

GAHC010092572023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : FAO/18/2023

MANIK KUMAR MUSHAHARY
S/O LT. SUBAN CHANDRA MUSHAHARY R/O COLLEGE ROAD NORTH
BONGAINAGON WARD NO. 10 P.O. P.S. AND DIST. BONGAIGAON ASSAM

VERSUS

DEV RAJ OWARY
S/O LT. NIRANJAN OWARY R/O VILL. JAKHATIPARA P.O. GERUKABARI P.S.
MANIKPUR DIST. BONGAIGAON ASSAM

Advocate for the Petitioner : MR. A C SARMA

Advocate for the Respondent :

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant :Mr. A C Sarma, Senior Advocate
Mr. B Haldar, Advocate

For the Respondents : Mr. D Das, Senior Advocate

Date of Hearing : 12.05.2023

Date of Judgement : 07.06.2023

JUDGEMENT & ORDER (CAV)

1. Heard Mr. A C Sarma, learned Senior counsel assisted by Mr. B Haldar, learned counsel for the appellant. Also heard Mr. D Das, learned Senior counsel assisted by Mr. K Mahammad, learned counsel for the respondents.
2. The present appeal is filed under Order 43 Rule 1 (r) of the CPC, 1908 assailing an order dated 06.04.2023 passed by the learned Civil Judge, Bongaigaon in Misc Case No. 16/2023 arising out of TS No. 19/2023.
3. **The background of the present case:**

- I. The appellant as plaintiff instituted a suit being TS No. 19/2023 before the learned court of Civil Judge, Bongaigaon for cancellation of a Registered deed of Revocation bearing registration No. 02/52 dated 11.01.2023, whereby of an irrevocable power of attorney executed earlier by the Defendant on 16.03.2005 was cancelled. Alternatively a prayer for damages and compensation was made.
- II. Along with the aforesaid suit, the plaintiff also filed an application under Order 39 Rule 1 and 2 read with Section 151 of the CPC for grant of injunction.
- III. The injunction prayed for was to the effect that the defendant be restrained from using and from utilizing the Deed of revocation under challenge in the suit. A prayer of ad-interim temporary injunction was also made with a further alternative

prayer that an injunction be issued to maintain status quo before 11.01.2023 (the date of execution of the deed under Challenge).

- IV. The learned trial court by the impugned order dated 06.04.2023 refused to grant ad-interim injunction without issuing notice to the defendant, after considering the nature of the allegation and pleading of Plaintiff.
- V. Such order has been assailed in the present appeal. The plaintiff has also filed an application under Order 39 Rule 1 and 2 read with Section 151 of the CPC along with the appeal, which is registered as IA (Civil) 1137/2023. This court under its order dated 03.05.2023, while issuing notice passed an injunction order restraining the respondent from acting upon the deed of revocation dated 11.01.2023 and also restrained them from interfering, disturbing in running the business in question until further order.
- VI. The respondent has appeared in this case and filed an IA being IA (civil) 1261/2023 for modification/ vacation of the aforesaid order dated 03.05.2023. The respondent has also filed objection in the IA (Civil) 1137/2023 resisting such prayer of injunction.
- VII. As the parties are duly represented and affidavit has been filed and as agreed to by the learned Counsels for the parties, instead of taking the IAs separately the entire first appeal is taken up for final hearing.

4. **The case projected by the plaintiff / petitioner:**

- I. The plaintiff/ petitioner pleaded that the respondent/ defendant was having a licence of retail outlet (petrol / diesel pump) from Indian Oil Corporation Limited and thus the defendant was an authorized dealer of a retail outlet at Rakhalidubi in the district of Bongaigaon under S.T. category.
- II. As the defendant had some personal inability and financial constraint to start the petrol pump and to look after and manage the said business, he appointed the plaintiff as his attorney by executing an irrevocable power of attorney dated 16.03.2005.
- III. It is also pleaded case of the plaintiff that such irrevocable power of attorney was executed pursuant to an unregistered deed of agreement dated 16.03.2005 entered between the parties.
- IV. It is further pleaded that it was agreed between the parties in the aforesaid deed of agreement that the deed will have an effect from 01.04.2004 and that the plaintiff shall arrange necessary finance as well as manage assistance required to run the retail outlet dealership. The defendant shall also provide full financial as well as managerial support in running the dealership and therefore, the defendant/ dealer shall execute an irrevocable power of attorney in favour of the plaintiff.
- V. It is also contended that by the aforesaid agreement it was agreed between the plaintiff and defendant that a monthly

retaining fees of Rs. 10,000/- shall be paid to the defendant dealer and the plaintiff shall be bound to pay such amount without fail irrespective of the fact whether there is any profit from the business of the retail outlet and such fees shall be enhanced by 10% after expiry every five years with effect from 01.11.2004.

- VI. It was also agreed that the plaintiff shall bear all taxes including professional tax, income tax, sales tax etc. Relating to the retail outlet and tax refund if any will be adjusted in the monthly retaining fees till validity of the LOI.
- VII. The plaintiff further pleaded that such agreement continued from 2004 to 2023, however, recently when the business was run with profit, the defendant started disturbing the plaintiff without any reason.
- VIII. A notice was issued on 31.08.2022 alleging certain mismanagement by the plaintiff, which includes diversion of fund of the retail outlet, non-payment of income to income Tax authority, misuse of power without knowledge of the principal, disobedience of principal, instruction etc. Also a demand was made to repay amount of Rs. 6 Lakhs purportedly borrowed by the plaintiff from the defendant dealer.
- IX. Thereafter, yet another notice was issued on 03.12.2022 on the similar line.
- X. Thereafter, another communication was issued by the defendant to the Sub-registrar, Bongaigaon for revocation of the

irrevocable power of attorney dated 16.03.2005.

- XI. It is also contended that the aforesaid notices were duly replied by the plaintiff through his Lawyer by reply notice dated 17.11.2022. It was specifically contended in the said notice that the power of attorney can be revoked only after cancellation of the agreement on the basis of which the power of attorney was executed.
- XII. Thereafter unilaterally the power of attorney dated 16.03.2005 was revoked by a deed of revocation dated 11.01.2023.
- XIII. It is also contended by the plaintiff that by virtue of the power of attorney dated 16.03.2005, the plaintiff is running the said dealership alone and exclusively till date of filing the suit.

5. Argument advanced on behalf of the appellant:

Mr. AC Sarma, learned Senior counsel for the appellant argues the followings:

- I. The learned trial Court has committed serious illegality in not granting ad-interim injunction without issuing notice inasmuch as there was a serious urgency in the matter and thus failed to consider the provision of Rule 3 of Order XXXIX.
- II. The learned Court below without discussing the three golden principles of law in granting injunction passed the order mechanically and without going into the merit of the case and also failed to appreciate the urgency.

III. The irrevocable power of attorney dated 16.03.2005, has been revoked by revocation deed No. 02/52 dated 11.01.2023 in violation of law and in complete violation of the contract arrived between the parties inasmuch as the said contract was the basis of the execution of the irrevocable power of attorney. Therefore, until and unless the contract is determined, the power of attorney cannot be revoked. The contract and the irrevocable power of attorney are co-terminus.

IV. The intentions of the parties are clear from the contract that the dealership shall be run by the plaintiff in lieu of monthly payment without any liability. Therefore, in absence of any allegation as to the violation of the term of the contract the revocation could have not been done and therefore, the plaintiff was able to make out a case for grant of an ad-interim injunction without notice. However, the learned court of the first instance has failed to exercise its discretion and acted arbitrarily.

6. **Argument advanced on behalf of the respondents :**

Mr. D Das, learned Senior counsel appearing on behalf of the respondent argues the followings:

- I. It is an admitted position that the retail outlet in question is settled / awarded in the name of the respondents. It is also an admitted fact that the plaintiff was well aware of the conduct of the defendant in initiating the revocation of the power of attorney in question.
- II. Due notices were issued to the plaintiff by the defendant expressing the intention of the defendant to revoke the power

of attorney. The plaintiff also responded to such notices. The plaintiff was also intimated about the proposed date of revocation of the power of attorney. However, the plaintiff did not respond to such request and accordingly, the Deed of Revocation of power of attorney was executed on 11.01.2023. The plaintiff waited till the month of March to file the Title suit and the injunction application and moved the injunction application in the month of April and in the meantime the Power of attorney was revoked. Therefore, the learned Trial Court has rightly not granted the injunction without issuing the notice to the defendants.

- III. The prayer made in the plaint disentitles the plaintiff from getting an injunction order inasmuch as there cannot be any irreparable loss and injury as the plaintiff himself quantified his loss to be @Rs.15 Crore for the alleged action of the defendants.
- IV. The impugned order has been passed in exercise of discretion which is permissible dealing with an application under Order 39 Rule 1 and 2 and in the given facts of the present case it cannot be said that the power has been exercised arbitrarily or capriciously or perversely or in ignorance of settled principle of law regulating grant or refusal of interlocutory injunction.
- V. The matter is not finally concluded only the ad-interim injunction without notice has been refused and that too on the basis of the material available on record. Therefore, this is not a fit case where the appellate court should interfere with the

exercise of discretion of the court of first instance.

7. Determination and Conclusion:

- I. This court has given anxious consideration to the submissions advanced by the learned counsel for the parties.
- II. From the perusal of the plaint and the petition filed under Order 39 Rule 1 and 2 of the Code of civil procedure, 1908, the following facts can be gathered.
 - A. On 16.05.2005, a deed of agreement was entered between the plaintiff and the defendant for running the retail outlet allotted in the name of the defendant. As per the agreement, the plaintiff is to run the Outlet due to inability of the defendant to run and manage the same. It was also agreed that the plaintiff will run the business by providing necessary finance as well as managerial assistance and it was agreed that for the purpose of running the outlet, one irrevocable power of attorney shall be executed by the defendant in favour of the plaintiff and accordingly, on 16.03.2005 the irrevocable power of attorney was executed.
 - B. Business was run by the plaintiff in terms of the agreement and power of attorney till a notice was issued by the defendant on 31.08.2022 alleging mismanagement of business and alleging diversion of fund, misuse of power and income tax dispute. Accordingly, a demand was made by the defendant to plaintiff to co-operate with the defendant for

revocation of power of attorney and the deed of agreement by fixing a date for such purpose before the Sub-Registrar, Bongaigaon.

- C. Subsequently, yet another legal notice was issued on 03.11.2022, by the defendant asking the plaintiff to appear before the Sub-Registrar, Bongaigaon on 10.11.2022 at 10:30 AM for cancellation of the irrevocable general power of attorney dated 21.03.2005 and deed of agreement and to bring all the original paper mentioned in the legal notice.
- D. On 09.11.2022, the plaintiff addressed a letter to the Sub Registrar, Bongaigaon whereby, inter alia, it was requested that if the irrevocable power of attorney is cancelled, the same will cause grave injustice to the plaintiff. Accordingly, a request was made to the Sub Register to allow the plaintiff to defend the allegation made by the defendant.
- E. Thereafter, by a legal notice dated 17.11.2022, the plaintiff intimated the defendant that to cancel the irrevocable of power of attorney, the deed of agreement is required to be cancelled first, as the power of attorney was result of the terms of the agreement. It was also intimated that the plaintiff seeks an amicable settlement of the dispute before approaching the court of law.
- F. Thereafter, a notice was published on 22.11.2022 in the Assamese daily newspaper "Axomiya Pratidin" informing the defendant that the plaintiff is going to revoke the power of

attorney within seven days from publication of such notice.

G. Thereafter, on 11.01.2023, the power of attorney was revoked.

III. From the aforesaid, it is clear that the plaintiff had knowledge of the intention of the defendant to revoke the power of attorney since 31.08.2022, when the allegations were made and intention of revocation of power of attorney was expressed. The aforesaid fact also reveals that on subsequent dates also, the plaintiff was put to notice regarding the intention of the defendant to revoke the power of attorney in question. Even if it is assumed that the plaintiff was not aware of the notice published in the newspaper, however, from the communication of the plaintiffs as discussed herein above, it is clear that he had knowledge at least till 17.11.2022, however, the plaintiff awaited till the month of March, 2023 to file the suit and to challenge the act of revocation itself.

IV. From the above it is seen that the injunction sought for was in the nature of a mandatory injunction inasmuch as the plaintiff had knowledge of such proposed action. Therefore, in the considered opinion of this Court, the learned Court below has rightly not passed an ex-parte ad-interim injunction. The plaintiff has failed to show that the object of granting the injunction would have been defeated by delay inasmuch as even after knowing that the power of attorney in question was sought to be revoked and accordingly, notices were issued but plaintiff waited till such proposed course of action was completed.

V. Therefore, in the considered opinion of this Court the learned Court

below has rightly did not exercise its power under Rule 3 of Order XXXIX of the Code of Civil Procedure, 1908.

VI. In the considered opinion of this court, the learned court of first instance has exercised its discretionary power without any arbitrariness and on the basis of settled principle of law. The decision of the learned trial court was a reasonably possible view in the given backdrop of facts. This court has not found any perversity to reach a different view on the basis of material available.

VII. In view of the discussions made hereinabove, this Court is of the unhesitant view that the present appeal lacks merit and accordingly same is dismissed. Parties to bear their own cost.

8. While parting with the record, it is made clear that the views expressed by this Court in the present order is for the purpose of determining whether the learned trial Court has committed any error of law or fact in not granting the ex-parte ad-interim injunction and therefore, such views shall not influence the learned trial Court below while taking up the matter for consideration of temporary injunction and the learned trial Court shall consider the injunction application on its own merits and in terms of settled proposition of law in this regard.

JUDGE

Comparing Assistant