

(1998) 08 GAU CK 0017

Gauhati High Court (Agartala Bench)

Case No: A.F.O. No. 2 of 1997

Ajit Kumar Deb Roy

APPELLANT

Vs

Narayan Chandra Nath

RESPONDENT

Date of Decision: Aug. 28, 1998

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 10, Order 39 Rule 2, Order 39 Rule 3, Order 39 Rule 3A

Citation: (1998) 3 GLT 482

Hon'ble Judges: D. Biswas, J

Bench: Single Bench

Advocate: A.C. Bhowmik and D.C. Roy, for the Appellant; D. Chakraborty and P.P. Phattacharjee, for the Respondent

Judgement

D. Biswas, J.

This is an appeal under Order 43 Rule 1 read with Section 104 of the CPC controverting the validity and propriety of the order dated 29.7.1997 passed by the learned Civil Judge, Senior Division, Dharmanagar, in Misc. Case No. 30 of 1997 arising out of Title Suit No. 21 of 1997 restraining the Defendant -Petitioner from alienating the land described in Schedule A and from entering the land described in Schedule B of the plaint.

2. Being aggrieved with the aforesaid order, the Defendant has preferred this appeal assailing the order on the ground that the learned trial Court below committed an error in granting the temporary injunction ex parte without hearing the, Defendant without any supporting material and in violation of the provision of Rule 3A of Order 39 of the Code of Civil Procedure. It is further contended that the prerequisites for issuing injunction, namely, existence of *prima facie* case, the presence of convenience and irreparable loss and injury have not been taken into consideration by the learned Court below and, therefore, the order under challenge

cannot be sustained.

3. I have heard Mr. A.C. Bhowmik, learned Counsel for the Appellant and Mr. D. Chakraborty, learned Counsel for the Opposite party-Respondent.

4. The impugned order dated 29.7.1997 shows that the learned Trial Judge, while directing issue of notice to the opposite party to show cause also restrained the Defendant-Opposite party in the manner as stated above without reference to the merit of the case and without recording his satisfaction as to the existence of a *prima facie* case. That apart, the requirement of Order 39 Rule 3 and Rule 3A do not appear to have been complied with.

5. The provisions of Rule 3 of Order XXXIX cannot be held to be mandatory and its non- compliance as fatal in any case. Each case has to be dealt with in its given circumstances, and ordinarily an appeal against an order of *ex parte* injunction ought not to be entertained. In the instant case, from the record of the trial Court, it would appear that the Defendant had entered appearance before the learned lower Court and filed written objection on 28.8.1997. The learned Court below fixed 12.9.1997 for hearing of the objection against the injunction. But on that day, the learned Judge was on leave and, as such, the case was adjourned to 1.11.1997. The delay in disposal of the injunction matter prompted the Defendant to approach this Court and obtain the order dated 26.9.97 staying the operation of the impugned order of injunction.

6. It has been submitted by the learned Counsel for the Plaintiff-opposite party that when the Defendant choose to file reply to the show cause notice, it was not proper on their part to approach this Court for cancellation of the order of injunction without waiting for a decision from the Court of the first instance. It was also pointed out that on 30.8.1997, when the Defendant-Petitioner filed written objection, he could have insisted for an early hearing. According to the learned Counsel, two proceedings cannot proceed simultaneously-one in the trial Court and the other one in this Court.

7. The above sumission of the learned Advocate appears to be of non consequence in view of the specific provision in Order 43 Rule 1(r) that an appeal shall lie from an order under Rule 1, Rule 2, Rule 4 or Rule 10 of Order 39 of the Code. When the right of a person to alienate of, and to exercise his right of possession over, a property is adversely affected by an interlocutory order of *ex parte* injunction, it cannot be held as a rule that such person is to vindicate his cause before the Court which passed the *ex parte* order debarring him from his right of appeal as per provisions of Order 43, Rule 1(r) of the Code of Civil Procedure. Therefore in my opinion, the appeal is maintainable.

8. It would appear from the impugned order that the learned trial Judge has not recorded any reason in order to justify the immediate necessity of passing the order and that, too, without complying with the provisions of Rule 2 of Order 39. An order

of injunction prohibiting or restraining any party from alienating his property or from exercising right of possession over his property cannot be passed in the manner as has been done in the instant case. An order of injunction may be issued in exercise of judicial discretion after taking into consideration of all relevant factors and after coming to a definite conclusion that the essential requirements of law, namely, *prima facie* case, balance of convenience and irreparable loss. An order passed without scant regard to the above requirements cannot but be denounced as arbitrary.

9. In 1989 2 G.L.R. 372, Smti Aparajita Mukherjee and Ors. v. Anil Kr. Mukherjee and Anr. a Division Bench of this Court held as follows:

5. "Injunction by the Court is not to be a matter of Course. Although an ex-parte injunction operates for a short period, that is , until the other side appears and contests the matter, if the ex parte injunction is vacated afterwards, by that time irreparable damage might have been caused. There is a great risk of creating injustice while granting or refusing injunction at the interlocutory stage. Therefore, at the stage of granting an injunction, Court should not act casually, i.e. the Court should pass an order only after considering all the facts and circumstances of the case, and while passing the order the Court is required to record reasons which weighed with the mind of the Court. More so when there is statutory provisions of appeal or revision to higher Court in order to enable the Superior Court or the appellate Court to know or to be apprised of the reasons which impelled the Court to know or to pass the order in question. If the reson is recorded, it enables both the Supreme Court and the parties concerned to know the mind of the Court as well as the reasons for its findings and conclusions.

6. A reading of the proviso R 3 suggests that only in the exceptional cases when the Court finds very good reason it would be justified in passing an ad interim ex parte order of a grave nature, and the Courts shall record reasons for its opinion that the object of granting the injunction would be defeated by delay.

10. In Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, in para 35, the Supreme Court held as follows:

35. As such whenever a Court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to other side, it must record the reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed. But any such ex-parte order should be in force up to a particular date before which the Plaintiff should be required to serve the notice on the Defendant concerned. In the Supreme Court Practice 1993, Vol. 1, at page 514, reference has been made to the views of the English Courts saying:

Ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion....

An ex parte injunction should generally be until a certain day, usually the next motion day...

11. It would appear from the above two decisions that the powers of a Court in granting injunction has to be exercised with judicial discretion devoid of any arbitrariness. An ex parte order of injunction passed without recording reasons cannot stand the test of judicial scrutiny. Therefore the order appeal against has to be set aside.

12. In the result, the appeal is allowed. The impugned order dated 29.7.1997 is hereby set aside. The learned trial Judge is directed to dispose of the matter relating to the prayer for injunction after hearing the parties within a period of 15 days from the date of receipt of this order in accordance with the provisions of law.

No costs.