

GAHC010297242019



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

Case No. : FAO/72/2019

MD. UBEDUR RAHMAN BORAH
S/O- LATE DR. MUHIBUR RAHMAN BORAH R/O- WARD NO. 6, SHANTI
NAGAR, NORTH LAKHIMPUR TOWN, P.O. AND P.S.- NORTH LAKHIMPUR,
MOUZA AND DIST.- LAKHIMPUR, ASSAM, PIN- 787001

VERSUS

MD. ULFATUR RAHMAN BORAH AND ANR
S/O- LATE DR. MUHIBUR RAHMAN BORAH PERMANENT RESIDENT OF
WARD NO. 6, NORTH LAKHIMPUR TOWN, P.O. AND P.S. NORTH
LAKHIMPUR, MOUZA AND DIST.- LAKHIMPUR, ASSAM, PIN- 787001,
PRESENTLY RESIDING AT 2ND FLOOR, BLOCK-B, PROTECH HERITAGE,
MOTHER TERESA ROAD, GEETANAGAR, GUWAHATI- 781024

2:SRI JYOTI PRASAD HAZARIKA
C/O- HOTEL NANDIKESHOR
S/O- LATE MAHENDRA HAZARIKA
R/O- VILL.AND P.O.- GORUMURIA
P.S. NORTH LAKHIMPUR
MOUZA AND DIST.- LAKHIMPUR
ASSAM
PIN- 78703

Advocate for the Petitioner : MR. SK N MOHAMMAD

Advocate for the Respondent : MR. S DEKA (R2)

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Date : 22-06-2023

Heard Mr. A. K. Purkayastha, the learned counsel appearing on behalf of the Appellant and Mr. S. Deka, the learned counsel appearing on behalf of the Respondent Nos. 1 and 2.

2. The instant First Appeal has been preferred against the order dated 15.02.2019 passed by the Court of the Civil Judge, Lakhimpur in Misc. (J) Case No.27/2018 arising out of Title Suit No.13/2018 whereby the Appellant's application seeking injunction was refused.

3. From a perusal of the plaint in Title Suit No.13/2018, it transpires that there are 6 (six) numbers of Defendants and 4 (four) Proforma Defendants. In the instant appeal the Principal Defendant Nos. 1 and 2 are the parties.

4. In the backdrop of the above, let this Court take into consideration the brief facts which led to the filing of the suit. The Appellant as Plaintiff claims that the Schedule-B land originally belonged to Late Tazuddin Borah. Late Tazuddin Borah gifted the Schedule-B land to the mother of the Plaintiff and the Defendant No.1 by way of an oral gift with delivery of possession. Subsequent thereto, the mother of the Plaintiff and the Defendant No.1 vide another oral gift, gifted the Schedule-B land in equal portions to the Plaintiff and the Defendant No.1. The Plaintiff claims that the Schedule-C land was the land gifted to the Plaintiff and the Schedule-D land was the land gifted to the Defendant No.1. It is the further case of the Plaintiff that a partition proceedings was initiated before the Circle Officer, North Lakhimpur Revenue Circle wherein

behind the back of the Plaintiff an order was passed thereby granting 1 Katha 2 Lechas of land in favour of the Defendant No.1. It is the further case of the Plaintiff that prior to the order passed by the Circle Officer, there was an amicable settlement between the Plaintiff and the Defendant No.1 whereby the Defendant No.1 gave a "No Objection" on affidavit dated 15.02.2016 to the effect that the Plaintiff can apply for partition of 1 Katha 10 Lechas of land. The further case of the Plaintiff as appears is that the Plaintiff came to learn that the Defendant No.3 had on the basis of a Power of Attorney executed by the Defendant No.1 transferred 1 Katha 2 Lechas of land to the Defendant No.2 vide a registered Deed of Sale No.193/I/18 dated 13.04.2018. It is under such circumstances that the suit was filed claiming right, title and interest over the Schedule-C land; for declaring that the General Power of Attorney executed by the Defendant No.1 in favour of the Defendant No.3 was illegal, inoperative in law; for declaration that the Sale Deed executed by the Defendant No.3 in favour of the Defendant No.2 was illegal and null and void; for recovery of possession of the 2 Lechas from the Schedule-D land; for declaration that the partition dated 29.01.2018 in Partition Case No.10/17-18 is illegal as well as for grant of a permanent injunction restraining the Defendant Nos. 1 and 2 from disturbing peaceful possession of the Plaintiff along with his tenants over the Schedule-C land. It appears on record that along with the said suit, an injunction application was also filed which was registered and numbered as Misc. (J) Case No.27/2018.

5. A perusal of the said application shows that the statements made in the plaint were reiterated and as such for the sake of brevity, this Court is not repeating the same. However, it is relevant to take note of that the relief sought for in the said injunction application was to restrain the Defendant Nos. 1 and 2

or their agents, representatives from entering into the premises of the Petitioner i.e. the Schedule-C land and over the Schedule-D land so that the Defendants cannot improve or sale the Schedule-D property till the disposal of the suit. It is further relevant to take note of that a perusal of the said application shows that only the Defendant Nos. 1 and 2 were arrayed as parties to the injunction application.

6. In the written objection filed by the Opposite Party No.1 i.e. the Respondent No.1 herein, it was stated that the predecessor in interest of the Plaintiff, Defendant No.1, Proforma Defendant Nos. 1, 2 and 3 and Late Muhibur Rahman Borah was the owner of the Schedule-A land. It was mentioned that out of the said Schedule-A land, the land which fell into the share of the Plaintiff, Defendant No.1, Proforma Defendant Nos. 1, 2 and 3 and Late Muhibur Rahman Borah was 3 Katha 9½ Lecha. The said 3 Katha 9½ Lecha was in two plots. One plot measured 2 Kathas 10 Lechas and the other plot measured 19½ Lechas. It was further stated that out of this 19½ Lechas, the Defendant No.1 and Late Muhibur Rahman Borah vide an unregistered gift deed dated 24.05.2004, gifted their share of land measuring 6.6 Lechas to the Proforma Defendant Nos. 1 and 2 and therefore, the Proforma Defendant Nos. 1 and 2 became the owner of the land measuring $(3.3 \text{ Lechas} \times 4) = 13.2 \text{ Lechas}$. The Proforma Defendant Nos. 1 and 2 thereupon vide a registered Deed of Sale dated 09.03.2009 sold the said portion of their share to one Musstt. Sofika Begum.

7. It was further stated that the plot of land measuring 2 Kathas 10 Lechas was divided amongst 6 (six) successor in interest of Late Muhibur Rahman Borah and as such each of such successors including the Plaintiff and the

Defendant No.1, Proforma Defendant Nos. 1, 2, 3 and 4 were entitled to 8.3 Lechas each. It was therefore the contention in the written objection that there was no oral gift by the mother of the Plaintiff and the Defendant No.1 to the Plaintiff and the Defendant No.1 of the Schedule-C and D land.

8. In the backdrop of the above facts, let this Court take into consideration as to how the learned Trial Court dealt with the injunction proceedings. From a perusal of the impugned order, it reveals that the learned Trial Court had believed the version of the Defendant Nos. 1 and 2 on the ground that the Proforma Defendant Nos. 3, 4(a), 4(b), 4(c) and 4(d) in their written statement fully supported the case of the Opposite Party No.1/Defendant No.1. The learned Trial Court further had taken note of that the Proforma Defendants had denied the fact of gift by the mother of the Plaintiff and the Defendant No.1. It is under such circumstances the learned Trial Court came to a finding that as the Petitioner/Plaintiff had failed to establish a prima facie case and as the legal heirs of the original owner instead of supporting the case of the Plaintiff had submitted a written statement denying to the case of the Plaintiff, the balance of convenience was not found in favour of granting a temporary injunction in favour of the Plaintiff/Petitioner. The third aspect as regards irreparable loss, harm and injury, the learned Trial Court felt it not necessary to take into consideration the said principle in view of the fact that the Plaintiff had failed to establish a prima facie case. It is under such circumstances, the injunction application was rejected.

9. I have heard the learned counsels for the parties and have perused the materials on record. Before analyzing as regards the entitlement of the Appellant, this Court finds it relevant to take note of the judgment of the

Supreme Court rendered in the case of ***Wander Ltd. and Another Vs. Antox India Private Ltd. reported in (1990) Supp. SCC 729*** and more particularly to paragraph No.14 wherein the Supreme Court explained the scope of interference by an Appellate Court against an order passed by the Trial Court in exercise of its equitable discretionary jurisdiction. The said paragraph is reproduced hereinunder:

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court’s exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Lid. v. Pothan Joseph : (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in Charles Oseinton & Co. v. Jhanaton ‘...the law as to the reversal by a court of appeal of an order made by a judge

below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.’”

The appellate judgment does not seem to defer to this principle.”

10. From a perusal of the said paragraph, it would be seen that the scope of interference by the First Appellate Court against an order passed in exercise of a discretionary jurisdiction is limited and it can only be interfered with when such order is arbitrary, capricious, or perverse or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunction. This Court also finds it relevant to take note of another paragraph in the said judgment which would be paragraph No.9 where the Supreme Court had observed that the prayer for grant of an interlocutory injunction is at a stage when the existence of legal right asserted by the Plaintiff and its alleged violation are both contested and uncertain and till they are established at the trial on evidence. It was further observed that the Court, at this stage, acts on the well settled principles of administration of interlocutory remedy which is both temporary and discretionary. It was observed that the object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages, recoverable in the action if the uncertainty were resolved in his favour at the trial. It was further observed that the need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court therefore is required to weigh one's need against another and determine where the balance of convenience lies. It was further observed that the interlocutory

remedy is intended to preserve in status quo, the rights of the parties which may appear on a prima facie case. The Court also, in restraining the defendant from exercising what he considers his legal right but what the Plaintiff would like to be prevented, has to put into the scales, as a relevant consideration the competing claims and the respective difficulties to be faced by the parties. Paragraph No.9 of the said judgment being relevant is quoted hereinbelow:

“9. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated

“...is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the ‘balance of convenience’ lies.”

The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case

considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted.”

11. Therefore, a reading of paragraph No.9 with paragraph No.14 would show that the interference to be made by the First Appellate Court against an order passed in exercise of the equitable and discretionary jurisdiction would not only be on the ground of arbitrariness or capriciousness or perversity but can also be made when the Trial Court ignores the settled principles of law regulating the grant or refusal of interlocutory injunction as have been stated in paragraph No.9 of the judgment in ***Wander Ltd. (supra)***.

12. In the backdrop of the above, let this Court therefore analyze as to whether the order dated 15.02.2019 passed by the learned Trial Court is required to be interfered with. From the facts as narrated herein supra, it would be apparent that the claim of the Plaintiff is on the basis that the Plaintiff has rights over the Schedule-C land upon an oral gift made by his mother. The Plaintiff also admitted in his plaint that the Schedule-D land was gifted orally by his mother to the Defendant No.1. It would also be seen from the plaint itself that it is the case of the Plaintiff that the Late Tazuddin Borah gifted the Schedule-B land to the mother of the Plaintiff as well as the Defendant No.1 who subsequently gifted to the Plaintiff and the Defendant the Schedule-C and Schedule-D land respectively.

13. Now, at this stage, if this Court takes into account Section 129 of the Transfer of Property Act, 1882, it would show that by virtue of the said provision, the applicability of Section 123 of the said Act is excluded to a gift of an immovable property by a Mohammedan. During the course of the hearing, this Court made a specific query upon the learned counsel appearing on behalf

of the Respondent Nos. 1 and 2 as to who is in possession of the Schedule-C land. It was submitted that the Plaintiff is in possession of the Schedule-C land and in respect to the houses standing thereon, the Plaintiff is collecting rent. It would further be seen from the written objection so filed that it is the specific case of the Defendant No.1 that there was no gift made by Late Tazuddin Borah in favour of the mother of the Plaintiff and the Defendant No.1. It was also the specific case that the mother of the Plaintiff and the Defendant No.1 also did not gift the Schedule-C and Schedule-D land to the plaintiff and the Defendant No.1 respectively. The said stand has also been supported by the Proforma Defendants in their written statement. But the question which needs to be taken note of as to whether the Plaintiff has been able to make out a prima facie case for going for trial inasmuch as it is a well settled principle of law that what is required to be taken into consideration for deciding an interlocutory application is a prima facie case in favour of the Plaintiff/Applicant seeking injunction which needs adjudication at the trial. The Supreme Court in the case of ***Dalpat Kumar and Another Vs. Prahlad Singh and Others*** reported in (1992) 1 SCC 719 had observed that prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. It was observed that a prima facie case means a substantial question raised bona fide which needs investigation and a decision on merits. From what has been mentioned hereinabove, this Court is of the opinion that there was a prima facie case for an adjudication at the trial.

14. Now in that backdrop, let this Court take note of as to on what basis the learned trial Court came to a conclusion that the Plaintiff did not have a prima facie case. A perusal of the impugned order dated 15.02.2019 and more particularly at paragraph No.13, the learned Trial Court observed that as the

other legal heirs of Late Tazuddin Borah including the O.P. No.1 categorically denied the claim of the Plaintiff and submitted relevant documents, the Trial Court came to the conclusion that the Applicant failed to establish a prima facie case requiring discretionary relief of granting a temporary injunction. This Court is of the opinion that the manner in which the exercise of discretion was done was contrary to the well settled principles for grant of an injunction.

15. Now, coming to the next essential requirement for grant of an injunction is the consideration of the balance of convenience. The Supreme Court in the case of ***Dalpat Kumar (supra)*** had explained how the principles relating to balance of convenience is to be taken into consideration. It was observed that the Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare that with what is likely to be caused to the other side, if the injunction is granted. The Court therefore is required to weigh competing possibilities or probabilities of likelihood of injury and upon such considerations, the principles of balance of convenience is required to be adjudged.

16. In the backdrop of the said principles, let this Court therefore take into consideration as to how the learned Trial Court considered the principles of balance of convenience in the impugned order. In the paragraph No.13 of the impugned order, the learned Trial Court observed that as the other legal heirs of the original owner of the suit land instead of supporting the case of the Petitioner/Appellant herein submitted written statement along with relevant documents in support of the Defendant No.1, the balance of convenience was not in favour of granting the temporary injunction as sought for by the

Plaintiff/Applicant. This Court is sorry to state that the learned Trial Court did not appreciate in the proper perspective as to how the balance of convenience is required to be considered. In the instant case, as would appear that the Plaintiff/Applicant on the basis of the materials as well as the allegations made in the plaint stated that the Schedule-C land belongs to the Plaintiff and he is in possession of the Schedule-C land. The Defendant No.2 stated that pursuant to a sale made by the Defendant No.1 through the Defendant No.3, the Schedule-D plot of land was sold to the Defendant No.2. Therefore, the balance of convenience has to be taken note of by taking into consideration the competing claims of the parties to the suit. The Defendant No.2 by virtue of a registered Deed of Sale had purchased the Schedule-D land. The Plaintiff in his plaint has also admitted that the Schedule-D land was the land which was gifted by the mother of the Plaintiff and Defendant No.1 to the Defendant No.1. Therefore, upon adjudicating competing claims, the question of granting an injunction in favour of the Plaintiff as regards the Schedule-D land does not arise. In the opinion of this Court, the learned Trial Court therefore rightly rejected the grant of injunction in respect to the Schedule-D land. However, in respect to the Schedule-C land, the Plaintiff claims ownership over the said land on the basis of an oral gift made by the mother of the Plaintiff in his favour. There is a denial by the Defendants as well as the Proforma Defendants and the said aspect of the matter requires adjudication. The learned Trial Court in the opinion of this Court did not also take into consideration a vital aspect of the matter whereby the Plaintiff is admittedly in possession of the Schedule-C land and as such till the competing claims were decided, the possession of Schedule-C land ought to have been protected thereby maintaining the status quo as regards possession in respect to the Schedule-C land.

17. Now coming to the question of the third principles for the grant of injunction is whether not granting of injunction would cause irreparable loss, harm and injury. The Supreme Court in the case of ***Best Sellers Retail (India) Private Ltd. Vs. Aditya Birla Nuvo Ltd. and Others*** reported in (2012) 6 SCC 792, explained the expression “irreparable injury” taking note of observation of ***Alderson, B. in Attorney General Vs. Hallett*** reported in (1857) 16 M&W 569 wherein it was explained that the meaning of “irreparable injury” would be if not prevented by an injunction cannot be afterwards compensated by any decree which the Court can pronounce in the result of the cause.

18. Now, let this Court take into consideration as to how the learned Trial Court had dealt with the principles pertaining to irreparable loss, harm and injury in the impugned order. In paragraph No.14 of the impugned judgment, the learned Trial Court held that as there was no prima facie case, the question of irreparable loss in the event of not granting the temporary injunction in favour of the Plaintiff does not arise. In the opinion of this Court, the manner in which the learned Trial Court had dealt with the principles relating to irreparable loss, harm and injury is not inconsonance with the well settled principles for grant of an injunction.

19. In the instant case, it would be seen that the Plaintiff claims for declaration as regards the Schedule-C land and admittedly, the Plaintiff is in possession of the Schedule-C land. The learned Trial Court did not take into consideration that if the Plaintiff is dispossessed from the Schedule-C land pending disposal of the suit, the Plaintiff cannot be compensated by way of any decree that can be passed in the instant suit. This Court is of the opinion that taking into account the competing claims and that the Plaintiff is in possession of the Schedule-C

land and from a perusal of the written objection filed by the Respondent No.2 herein, it transpires that there is a counter claim filed by the Proforma Defendant Nos. 1 and 2 claiming a portion of the Schedule-C land, it was the requirement of law that the status quo as regards Schedule-C land ought to have been passed during the pendency of the suit.

20. Accordingly, this Court therefore is of the opinion that the impugned order dated 15.02.2019 passed by the learned Trial Court in Misc. (J) Case No.27/2018 is not in accordance with the well settled principles of law insofar as the Schedule-C property. However, as regards the Schedule-D property, this Court is of the opinion that no interference is required. Accordingly, this Court therefore disposes of the instant appeal thereby directing the Plaintiff as well as the Defendant Nos. 1 and 2 to maintain status quo as regards the possession of the Schedule-C land till the disposal of the suit. It is clarified that the injunction is only in respect to the Schedule-C land of the plaintiff and not the Schedule-D land.

21. With above observations and directions, the instant appeal stands disposed of. Pending applications stands disposed of in terms with the instant order.

22. Taking into account that the observations made hereinabove are only as regards the entitlement of an injunction pending disposal of the suit, the observations made herein are recorded prima facie and tentative which shall not influence the learned Trial Court while deciding the suit on merits.

JUDGE

Comparing Assistant