

GAHC010104852024



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

Case No. : FAO/48/2024

JAMES HENRY ANTHONY
S/O EDWARD ANTHONY AND RITA LILY ANTHONY,
R/O HOUSE NO. 32, MASZID ROAD, BIRUBARI, GUWAHATI, P.O.-
GOPINATH NAGAR, P.S.- PALTANBAZAR, DIST.- KAMRUP (METRO),
ASSAM, PIN- 781016.

VERSUS

MARY FLORENCIA ANTHONY AND ORS.
D/O EDWARD ANTHONY AND RITA LILY ANTHONY,
W/O LATE WALTER JOSEPH,
R/O HOUSE NO. 32, MASZID ROAD, BIRUBARI, GUWAHATI, P.O.-
GOPINATH NAGAR, P.S.- PALTANBAZAR, DIST.- KAMRUP (METRO),
ASSAM, PIN- 781016.

2:JOSEPH LAWRENCE ANTHONY
S/O EDWARD ANTHONY AND RITA LILY ANTHONY

R/O HOUSE NO. 32
MASZID ROAD
BIRUBARI
GUWAHATI
P.O.- GOPINATH NAGAR
P.S.- PALTANBAZAR
DIST.- KAMRUP (METRO)
ASSAM
PIN- 781016.

3.1:ON THE DEATH OF LATE RICHARD JORDAN ANTHONY
THE SUBSTITUTED LEGAL HEIRS USHA ANTHONY
W/O LATE RICHARD JORDAN ANTHONY

R/O HOUSE NO. 33
MASZID ROAD
BIRUBARI
GUWAHATI
P.O.- GOPINATH NAGAR
P.S.- PALTANBAZAR
DIST.- KAMRUP (METRO)
ASSAM
PIN- 781016.

3.2:GEORGINA CATHERINE BANIK
D/O LATE RICHARD JORDAN ANTHONY

R/O HOUSE NO. 33
MASZID ROAD
BIRUBARI
GUWAHATI
P.O.- GOPINATH NAGAR
P.S.- PALTANBAZAR
DIST.- KAMRUP (METRO)
ASSAM
PIN- 781016.

3.3:DOCEENA PATRICIA ANTHONY
D/O LATE RICHARD JORDAN ANTHONY

R/O HOUSE NO. 33
MASZID ROAD
BIRUBARI
GUWAHATI
P.O.- GOPINATH NAGAR
P.S.- PALTANBAZAR
DIST.- KAMRUP (METRO)
ASSAM
PIN- 781016

Advocate for the Petitioner : MR. T DEURI

Advocate for the Respondent :

**BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI**

ORDER

14-06-2024

Heard Shri T. Deori, learned counsel for the appellant, who has preferred this first appeal against a order dated 26.02.2024 passed in Misc. (J) Case No. 29/2024 arising out of probate Title Suit No. 14/2022 by the learned Addl. District Judge, No. 1, Kamrup (M). By the said order, the learned Court has passed an order of injunction restraining the appellant/defendant to interfere with the possession or make any construction over the land of common area and other areas mentioned in the Will.

2. Originally, an application for grant of probate was filed on 31.03.2021 and was numbered as Misc. Probate Case No. 30/2021. However, there being a contest, it was converted into Probate Title Suit No. 14/2022.

3. It is submitted that the original application having been filed beyond the prescribed period of limitation, the mandate of law required for filing of an application for condonation of delay which was not done. However, without considering that aspects on the maintainability of the application at all, the impugned order has been passed on 26.02.2024 granting injunction.

4. Shri Deori, the learned counsel for the appellant has strenuously argued that the order of injunction could not have been passed in view of the fact that there was no application filed for condonation of delay which is required under the law. He has also questioned the jurisdiction of the learned Court in passing orders of injunction in a Probate case which according to him is not permissible. In support of his submission, the learned counsel has referred to the decision of

Kamakhya Prasad Gupta & Anr. Vs Jibon Lal Gupta reported in **2011 (1) GLT 435** wherein this Court has held that a case for probate, the application of the Limitation Act including the provisions for condonation of delay under Section 5 would be applicable. The learned counsel has also referred to the case of the Hon'ble Bombay High Court in the case of ***Rupali Mehta Vs Smt. Tina Narinder Sain Mehta*** reported in **AIR 2007 Bombay 62** wherein an observation was made that in a testamentary suit, the interim orders are not to be passed.

5. The adjudication of a petition for injunction is essentially an exercise of discretion which however is to be exercised by following the due process of law. It is trite law that the three golden principles namely availability of a *prima facie* case, sufferance of irreparable loss and injury and balance of convenience are to be looked into by the Trial Court. The aspect of public interest is also one of the factors which is to be looked into.

6. The exercise of discretion, if done by following the prescribed procedure is not to be interfered in a routine manner by an Appellate Court. The law in this field is well settled and one may gainfully refer the case of ***Wander Ltd. v. Antox India (P) Ltd.***, reported in **1990 Supp SCC 727** and the subsequent cases including the case of ***Ramdev Food Products (P) Ltd. Vs Arvindbhai Rambhai Patel*** reported in **(2006) 8 SCC 726**.

7. In the landmark case of ***Wander Ltd.*** (supra), the following has been laid down:-

“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. ..."

8. In the case of **Ramdev Food Products (P) Ltd.** (supra), the following has been laid down:-

“125. We are not oblivious that normally the appellate court would be slow to interfere with the discretionary jurisdiction of the trial court.

126. The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate courts will usually not interfere with it. However, the appellate courts will substitute their discretion if they find that discretion has been exercised arbitrarily, capriciously, perversely, or where the court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions. This principle has been stated by this Court time and time again.

127. The appellate court may 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.”

9. This Court being an Appellate Court, while examining the correctness or legality of an order of grant or non grant of injunction would only see whether such orders has been passed by consideration of the materials on record or whether there is any perversity in the same. This Court will not make a roving

enquiry into all the materials which were before the Trial Court, as the same are matters of discretion to be exercised in an equitable manner.

10. A bare perusal of the impugned order dated 26.02.2024 would show that the same has been passed by taking into consideration all the materials on record and after hearing the affected parties. Such order being passed only as an interim measure till final adjudication of the */is* between the parties, this Court is of the opinion that the same does not require any interference by this Court.

11. The aspect of not filing an application for condonation of delay till now, as has been contended by the learned counsel would be an aspect which would touch on the merits of the suit including its maintainability which the present appellant as defendant could be free to contest in the appeal and accordingly the Court would be under an obligation to consider the aforesaid aspect.

12. The appeal accordingly stands dismissed in terms of the observations made above.

JUDGE

Comparing Assistant