

(2005) 12 GAU CK 0017**Gauhati High Court****Case No:** FAO No. 40 of 2005

Pranab Kumar Banerjee and
Another

APPELLANT**Vs**

Momin Ali alias Mukib Ali

RESPONDENT**Date of Decision:** Dec. 5, 2005**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, Order 6 Rule 4, Order 7 Rule 11, 151
- Constitution of India, 1950 - Article 227
- Criminal Procedure Code, 1973 (CrPC) - Section 145
- Limitation Act, 1963 - Article 58, 3, 5

Citation: (2006) 2 GLR 26**Hon'ble Judges:** D. Biswas, Acting C.J.; B.P. Katakey, J**Bench:** Division Bench**Advocate:** B.K. Goswami, D. Baruah, D.P. Hazarika, K. Saharia and S.R. Gogoi, for the Appellant; M. Nath and J. Das, for the Respondent**Final Decision:** Allowed**Judgement**

B.P. Katakey, J.

This appeal is directed against the order of temporary injunction dated 3.11.2005 passed by the learned Civil Judge (Senior Division) No. 1, Guwahati in Misc. (J) Case No. 114/2005 arising out of Title Suit No. 202/2005 restraining the appellants/defendants from interfering with the possession of the respondent/plaintiff over the suit land described in Schedule "C" of the plaint and Schedule "B" of Title Suit No. 494/96, till disposal of the suit.

2. A suit being Title Suit No. 494/96 was filed by the appellants as plaintiffs against the respondent as defendant, before the then Sadar Munsiff, Guwahati praying for declaration of right title and interest in respect of the Schedule "A" and "B" property

and also for recovery of khas possession by evicting the present respondent and others from the said suit property. On being decreed, the appeal being Title Appeal No. 80/03 was preferred by the present respondent in the Court of the learned Civil Judge (Senior Division), Kamrup, Guwahati which was dismissed vide judgment dated 30.7.2004 affirming the judgment and decree passed by the learned Trial court. Being aggrieved, the respondent preferred R.S.A. No. 159/04 before the High Court which was, however, dismissed vide judgment dated 1.10.2004 as no substantial question of law was involved in the appeal. The SLP being SLP (Civil) No. 23651/04 filed by the respondent challenging the order dated 1.10.2004 passed in R.S.A. No. 159/04, was also dismissed by the Hon'ble Supreme Court vide order dated 29.11.2004. The appellants after dismissal of the Second Appeal by the High Court, put the decree passed in Title Suit No. 494/96 into execution, wherein, the respondent on 11.10.2004 filed an application for stay execution of the said decree on the ground that he was taking steps in filing SLP before the Hon'ble Supreme Court, and hence the execution may be stayed till the SLP is taken up for consideration by the said Court. The respondent in the said application also undertook to vacate the suit premises, in the event, the SLP is dismissed by the Hon'ble Supreme Court. On the basis of the said application, the execution proceeding was stayed till the SLP is decided. After dismissal of the SLP, the respondent filed objection u/s 47 of the CPC before the learned Executing Court raising objection to the executability of the decree on the ground that the decreetal land in Title Suit No. 494/96 is not of the suit patta involved in the said suit. An application u/s 151 CPC was also thereafter filed by the respondent before the learned Executing Court objecting the execution of the decree on the ground that the Court which passed the order lacked inherent jurisdiction for entertaining the suit as the suit filed by the appellants as plaintiff was barred by time. Another application was filed by the respondent in the learned Executing Court praying for allowing him to adduce evidence in support of the said grounds taken in such objection, which was rejected by the learned Executing Court vide order dated 3.2.2005, against which an application under Article 227 of the Constitution of India was filed by the respondents before the High Court, which was numbered as WP(C) No. 2265/05. The said writ petition was dismissed by judgment and order dated 6.4.2005. Thereafter, an application u/s 24, read with Section 151 CPC was filed for transfer of the Title Execution Case No. 53/04 from the Court of the learned Civil Judge (Junior Division) No. 1, Guwahati to any other Court of competent jurisdiction, before the High Court, which was numbered as Transfer Petition(C) No. 28/2005. The same was also dismissed by the High Court vide judgment and order dated 15.9.2005. The respondent as plaintiff, in the meantime, on 8.6.2005 filed Title Suit No. 202/05 in the Court of the learned Civil Judge (Senior Division) at Guwahati against the appellants as defendants praying for a decree declaring that the plaintiffs-appellants herein fraudulently filed Title Suit No. 494/96, though the same was heavily barred by time and without any application for condonation of delay u/s 5 of the Limitation Act, that the said Court lacked inherent jurisdiction to entertain a

time barred suit and also praying for permanent injunction restraining the appellants from executing the decree passed in Title Suit No. 494/96 and from evicting the plaintiff-respondent from the land described in Schedule "C". In the said suit the respondent also filed an application under Order 39 Rules 1 and 2, read with Section 151 CPC praying for temporary injunction for restraining the defendants-appellants herein from interfering with the possession of the plaintiff (the respondent herein), over the suit land described in Schedule "C" of the plaint, which was registered as Misc(J) Case No. 114/05. The learned Trial Court upon hearing the learned Counsel for the parties, vide order dated 3.11.2005 passed the order of injunction restraining the defendants (appellants herein) from interfering with the possession of the plaintiff (respondent herein) over the land described as Schedule "C" of the plaint, Schedule "B" of T.S. No. 494/96 till disposal of the suit. The learned Executing Court also in the meantime, vide order dated 8.11.2005 rejected the application u/s 47 as well as u/s 151 CPC filed by the respondent herein objecting the execution of the decree passed in Title Suit No. 494/96, wherein also, the respondent herein raised the question of filing of a time barred suit as well as wrong description of the boundary of the suit land in the earlier suit. Hence, the present appeal filed by the defendants in Title Suit No. 202/05 against the order of injunction dated 3.11.2005.

3. We have heard Mr. B.K. Goswami, learned senior counsel assisted by Mr. D. Baruah for the appellants and Mr. J. Das, learned Counsel assisted by Ms. M. Nath for the respondents.

4. Mr. Goswami, learned Senior counsel for the appellants has submitted that the learned Trial court has mechanically passed the order of injunction restraining the appellants from interfering with the possession of the respondent over the Schedule "C" land, thereby in effect has restrained the appellants from executing the decree passed in T.S. No. 494/96, which was affirmed by the learned First Appellate as well as by the Second Appellate Court and against which though SLP was filed, the same was also dismissed. According to the learned Senior counsel, the present suit filed by the respondent is nothing but a dilatory tactics of the respondent so that execution of the decree passed in T.S. No. 494/96 can be delayed and the appellants, who were the plaintiffs in the said suit are deprived from enjoying the fruit of the decree. Mr. Goswami, learned Senior counsel has further submitted that the grounds on which the present respondent has filed the suit challenging the decree passed in the earlier suit were also taken up by the respondent in the application u/s 47 as well as Section 151 CPC before the learned Executing Court and the said objection was rejected by the learned Executing Court, which has not been challenged by the respondent herein before any Higher Court till date. The further submission of the learned Senior counsel is that the learned Trial court ought not to have passed the order of injunction which has the effect of stalling execution of a legally valid decree passed in another suit. According to the learned Senior counsel, T.S. No. 494/96 being a suit for declaration of right, title and interest as well as for

recovery of khas possession and not the suit for declaration that the order passed in Section 145 CrPC is null and void, the period of limitation for filing such suit is 12 years and not 3 years as contended by the respondent-plaintiff in T.S. No. 202/05 and hence, the plaintiff-respondent does not have strong *prima-facie* case for the purpose of granting temporary injunction. It has further been submitted by the learned Senior counsel that the respondent, after passing of the decree in the earlier suit and dismissal of the appeals by the learned First and Second Appellate Court, cannot be allowed to contend that the suit property was not properly described in the earlier suit and the decree in the earlier suit was obtained fraudulently because the suit was barred by time. Mr. Goswami, referring the statements made in the Title Suit No. 202/2005 has contended that the respondent has alleged fraud not against the plaintiff in T.S. No. 496/96 but against the Court who passed the decree in the said suit by alleging that fraud was committed by that Court by entertaining a time barred suit. Referring to the provision of Order 6, Rule 4 of the CPC, Mr. Goswami, learned Senior counsel has submitted that where in a suit fraud is alleged the party alleging such fraud must furnish all material particulars constituting such fraud and in the instant case the plaint filed by the respondent does not disclose any fraud so as to make out a case of fraudulently obtaining a decree. Countering the statement of the respondent in the plaint that a duty was cast on the court to examine the question of limitation by virtue of Section 3 of the Limitation Act, which according to the respondent was not done in the earlier suit and therefore the decree is a nullity, the learned Senior counsel has submitted that even a decree passed by a court having jurisdiction over the parties and the subject matter of the suit, which is barred by time, is not a nullity, as the court having the jurisdiction may decide a suit rightly or wrongly and if it decides wrongly, the aggrieved party can challenge the same in the higher court. In the instant case, according to the learned Senior counsel, the respondent herein never raised the question of the limitation, though he challenged the decree passed in T.S. No. 494/96 up to the Apex Court. According to the learned Senior counsel, the suit is a vexacious suit filed with a design to deprive the appellants from enjoying the benefit of the decree passed in T.S. No.494/96. The learned Senior counsel has further submitted that the balance of convenience is also in favour of the appellants as they got the decree declaring right, title and interest as well as recovery of khas possession against the respondent in the earlier suit. The conduct of the respondent herein, according to Mr. Goswami, does not entitle him to get an order of injunction. 5. Mr. Goswami, learned Senior counsel, in support of his contention has placed reliance on [Ittavira Mathai Vs. Varkey Varkey and Another, T. Arivandandam Vs. T.V. Satyapal and Another, ,](#) [Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, ,](#) [Ravinder Kaur Vs. Ashok Kumar and Another, ,](#) [Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others, ,](#) [Balvant N. Viswamitra and Others Vs. Yadav Sadashiv Mule \(dead\) through Lrs. and Others,](#)

6. Mr. J. Das, learned Counsel for the respondent supporting the order of injunction dated 3.11.2005 has submitted that as the suit filed in T.S. No. 494/96 was time barred, the Court lacked inherent jurisdiction to entertain the said suit and to pass a decree. According to the learned Counsel if a time barred suit is decreed, the said decree is a nullity and therefore the suit filed by the respondent praying for a decree for declaration that the decree was obtained fraudulently in T.S. No. 494/96 is maintainable and hence, the learned Trial court has rightly passed the order of injunction , otherwise the respondent will be evicted from the land in question by executing the decree passed in T.S. No. 494/96. According to the learned Counsel, the earlier suit was governed by Article 58 of the Limitation Act, as it was a suit for declaration and therefore it has to be filed within 3 years from the date when the possession u/s 145 Code of Criminal Procedure was declared in favour of the respondent by the learned Executive Magistrate. According to the learned Counsel, admittedly, the suit was not filed within 3 years from 19th February 1991, i.e., the date when the possession was declared u/s 145 CrPC and therefore the earlier suit was out and out a time barred suit and the decree passed therein is a nullity. Mr. Das, learned Counsel has further contended that even if the question of limitation was not raised by the respondent in the earlier suit, a duty was cast on the court by virtue of Section 3 of the Limitation Act to see whether the suit was barred by time, which was not done in the earlier suit and hence the respondent, who was one of the defendants in the earlier suit, can maintain a subsequent suit for declaration that the earlier suit was barred by time and hence, the decree passed therein is a nullity. The learned Counsel has submitted that when the fraud is committed, it amounts to "injury" within the meaning of Order 39, Rules 1 and 2 of the CPC, and, therefore, the learned Trial court can grant injunction as has been done in the instant case. According to the learned Counsel, even the Executing Court can go into the question of lack of inherent jurisdiction in entertaining the suit, wherein the decree has been passed, as well as the question of nullity of a decree. Mr. Das, learned Counsel in support of his Contention has placed reliance on Sunder Dass Vs. Ram Prakash, , Mahboob Pasha Vs. Syed Zaheeruddin and Others, , Tazmul Ali and Ors. v. Md Ulairaja reported in AIR 1978 Gau 56.

7. The law relating to grant of temporary injunction under Order 39, Rules 1 and 2 CPC is by now settled. The grant of temporary injunction, during the pendency of a suit, in exercise of the power conferred by Order 39, Rules 1 and 2 CPC is a discretionary relief. While exercising such discretion, the Court has to see whether the plaintiff has a strong *prima-facie*, whether the balance of convenience is in favour of the plaintiff, whether the plaintiff would suffer irreparable loss or injury if the prayer for temporary injunction is dis-allowed. The court is also required to see whether the suit filed by the plaintiff is *prima-facie* maintainable. The relief by way of temporary injunction is granted to mitigate the risk of injustice to the plaintiff during the pendency of the suit. Such injustice that may be caused to the plaintiff is to be weighed against the corresponding need of the defendant to be protected

against the injury resulting from preventing him from exercising his legal rights. Therefore, the Court is to weigh the plaintiffs need, against the defendant and determine where the balance of convenience lies. It is being an equitable relief it rests on the sound judicial discretion of the court, to be exercised in the backdrop of the facts of each case. While granting or refusing the injunction, the Court is also required to see the conduct of the parties.

8. In *Shiv, Kumar Chandha* (supra), the Apex Court has held that, a party is not entitled to an order of injunction as a matter of right or course. Grant of injunction is the discretion of the Court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. Before such order of injunction is passed, the Court must be satisfied that a strong *prima-facie* is made out by the plaintiff including the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him. It has further been held that the power to grant injunction is an extra ordinary power vested in the Court, which has to be exercised taking into consideration the facts and circumstances of each case.

9. In *Ravinder Kaur* (supra), the Apex Court while dealing with a case relating to the eviction of a tenant, wherein a decree was passed and the execution of the decree was challenged by raising dispute regarding description or identity of the suit and, has observed that the Court of law should be careful enough to see the diabolical plans of the judgment debtor to deny a decree holder the fruit of the decree obtained by them and in such cases in passing the order of injunction the court only encourage frivolous and cantankerous litigation causing law's delay and bringing bad name to the judicial system.

10. The Apex court in *Sopan Sukhdeo Sable and Ors.*, (supra) while dealing with the scope of the exercise of discretion while granting injunction in favour of a trespasser has held that, no injunction could be granted against true owner at the instance of a person in unlawful possession.

11. In *T. Arivandandam* (supra), the Apex court while dealing with the provisions of Order 7, Rule 11 CPC has held that the trial court must insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest and such litigation should be nipped in the bud.

12. The Apex court in *Balvant N. Viswamitra and Ors.* (supra) has held that where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such Court would be without jurisdiction, non-est and void ab initio as defect of jurisdiction of court goes to the root of the matter and strike at the very authority of the court to pass a decree or to make an order and such defect has always been treated as basis and fundamental of the decree or order passed by the

Court or an authority having no jurisdiction, is nullity, which can be challenged in any stage even in execution or collateral proceeding. The Apex court has further held that the distinction between a decree which is void and the decree which is wrong, incorrect, irregular or not in accordance with the law cannot be overlooked or ignored and where such decree is irregular or wrong decree, it is not necessarily null and void. An erroneous or illegal decree, which is not void, cannot be objected in execution or in a collateral proceeding.

13. The Apex Court in *Ittyavira Mathai* (supra) while dealing with Section 9 of the CPC has held that though Section 3 of the Limitation Act is peremptory and it is the duty of the court to take notice of the said provision and give effect to it, even though the point of limitation has not been raised in the pleadings, it does not mean that where the court fails to perform his duty, it acts without jurisdiction and in that case it is merely an error of law which can be corrected only in the manner laid down in the CPC. It has further been held that if the suit was barred by time and yet the court decreed it, the court would be committing an illegality and therefore aggrieved party is entitled to have the decree set aside by preferring an appeal against it, but at the same time, a court having jurisdiction over the subject matter of the suit and over the parties thereto, though bound to decide right, may decide wrong and even though it decided wrong it would not be doing something which it had no jurisdiction to do. The Apex court, therefore, held that the decree passed in a time barred suit cannot be treated as nullity.

14. In *Sunder Dass* (supra), the Apex Court has held that executing court can neither go behind the decree nor can it question its legality or correctness, but where the decree sought to be executed is a nullity for lack of inherent jurisdiction in the court passing it, its invalidity can be set up in an execution proceeding and the Executing Court can entertain such objection and refuse to execute the decree.

15. A Division Bench of the Karnataka High Court in *Mahboob Pasha* (supra) has held that if the suit is barred by limitation, the court has no jurisdiction to entertain it and it is the duty of the Court to decide the question of limitation and the parties cannot confer jurisdiction on the court by consent. A Full Bench of this Court in *Tazmul Ali* (supra) has held that if the "fraud" is established, it is an "injury" within the meaning of Order 39 Rules 1 and 2 and in that case the order of injunction can be passed by the Court.

16. In the backdrop of the aforesaid decisions referred to by the learned Counsel for the parties, let us now discuss the facts and circumstances of the case in hand.

17. There is no dispute that the appellants herein filed T.S. No. 494/96 against the present respondent as one of the defendants praying for a decree for declaration of right, title and interest and recovery of possession by evicting him from the suit land. The decree passed in the said suit was affirmed by the First as well as the Second Appellate Court. Even the SLP filed by the respondent against the judgment

and order passed in the Second Appeal by the High Court was not entertained by the Apex court. Thus the decree passed in T.S. No. 494/96 has attained its finality.

18. The respondent upon his failure to get the decree passed in T.S. No. 494/96 set aside in the Higher Courts tried to delay execution of the decree by adopting one method or the other. Firstly, the respondent after dismissal of the Second Appeal filed an application before the learned Executing court to stay the execution of the decree during the pendency of SLP before the Hon"ble Supreme Court by giving the undertaking that he will vacate the suit premises, in the event of dismissal of the SLP. Thereafter, he filed an application under Article 227 of the Constitution of India against the order passed by the learned Executing Court rejecting his prayer for examination of the witnesses in support of his objection u/s 47 CPC which writ petition was also dismissed by the High Court. By initiating a transfer proceeding u/s 24 of the CPC before the High Court, respondent thereafter sought to transfer the execution proceeding from the existing Executing Court to any other Court, in which also the respondent could not succeed. The respondent, in the meantime, tiled-present suit being T.S. No. 202/05 praying for a decree declaring that the decree passed in T.S. No. 494/96 was obtained by fraud. The respondent became successful in getting an order of temporary injunction in the said suit restraining the appellants herein from interfering with his possession in respect of Schedule "C" property.

19. The allegations of fraud in T.S. No. 202/05 filed by the respondent is basically based on the assertion that the T.S. No. 494/96 was barred by time, the same having not been filed within 3 years from the date of declaration of possession by the learned Executive Magistrate in a proceeding u/s 145 CrPC. From the reading of the plaint filed in T.S. No. 202/05, it appears that the respondent alleged fraud against the court who passed the decree and not against the appellants who were the plaintiffs therein. The respondent in the plaint has seated that the fraud has been committed as the Court has entertained a time barred suit and as it failed to discharge its duty to decide the question of limitation as required u/s 3 of the Limitation Act, even though the question of Limitation has not been raised by the respondent at any stage of the said suit or in the first or second appellate stage.

20. The Apex Court in Ittyavira Mathai (supra) has held that the decree passed in a time barred suit, cannot be treated as nullity if the said court has jurisdiction over the parties or the subject matter of the suit. It is not the case of the respondent that the court had no jurisdiction either over the subject matter of the suit or the parties to the said suit. The only plea of the respondent is that the earlier suit was time barred. Moreover, the plea of the respondent that the suit was barred by time and hence the decree obtained in the said suit is a nullity as well as the plea relating to the description of the suit land has already been decided by the learned Executing Court on the objection filed by the respondent, which went against, the respondent. In T.S. No. 202/05 the respondent has raised the same issue which has already been

decided by the learned Executing Court vide order dated 8.11.2005.

21. There is no-dispute in the proposition of law that if fraud is prima-facie proved it amounts to an "injury" and in that case the court can issue an order of temporary injunction under Order 39, Rules 1 and 2 CPC but at the same time the granting or refusing to grant the order of injunction depends on the plaintiff having a strong prima-facie case, balance of convenience, irreparable loss and injury. Such irreparable loss or injury of both the plaintiff and defendant are to be seen while granting or refusing to grant an injunction. In T.S. No. 494/96 the decree was passed against the respondent for his eviction by holding that he is a trespasser in respect of the said land. The respondent by filing the present suit wants to delay execution of the decree obtained by the appellant in the earlier suit by raising the plea that the earlier suit was barred by time, though such plea was never taken by the respondent at any stage up to the Hon'ble Supreme Court. From the facts as narrated above, it appears that the respondent wants to delay execution of the decree passed in the earlier suit and deprive the appellants from enjoying fruit of the decree passed therein. Even on the point of limitation, as raised by the respondent in the present suit, we are of the prima-facie view, that the earlier suit was not time barred as the said suit was for declaration of right, title and interest and recovery of khas possession by evicting the present respondent and others and not the suit for declaration that the order passed in 145 CrPC proceeding was illegal and void. However, this is our prima-facie view for the purpose of scrutinizing as to whether the respondent has a strong prima-facie for the purpose of granting injunction.

22. The learned court below while granting the injunction has failed to take into consideration the aforesaid aspect of the matter and injunction the appellants from interfering with the possession of the respondent over the suit land, which in effect is an order of injunction restraining the appellants from executing the decree passed in T.S. No. 494/96. The learned court below has also failed to take into consideration the irreparable loss and injury that would be caused to the appellants, who were plaintiffs in the said suit, in granting the order of injunction.

23. In view of above, we are of the considered opinion that the respondent has failed to make out a strong prima-facie case for granting injunction. The balance of convenience is also not in favour of the respondent for granting such injunction. The appellants would also suffer immensely if the order of injunction is passed, as in that case they will be debarred from executing the lawful decree obtained by them. Hence, the order of injunction dated 3.11.2005 passed by the learned Trial court is liable to be set aside and quashed, which we hereby do. Before parting we would like to observe that the learned Executing Court shall execute what is there in the decree passed in T.S. No. 494/96 and shall not go beyond the said decree.

24. The appeal is accordingly allowed with cost of Rs. 10.000 to be paid by the respondent within two months.