswar Rai*, 1976 Assam LR 224 the judgment-debtor filed a suit against the decree-holder, challenging the decree on

the ground of fraud, and prayed for a permanent injunction to restrain execution of the decree with an application for temporary injunction to the

same effect. My learned brother, Lahiri J. was of the opinion that the law laid down by this Court in the cases reported in AIR 1955 Assam 174;

AIR 1971 A&N 95 and AIR 1971 A&N 157; related only to a suit instituted by a third party against a decree-holder, and not to a suit by the

Judgment-debtor against the decree-holder. Following the decision of the Division Bench in *Ganeshilal Khaitan* Misc. Appeal (F) No. 23 of 1956

(Assam) (supra), my learned Brother, Lahiri J. was also of the view that mere existence of a decree by a party did not disentitle a court to restrain

the decree-holder from executing his decree, by a temporary injunction under O. 39 of the Code, where grave allegations, such as, fraud and

collusion were prima facie sustainable.

80. Mr. B.K. Das. Learned Counsel for the petitioner, submitted before us twin arguments, and cited a number of decisions of other High Courts

besides decisions of this Court discussed above, in support of the contention that the court has jurisdiction to grant temporary injunction under Sec.

151 of the Code or under O. 39 Rule 2, C.P.C. to restrain execution of the decree, which was obtained by the Respondent and which is being

impeached on the ground of fraud in Title Suit No. 35 of 1970 pending in the court of the Asstt. District Judge, Cachar, vide the The Allahabad

Bank Ltd. Vs. Rana Sheo Ambar Singh and Others, ; Surendra Singh and Others Vs. Lal Sheoraj Bahadur Singh and Others, ; Kittamma v. B.

Subbrai, AIR 1959 Mys 75 and Umapati Choudhuri and Others Vs. Subodh Chandra Choudhuri and Others, . Shri C.R. Dey, learned Counsel

for the Respondent, also relied on a number of decisions of other High Courts which hold the view that Order 39 Rule 2 could not be invoked in

such cases vide Gaumont Kali Private Ltd. Co. Vs. Badri Prasad Jaiswal, ; Subramanian v. Seetarama Aiyar AIR 1949 Mad 104; Aniseti

Venkanna alias Venkateswara Rao and Another Vs. Rimalapudi Venkata Rao and Another, ; Hemant Kumar Vs. Ayodhya Prasad, ; M/s. Rattan

Chand Jaigopal v. Mian Safuddin, AIR 1961 J & K 29; Mangai Achi Vs. S. Asokan and Another, and Datla China Appalarasimha Raju Vs.

Nadimpalli Seethayamma Garu and Others, .

81. There is, thus, plethora of case laws on this question holding divergent views. In the cases which take the view that the Court has no

jurisdiction to pass the temporary injunction under Order 39, Rule 2 to restrain the decree-holder from executing his decree, a narrow

interpretation has been put on the word "injury." With great respect I am unable to persuade myself to subscribe to this view. To interpret so, is in

my opinion, to strain the expression other injury of any kind occurring in the said rule, and thereby defeat the beneficial object sought to be

achieved by said rule.

82. At the outset, it is necessary to ascertain what the word "injury" connotes. "Injury" is a violation of another's right or violation of a legal duty to

the prejudice of another (Mozley and Whitley's Law Dictionary, 4th edition, page 162). The word "injury" comprehends all wrongs, which one

man by any way do unto another, being an injury, and includes in it all matter of equity, and also of law. (Words and Phrases Legally Defined by B.

Saunders 2nd edition Vol. 3 page 57). "Injury" is either legal or equitable. Legal injuries or those formerly cognizable by the common law, are

divided into breaches of contract and torts. Equitable injuries, or those formerly cognizable by the courts of equity, include breaches of trust,

equitable waste and certain kinds of fraud. (The Dictionary of English Law, by Earle Jowitt, 1959 Edition, page 973).

83. The Dictionary meaning of "injury" which connotes not only all wrongs covered by "tort" but also other species of wrongs indicates that the

expression "other injury of any kind" in the said rule is wide enough in its amplitude to embrace "injury" threatened or actual, flowing from

execution of the decree impeached on the ground of fraud either at the instance of the judgment-debtor or of a third party to such a decree, Fraud

the inevitable outcome of which is to cause injury to the other party, is synonymous with deceit, and is within the concept of Tort ; and obtaining of

a fraudulent decree is a part of the chain of actions for violation of the right of the other party defrauded, resulting in injury.

84. In Nagubai Ammal and Others Vs. B. Shama Rao and Others, their Lordships of the Supreme Court explained what is meant by a fraudulent

proceeding, and observed, at page 599:--

But when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that the claimant has managed to

obtain the verdict of the court in his favour and against his opponent by practising fraud on the court. Such a proceeding is started with a view to

injure the opponent, and there can be no question of its having been initiated as the result of an understanding between the parties. While in

collusive proceedings the combat is a mere sham, in a fraudulent suit it is real and earnest.

85. Fraud and right never dwell together (*Fraus et jus nunquam cohabitant*). Where, therefore, fraud is proved, the Court will set aside such a

decree, and remit the parties to their rights (*vide Nilmani Burnick v. Puddo Lochan Chuckerbutty*, Beng LR Sup Vol. 379). In *Patch v. Ward*,

(1867) 3 Ch 203, Lord Cairns L.J. observed:--

Now, it is necessary to bear in mind what is meant, and what must be meant, by fraud, when it is said that you may impeach a decree, signed and

enrolled, on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on

this subject. The Duchess of Kingston's case where the judges, being consulted by the House of Lords, replied to one of the questions "Fraud is

an extrinsic collateral act, which vitiates the most solemn proceeding of Courts of justice. Lord Cook says, it avoids all judicial acts, ecclesiastical

or temporal. The fraud there spoken of must clearly, as it seems to me, be actual, fraud, such that there is on the part of the person chargeable with

it the *malus animus*, the *mala mens*, putting itself in motion and acting in order to take an undue advantage of other person for the purpose of

actually and knowingly defrauding him.

86. In a suit for perpetual injunction to restrain execution of a decree impeached on the ground of fraud, instituted either by judgment debtor or by

a third party to the decree, by the very nature of the suit itself, it is to afford relief against future acts, actually threatened or apprehended with

reasonable probability, and to keep or preserve a thing in status quo rather than to remedy what is past or to prevent wrongful acts already

committed, and also to prevent multiplicity of suits or judicial proceedings. The decree which is sought to be executed is the subject matter of the

suits (vide Sultan Ali v. Bajali, AIR 1924 Nag 413; Korr on injunction 4th Edn. p. 14). ""Execution"" in its widest sense signifies enforcement of

decrees and orders by the process of Court so as to enable the judgment creditor to recover fruits of the judgment vide (1883) ILR 9 Cal 773.

Execution of a decree, which is prima facie shown to be tainted with fraud, cannot but be described to be a violation of the right of the plaintiff,

proprietary or other rights. In such a suit for injunction quia timet, relief to restrain commission of the threatened injury by the execution of the

decree is asked for, and in such a case temporary injunction in restraint of the execution proceeding can be passed under Order 39 Rule 2 C.P.C.

(See also Woodroffe the Law relating to Injunction (T.L.L.) 1969 Edn. P 192) The Court has however, to exercise judicial discretion enjoined by

the said Rule guided by the general principles, doctrines and rules, which determine and regulate the exercise of jurisdiction for relief of injunction

to the facts and circumstances of each case. The general features of the two kinds of injunctions, permanent or temporary are in the main same and

do not differ (vide Dr. Bannerjee on Specific Relief Act. (T.L.L.) 4th Edn. 1969 p. 551).

87. The principle that the Court has jurisdiction to exercise discretion under the said rule on ground of irreparable injury which the plaintiff might

suffer even in cases, where a decree is challenged on other grounds and not on fraud, is illustrated by the case of Ananta Nath Dev v. Machintosh

(1871) 6 Beng LR 571. Mr. Machintosh obtained a decree against certain persons for possession of undivided moiety of a dwelling house on a

title of purchase from them and he sought for execution of his decree. The plaintiff alleged that he was entitled jointly with others to the remaining

undivided moiety, and he was by his family and dependants in actual possession of the house according to his status. He brought a suit in the

Calcutta High Court (original side) against the decree-holders Machintosh and his vendors for the purpose of ousting Machintosh from all benefits

of his decree on the ground that he obtained no title by his purchase, or, if he had obtained such a title and had a right to have the decree executed,

then of obtaining partition of the dwelling house. An application was made for temporary injunction to restrain the decree-holder from taking

possession under his decree until the decision in the partition suit. The Learned Judge Phear, granted temporary injunction and observed:--

I think that a forced joint occupation in this fashion of an undivided dwelling house by an intruder, even though he be an owner against the will of

the resident Hindu coparcener, amounts to a proprietary injury which the latter is not in equity called upon to sustain, and for which pecuniary

damages would not be compensation. Money alone will not in any degree set the matter right, and therefore the injury is in its character which is

irreparable; and also, I think that it is substantial enough to justify the interference of this Court.

88. From the point of equity also the defendant, who holds such a decree, cannot be kept on par with a person exercising his legal right by

execution of a valid decree. The Defendant, by his fraudulent act, will make the Court an instrument of injustice; and it is a case to which the

equitable doctrine will apply, namely where a legal judgment was obtained or entered through fraud, mistake, or accident, or where the plaintiff,

who challenges the decree, having a valid legal defence on the merits, was prevented in any manner from maintaining it by fraud, mistake, or

accident, and there had been no negligence, laches, or other fault on his part, or on the part of his agents, then a Court will interfere at his suit, and

restrain proceedings on the judgment, which cannot be conscientiously enforced, and a Court will interfere to prevent manifest wrong by restraining

the party whose conscience is thus bound from using the advantages he has gained, and it will generally proceed to administer all the reliefs which

the particular case requires, whether by a partial or total restraint of such proceeding. (See Dr. John Norton Pomeroy in his Treatise on Equity

Jurisprudence (1947) Edn. Vol 4 page 1364 and also Kerr on Fraud & Mistake 7th Edn pages 10 and 417).

89. From the foregoing discussions, I conclude that the Court has the judicial discretion to grant temporary injunction under sub-R. (1) of Rule 2 of

Order 39 of the Code restraining execution of a decree impeached on the ground of fraud in appropriate cases, I am also in respectful agreement

with the view taken by the Division Bench of this Court in Ganeshilal Khaitan (Misc. Appeal (F) No. 23 of 195-6 (Assam)), (supra).

90. As to the merit of the case before us, my learned Brother, Sadanandaswamy J. has stated the facts of the case, in his illuminating judgment, and

I agree with the conclusion that the Respondent should be restrained, in the circumstances of the case, by a temporary injunction under O. 39 R. 2

C.P.C from executing the impugned decree till final disposal of the suit. In view of my conclusion above, the question, whether the defendant

should be restrained from executing decree in exercise of the jurisdiction under S. 151 of the Code, does not arise in the case.

By the Court

91. In view of the opinion of the majority the Revision Petition is allowed, the order of the Lower Appellate Court is set aside and the appeal is

remanded to the Lower Appellate Court for fresh disposal according to law.

92. Parties will bear their own costs in this Revision Petition.

93. This will form part of the judgment in the Revision Petition.

94. Mr. C.R. De, learned Counsel for the Opp. Party prays for certificate to appeal to the Supreme Court under Art, 133 of the Constitution. In

our opinion the case does not involve any substantial question of the law of general importance which requires to be decided by the Supreme

Court. Hence the prayer is rejected.