

GAHC010199462024



2024:GAU-AS:10229

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

Civil Revision Petition(I/O) No.382/2024

Smti Dipanwita Biswas,
D/o-Late Utpal Mazumdar,
W/o-Sri Moloy Biswas,
R/o-Borbil No. 1, Near Ram Thakur Mandir,
P.O. & P.S.-Digboi,
District-Tinsukia, Assam, Pin-786171.
.....Petitioner

-Versus-

1.Sri Sanjoy Kumar Majumdar,
S/o-Late Kalyan Kumar Majumder,
R/o-Tinkunia, Garham Bazar,
P.O. Dibrugarh Town,
P.S. & District- Dibrugarh, Assam, Pin-786001.

2. Sri Sanjeeb Kumar Majumdar,
S/o- Late Kalyan Kumar Majumder,
R/o- Tinkunia, Garham Bazar,
P.O. Dibrugarh Town,
P.S. & District- Dibrugarh, Assam, Pin-786001.

3. Sri Uma Majumdar,
S/o- Late Adhir Majumder,
R/o- Tinkunia, Garham Bazar,
P.O. Dibrugarh Town,
P.S. & District- Dibrugarh, Assam, Pin-786001.
.....Respondents

For Petitioner : Mr. S. Dutta, Senior Advocate.
Mr. A. Biswas, Advocate.

For Respondent(s) : B. Dutta, Senior Advocate.
Mr. J. Das, Advocate.

Date of Judgment : 04.10.2024.

BEFORE

HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA
JUDGMENT & ORDER (CAV)

1. Heard Mr. S. Dutta, the learned Senior Counsel, assisted by Mr. A. Biswas, learned counsel for the petitioner. Also heard Mr. B. Dutta, learned Senior Counsel, assisted by Mr. J. Das, learned counsel for the respondent No. 1.

2. This application under Article 227 of the Constitution of India, read with Section 151 of the Code of Civil Procedure, 1908 has been filed by the petitioner, namely, Dipanwita Biswas impugning the order dated 21.08.2024, passed by the Court of learned Additional District Judge (FTC), Dibrugarh in Misc. Appeal No. 03/2024, whereby the temporary injunction granted in favour of the petitioner, by the Court of learned Civil Judge (Senior Division), Dibrugarh on 04.04.2024 in Misc. (J) Case No. 04/2024 was set aside.

3. The facts relevant for consideration of the instant revision petition are that the petitioner had filed a suit for declaration of her right, title and interest over Schedule-A plot of land along with permanent injunction. The suit was registered as T.S. No. 02/2024 before the Court of learned Civil Judge (Senior Division), Dibrugarh.

4. The case of the petitioner projected in her plaint is that one Sudhangshu Bimal Majumdar was the absolute owner of the plot of land measuring 1 Katha covered by Dag No. 130 of Periodic Patta No. 69 of Tinkunia Ward, Mouza and District Dibrugarh over which he had constructed an Assam Type house for residential purpose for him and his other family members. The said property is described in the Scheduled-A of the plaint.

5. It is contended by the petitioner in her Plaint that at the time of his death, Late Sudhangshu Bimal Majumdar left his wife, Parul Majumdar, his four sons, namely, Kalyan Majumdar, Chiru Majumdar, Utpal Majumdar and Adhir Majumdar and two daughters, namely, Jharna Majumdar and Aruna Biswas as his legal heirs. All of the aforesaid legal heirs except Jharna Majumdar had expired.

6. It is also contended by the petitioner in her Plaint that after the death of the Sudhangshu Bimal Majumdar,

the suit property devolved upon his legal heirs in the ration of $1/7^{\text{th}}$ share each. However, it is also contended by the petitioner in her plaint that as whereabouts of two of the legal heirs of Sudhangshu Bimal Majumdar, were not known to anyone and as the wife and daughter of Sudhangshu Bimal Majumdar, namely, Parul Majumdar and Jharna Majumdar died, the surviving legal heirs, shared $1/3^{\text{rd}}$ of share of the suit property amongst themselves.

7. It is contended that the present petitioner is the daughter of the Utpal Majumdar and Kalyan Majumdar was the father of the respondent Nos. 1 and 2 and Utpal Majumdar was the father of respondent No. 3.

8. It is further contended by the learned Senior Counsel for the petitioner that the petitioner was under general believe of being legal heir of one of the remaining sons of Late Sudhangshu Bimal Majumdar, she would be entitled to $1/3^{\text{rd}}$ share of the Schedule-A land. However, she was shocked to know that the Schedule-A land was mutated in the names of respondent Nos. 1, 2 and 3 by Mutation Order dated 29.06.2022. It is also contended that the respondents have demolished the Assam Type building which was initially built by Late Sudhangshu Bimal

Majumdar and have started construction an RCC building over the said plot of land.

9. The learned Senior Counsel for the petitioner has submitted that after filing of the aforementioned Title Suit, the petitioner filed an application under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908 read with Section 151 of the said Code praying for an issuance of temporary injunction against the respondents for restraining them from carrying out any permanent construction over Schedule-A land. The said Misc. Case was registered as Misc.(J) Case No. 04/2024.

10. The learned Senior Counsel for the petitioner has submitted that after hearing learned counsel for both the sides, the Trial Court had, by its order dated 04.04.2024, passed in Misc.(J) Case No. 04/2024 allowed the application filed by the petitioner and issued temporary injunction restraining the respondents from carrying out any construction over the suit land till the disposal of the Title Suit No. 02/2024.

11. Being aggrieved by the said order, the respondent No. 1 preferred an appeal under Order 43 Rule 1(r) of the Code of Civil Procedure before the Court of learned Additional District Judge (FTC), Dibrugarh, wherein, the

present respondent Nos. 2 and 3 were arrayed as proforma respondents.

12. By order dated 21.08.2024, which has been impugned in the instant revision application, the Court of learned Additional District Judge(FTC), had set aside the order dated 04.04.2024, passed in Misc.(J) Case No. 04/2024 by the Court of learned Civil Judge(Senior Division), Dibrugarh.

13. The learned Senior Counsel for the petitioner has submitted that the respondent No. 1 had claimed his right over entire suit land on the basis of an alleged Will executed in his favour by Late Jharna Majumdar. However, the learned Senior Counsel for the petitioner submits that no probate has yet been granted in respect of the said Will, therefore, the Court of learned Additional District Judge (FTC), Dibrugarh erred in recognizing the right of the respondents over entire suit land on the basis of an unprobated Will.

14. The learned Senior Counsel for the respondents have submitted that as the petitioner is also one of the heir of the original owner of the land, along with the respondent No. 1, she has right over entire suit property unless same is partitioned amongst the legal heirs of the original owner.

15. The learned Senior Counsel for the petitioner has also submitted that the Trial Court as well as the Court of learned Additional District Judge (FTC), Dibrugarh have held that there is a *prima facie* case in support of the right claimed by the petitioner. However, the learned Senior Counsel for the petitioner has submitted that the First Appellate Court had erred in holding that the balance of convenience is not in favour of the petitioner as well as that she would not suffer irreparably loss.

16. The learned Senior Counsel for the petitioner has also submitted that unless the further construction over the suit property is restrained immediately, it would lead to multiplicity of cases and therefore, he submits that the impugned judgment dated 21.08.2024 passed by the learned Additional District Judge (FTC), Dibrugarh is liable to be set aside for the ends of justice.

17. In support of his submissions, the learned Senior Counsel for the petitioner has cited a ruling of Apex Court in the case of "***Binapani Kar Chowdhury Vs. Sri Satyabrata Basu and Another***" reported in **(2006) 10 SCC 442**, wherein it was observed that Section 213 of the Succession Act, clearly creates a bar to the establishment of any right

under a Will by the executor or legatee unless probate or letters of administration of the Will has been obtained.

18. The learned Senior Counsel for the petitioner has also submitted that where a property is owned by several co-owners, one of the co-owner cannot take exclusive possession of the property nor commit any waste, ouster or illegitimate use, and if he does so, he may be restrained by an injunction.

19. To support his submission, learned Senior Counsel for the petitioner has cited a ruling of the Apex Court in the case of T. ***"Lakshmipathi And Others Vs. P. Nithyananda Reddy And Others,"*** reported in ***"(2003) 5 SCC 150."***

20. The learned Senior Counsel for the petitioner has also submitted that a co-owner has an interest in the whole property and also in every parcel of it and possession of joint property by one of the co-owner is in the eye of law, possession of all even if all but one are actually out of possession. He has submitted that when a co-sharer is in possession exclusively of some portion of the joint holding, he is in possession thereof as a co-sharer and is entitled to continue in its possession if it is not more than his share till joint holding is partitioned.

21. In support of the aforesaid submission, the learned Senior Counsel for the petitioner has cited the ruling of the High Court of Punjab And Haryana in the case of "***Bhartu Vs Ram Sarup***" reported in "***MANU/PH/0364/1981.***"

22. The learned Senior Counsel for the petitioner has also submitted that if further construction of the suit property is not restrained, the respondent No. 1 may create third party interest and may also alienate the suit property, which would result in multiplicity of cases and therefore, he prays for setting aside the impugned order.

23. On the other hand, Mr. B. Dutta, learned Senior Counsel for the respondent No. 1, has also submitted that the Court of learned Additional District Judge (FTC), Dibrugarh has rightly set aside the injunction order granted by the Trial Court and same needs no interference by this Court in exercise of its powers under Article 227 of the Constitution of India.

24. He has submitted that after the passing away of Sudhangshu Bimal Majumdar in the year 1960, as per the oral family settlement, all the legal heirs had relinquished their rights over the property in favour of the wife of the Sudhangshu Bimal Majumdar, namely, Parul Majumdar, who became the sole owner of the suit property and

accordingly, the suit land was mutated in the name of Late Parul Majumdar on 17.12.1962 with consent of all the legal heirs.

25. It is further submitted by the learned Senior Counsel for the respondents that during the lifetime of the Parul Majumdar, she had sold the suit land to her unmarried daughter, namely Jharna Majumdar, in the year 1972 by executing a registered sale deed No. 1412 dated 16.06.1972 and accordingly, the name of Jharna Majumdar, was also mutated in respect of the suit land on 23.03.1976. Thereafter, during her lifetime, Jharna Majumdar executed a Will on 22.06.2014 bequeathing the suit property to the respondent No. 1, Shri Sanjoy Kumar Majumdar.

26. It is further submitted by learned Senior Counsel for the respondents that after execution of the Will, the respondent No. 1 obtained the construction permission from Dibrugarh Municipality and constructed a residential house on a portion of the suit land and the old residential house of Late Sudhangshu Bimal Majumdar, is still standing on the remaining portion of the land.

27. It is also submitted by learned Senior Counsel for the respondents that the respondent No. 1 is having the

exclusive possession over the said land and one of his sister namely, Sanghamitra Ghosh is also staying with him.

28. Learned Senior Counsel for the respondents has also submitted that out of the total area of 1270 square feet of the suit land, the construction of a two storey building has been made only over 118 square feet.

29. Learned Senior Counsel for the respondents has also submitted that as the old house has become inconvenient for living during rainy days and as the construction of the two storeys has already been partly made, it requires to be completed soon so as to make it habitable.

30. Learned Senior Counsel for the respondents has also submitted that the construction over the suit land has been made by the respondent No. 1 for his own use and he undertakes not to create any third party interest over the suit land or to alienate the suit land to any third party during the pendency of the suit.

31. Learned Senior Counsel for the respondents has also submitted that as the construction has already been there in the suit property and as the petitioner has also prayed for mandatory injunction to dismantle the permanent construction, hence, if in the event the petitioner succeeds

in the suit filed by her, the suit property may be dismantled and thus, she would not suffer any irreparable loss even if the construction is completed by the respondent No. 1. Hence, he submits that the Court of learned Additional District Judge (FTC) has rightly held that the balance of convenience is in favour of the respondent No. 1 and that the petitioner would suffer no irreparable loss if injunction is denied to her.

32. Learned counsel for the respondents has also submitted that the injunction being an equitable relief should not be granted to a party whose conduct does not inspire confidence. In the instant case, the respondent is in possession over the suit land since many years and the petitioner has approached the Trial Court without challenging the mutation order in respect of the respondent or the predecessor-in-interest of the respondent namely, Jharna Majumdar.

33. It is also submitted that the sale deed in respect of the suit land in favour of Late Parul Majumdar has also not been challenged and therefore the petitioner is not entitled to get an equitable relief of injunction in this case.

34. Learned Senior Counsel for the respondents has also submitted that the High Court while exercising supervisory

jurisdiction does not act as a Court of appeal to re-appreciate and re-weigh the evidence or facts upon which determination under challenge is based. This jurisdiction is exercised only if there is grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice by the inferior Court, which in the instant case, according to learned Senior Counsel for the respondent, is not there as the Court of learned Additional District Judge (FTC) has given reasons justifying the setting aside of the order granting injunction by the Trial Court.

35. The learned Senior Counsel for the respondents has submitted following rulings of the Apex Court in support of his submissions:-

- i. ***"Narendra Kante Vs. Anuradha Kante And Others,"*** reported in ***"(2010) 2 SCC 77;"***
- ii. ***"Kattukandi Edathil Krishnan And Another Vs Kattukandi Edathil Valsan and Others"*** reported in ***"(2022) 16 SCC 71;"***
- iii. ***"Akriti Land Con Private Limited Vs Krishna Bhargava And Others"*** reported in ***"(2017) 13 SCC 212."***
- iv. ***"Garment Craft Vs Prakash Chand Goel"*** reported in ***"(2022) 4 SCC 181,"***

36. Learned Senior Counsel for the respondents has also produced three photographs of the suit property, which shows that there is a RCC construction over there up to 2nd floor with a tin roof on the 2nd floor.

37. I have considered the submissions made by learned counsel for both the sides and have also gone through the rulings cited by learned counsel for both the sides in support of their respective submissions.

38. On perusal of the materials on record, it appears that the petitioner is claiming her share over the suit property as an heir of the original owner of the suit land, namely Sudhanshu Bimal Majumdar, whereas the respondent No. 1, apart from being one of the legal heir of the original owner of the suit land, has also claimed that the suit land was bequeathed to him by one Jharna Majumdar, who had purchased the suit land from Parul Majumdar, to whom the heirs of Sudhanshu Bimal Majumdar had relinquished their rights.

39. There is no dispute over the legal position that Section 213 of the Succession Act creates a bar to establishment of any right under a Will by an executor or a legatee unless probate or letter of administration of the Will have been obtained. Hence, the petitioner has been

able to make out a *prima facie* case in support of right claimed by her and same has been rightly decided by both the Trial Court as well as First Appellate Court that *prima facie* case exists in support of the right claimed by the petitioner.

40. However, mere existence of *prima facie* case, in itself, is not sufficient for granting the relief of temporary injunction. The other two essential ingredients for grant of injunction, namely, whether the petitioner would suffer irreparable loss, if her prayer for temporary injunction is not granted and whether the balance of convenience is in her favour has also to be considered while granting injunction.

41. Before examining the correctness of the impugned order, it would be apt to quote the observation of the Supreme Court of India in the case of "**Garment Craft** (supra)," wherein it has observed as follows:-

15. Having heard the counsel for the parties, we are clearly of the view that the impugned order [Prakash Chand Goel v. Garment Craft, 2019 SCC OnLine Del 11943] is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence

or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. [Celina Coelho Pereira v. Ulhas Mahabaleshwar Kholkar, (2010) 1 SCC 217: (2010) 1 SCC (Civ) 69] The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.

42. From above, it is clear that the jurisdiction under Article 227 of the Constitution of India is exercised by this Court only to set right the grave dereliction of duty or flagrant abuse, violation of fundamental principle of law and justice on the part of the Court whose order is under put to challenge in such case.

43. In light of above observation of the Apex Court as well as in light of the facts and circumstances of this case, let us examine the impugned order.

44. In the impugned order, the Court of learned Additional District Judge (FTC) has rightly held that there is a *prima facie* case made out by the petitioner on the basis of averments made by her in her injunction petition as well as in her plaint. However, the First Appellate Court has come to the finding that the construction over the suit property has already been made and as there is a prayer for mandatory injunction also to dismantle the permanent construction in the event of the petitioner succeeding in her suit and as the respondent No. 1 appears to be in possession of the suit property since the year 2014, balance of convenience is in favour of the respondent No. 1 and not in favour of the petitioner neither she would suffer an irreparable loss which cannot be compensated in terms of money.

45. It is settled proposition of law that granting of injunction is an equitable relief and such power can be exercised when judicial intervention is absolutely necessary to protect the rights and interest of the applicant. However, in the instant case, when the materials on record clearly shows that there is already a permanent RCC construction over the suit property which has been made by the respondent No. 1 and which is almost complete up to second floor with tin roof over it. Hence, the petitioner

does not appear to suffer irreparable injury which could not be compensated in the event if construction is completed and she succeeds in the title suit filed by her. The petitioner will not suffer, more so when the relief of mandatory injunction for dismantling the permanent construction is also sought for by her.

46. For grant of injunction, the three pillars of *prima facie* case, irreparable injury and balance of convenience on which the foundation of every injunction order must exist and in this case, this Court is of considered opinion that the Court of learned Additional District Judge (FTC), Dibrugarh has rightly set aside the order of the Trial Court by holding that the petitioner would not suffer irreparable injury even if the injunction is not granted.

47. Under the facts and circumstances of the case, the balance of convenience also does not appear to be in favour of the petitioner, as over the suit property already an RCC construction exists which has been substantially made, hence, the completion of the said construction, in the considered opinion of this Court would not change the nature of the suit land.

48. The plea of learned Senior Counsel for petitioner that the respondent No. 1 may create third party interest over

the suit property or alienate the same resulting into multiplicity of cases also appears to be a remote probability as no materials has been produced by the petitioner to show that the respondent No. 1 intends to do so. Moreover, in view of the undertaking given by the learned Senior Counsel for respondent No. 1 that the respondent No.1 shall not create any third party interest and shall not alienate the suit land during the pendency of the title suit also justifies that the impugned order needs no interference by this Court. The reasons mentioned by the Court of learned Additional District Judge (FTC), Dibrugarh also justifies that there has been no perversity in passing the impugned order by the Court which needs any interference by this Court in exercise of its so pretending jurisdiction under Article 227 of the constitution of India.

49. This Court, therefore, finds no justification to interfere with the impugned order, the instant revision petition is therefore dismissed.

JUDGE

Comparing Assistant