

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.12826 of 2011

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1. Jagdish Prasad S/O Late Chetan Ram R/O Moh.- Mathuria, P.O.+P.S.-
 Biharsharif, Distt.- Nalanda

.... Petitioner/s

Versus

1. Shrawan Kumar S/O Late Krishna Prasad R/O Moh.- Bharao Par, Ranchi
 Road, In Front Of L.I.C. Building, P.O.- Biharsharif, P.S.- Laheri, Distt.-
 Nalanda

2. Mahfuz Alam @ Fuzzu Mian S/O Late Ghulam Mian R/O Moh.-
 Murarpur Kantepar, P.O.- Biharsharif, P.S.- Laheri, Distt.- Nalanda

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. B.N. Sinha, Advocate

Mr. Shailendra Kumar, Advocate

For the Respondent/s : None

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

4 09-03-2016 Petitioner/defendant has challenged order dated
 09.05.2011 passed by learned Munsif, Biharsharif, Nalanda in
 Title Suit No. 04/2011 whereby and whereunder petitioner has
 been directed to erect boundary wall by way of mandatory
 injunction within fifteen days and further observing that, in case
 of failure on his part, will be deemed to be disobedience of the
 court's order.

2. In order to proper appreciation of the lis, the
 portrayal of the facts is to be conceived; respondent/plaintiff filed
 Title Suit No. 04/2011 disclosing the fact there happens to be a
 Basant Bihar Housing Society and plaintiff, being one of the
 members, was allotted land. For connectivity, a private road has
 been properly identified having 40 Ft. East to West, 14 Ft North to



South. Just adjacent to the road, house of petitioner/defendant lies which is duly fenced with a pucca boundary wall. In due course of time, as has been alleged that petitioner/defendant developed an ulterior motive whereunder, he intends to open door in the boundary wall as well as also willing to open windows and on account thereof, sought for a declaration that the petitioner/defendant has no right to open door or window in northern side of their establishment towards Raasta as well as for temporary injunction restraining them from opening the door as well as window.

3. Petitioner/defendant appeared and filed WS whereunder he admitted presence of boundary wall. Furthermore, it has also been pleaded that plaintiff including defendant are purchasers of Survey Plot Nos. 469 and 471. It has also been averred that the aforesaid road has been allowed to all the purchasers of Survey Plot Nos.469 and 471 having ingress and outgress through the aforesaid Raasta and now its character has transformed as public passage. It has also been pleaded that the aforesaid Raasta happens to be the only passage available to him for ingress and outgress.

4. Subsequently thereof, a petition was filed on behalf of respondent/plaintiff under Order XXXIX Rule 1 & 2 of the



CPC whereupon an objection was filed and then both the parties were heard and vide order dated 15.03.2011, the learned lower court had allowed the prayer restraining both the parties not to indulge in new construction over disputed area and in likewise manner, defendant was also directed not to make any sort of construction over his northern building wall. In case any sort of urgency is found, then in that event, construction is to be made after taking permission from the Court.

5. In due course of time, the plaintiff had reported that on 17.03.2011, the defendant along with others demolished his boundary wall and further tried to fill up the plinth in order to have access to the road in question. Simultaneously, a Miscellaneous Case has also been drawn up on a prayer of respondent/petitioner/plaintiff in the background of Order XXXIX Rule 2A of the CPC. On the aforesaid petition, an objection was filed at the end of petitioner/defendant, both the parties were heard and then, by the order impugned, mandatory nature of order has been passed directing the petitioner/defendant to reconstruct the boundary wall which happens to be the subject matter of instant petition.

6. It has been submitted on behalf of petitioner that the learned lower court was wrong in his action wherein the court had



directed the petitioner/defendant to construct the boundary wall which was pre-existing as, from the show-cause filed on behalf of petitioner/defendant, it is apparent that it was not a demolition having been carried out manually, rather the same had fallen down on account of pressure exerted due to accumulation of sand, chips by its side. Therefore, once plausible explanation has been tendered, then in that event, the learned lower court would not have exercised its power which happens to be against the principle of natural justice. Then, it has also been submitted that at the present juncture, the learned lower court was not at all competent to pass an order like the present one in the background of the fact that no such kind of provision is found available under Order XXXIX of the CPC. Under Specific Relief Act, though such provision is there, but its applicability is only permissible after proper adjudication, that means to say, after conclusion of the trial. Therefore, the order impugned happens to be beyond ambit and scope of the learned lower court.

7. It has further been submitted that on a prayer of the respondent/plaintiff, Miscellaneous Case No. 04/2011 had already been drawn up, then in that event, unless and until there happens to be conclusive finding with regard to disobedience on account demolition of the boundary wall at the end of petitioner, the order

impugned would not have been passed because of the fact that in case of natural decay/mishappening, no one could be held responsible and in likewise manner, could be proceeded with. So, in any view of the matter, the order impugned is non sustainable in the eye of law and is fit to be set aside.

8. On the other hand, learned counsel for the respondents submitted that plaintiff was very much apprehensive over obnoxious activity of petitioner/defendant and on account thereof, had prayed for appointment of pleader-commissioner which was allowed and who had visited the site, found the boundary wall and submitted a report having no objection at the end of petitioner/defendant. Furthermore, during his show-cause, the petitioner/defendant never denied nor controverted falling of boundary wall which, as per plaintiff was demolished while as per petitioner/defendant had fallen on account of non sustainability of the pressure having been exerted on account of accumulation of sand and chips by its side. So, in the aforesaid eventualities as well as admission at the end of petitioner/defendant, the action of the learned lower court happens to be just and proper in consonance with the relief so sought for. Furthermore, it has been argued that the whole purpose of suit will frustrate, once the petitioner/defendant succeeds in getting his presence uninterrupted

illegally.

9. The moot question for consideration is whether the court is competent to pass such kind of order or not.

10. In the case of *Dorab Cawasji Warden v. Coomi Sorab Warden* as reported in [1991 (1) BLJ 59] SC, it has been held as follows:-

10. The trial court gave an interim mandatory injunction directing the fourth respondent not to continue in possession. There could be no doubt that the Courts can grant such interlocutory mandatory injunction in certain special circumstances. It would be very useful to refer to some of the English cases which have given some guidelines in granting such injunctions.

11. In *Shepherd Homes Ltd. v. Sandham*, (1970) 3 All ER 402, Megarry, J. observed:

"(iii) On motion, as contrasted with the trial, the court was far more reluctant to grant a mandatory injunction; in a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this was a higher standard than was required for a prohibitory injunction."

12. In *Evans Marshall and Co. Ltd. v. Bertola SA* (1973) 1 All ER 992 the Court of Appeal held that.

"Although the failure of a plaintiff to show that he had a reasonable prospect of obtaining a permanent injunction at the trial was a factor which would normally weigh heavily against the grant of an interlocutory injunction, it was not a factor which, as a matter of law, precluded its grant;"

The case law on the subject was fully considered in the latest judgment in *Films Rover International Ltd. v. Cannon Film Sales Ltd.* (1986) 3 All ER 772, Hoffmann, J. observed in that case:

"But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e. useful



generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or Would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

Again at page 781 the learned Judge observed :

"The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would be in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance, about the plaintiffs chances of establishing his right, there cannot be any rational basis for withholding the injunction."

and concluded that :

"These considerations lead me to conclude that the Court of Appeal in *Locabail International Finance Ltd. v. Agroexport* (1986) 1 All ER 901 at p. 906, (1986) 1 WLR 657 at p. 664 was not intending to 'fetter the court's discretion by laying down any rules which would have the effect of limiting the flexibility of the remedy, to quote Lord Diplock in the *Cyanamid* case (1975) 1 All ER 504 at p. 510, (1975) AC 396 at p 407. Just as the *Cyanamid* guidelines for prohibitory injunction's which require

a plaintiff to show no more than an arguable case recognise the existence of exceptions in which more is required (compare *Cayne v. Global Natural Resources plc* (1884) 1 All ER 225), so the guideline approved for mandatory injunctions in *Locabail* recognises that there may be cases in which less is sufficient.

On the test to be applied in granting mandatory injunctions on interlocutory applications in 24 Halsbury's Laws of England (4th Edn.) para 948 it is stated :

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied , or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."

13. The law in United States is the same and it may be found in 42 American Jurisprudence 2nd page 745 *et set*.

14. As far the cases decided in India we may note the following cases.

15. In one of the earliest cases in *Rasul Karim Anr. v. Pirubhai Amirbhai* (1914) ILR 38 Bom 381 : (AIR 1914 Born 42), Beaman, J. was of the view that the court's in India have no power to issue a temporary injunction in mandatory form but Shah, J. who constituted a Bench in that case did not agree with Beaman, J. in this view. However, in a later Division Bench judgment in *Champsey Bhimji and Co. v. Jamna Flour Mills Co. Ltd.* (1914) 16 Bom LR 566: (AIR. 1914 Born 195), two learned Judges of the Bombay High Court took a different view from Beaman, J. and this view is now the prevailing view in the Bombay High Court. In *M. Kandaswami Chetty v. P. Subramania Chetty* (1918) ILR 41 Mad 208: (AIR 1918 Mad 588) a Division Bench of the



Madras High Court held that courts in India have the power by virtue of Order 39, Rule 2 of the Code of Civil Procedure to issue temporary injunctions in a mandatory form and differed from Beaman's view accepting the view in *Champsey Bhimji and Co. v. Jamna Flour Mills Co.* (supra). In *Israil v. Shamser Rahman* (1914) ILR 41 Cal 436: (AIR 1914 Cal 362), it was held that the High Court was competent to issue an interim injunction in a mandatory form. It was further held in this case that in granting an interim injunction what the Court had to determine was whether there was a fair and substantial question to be decided as to what the rights of the parties were and whether the nature and difficulty of the questions was such that it was proper that the injunction should be granted until the time for deciding them should arrive. It was further held that the Court should consider as to where the balance of convenience lies and whether it is desirable that the status quo should be maintained. While accepting that it is not possible to say that in no circumstances will the courts in India have any jurisdiction to issue an ad interim injunction of a mandatory character, in *Nandan Pictures Ltd. v. Art Pictures Ltd.* AIR 1956 Cal 428, a Division Bench was of the view that if the mandatory injunction is granted at all on an interlocutory application it is granted only to restore the status quo and not granted to establish a new state of things differing from the state which existed at the date when the suit was instituted.

16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy- until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain

guidelines. Generally stated these guidelines are :

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie cast that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive or complete or absolute rules, and there may be exceptional circumstances needing action, applying them as pre-requisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.

18. The suit is one filed under Section 44 of the Transfer or Property Act (hereinafter referred to as 'the Act'). In considering the question of interim mandatory injunction in a suit filed under Section 44 of the Act the Court has also to keep in mind the restriction on the rights of the transferee to joint possession under that section. The section reads as follows:

"44. Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same but subject to the conditions and liability affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

19. In order to attract the second paragraph of this section the subject-matter of the transfer has to



be a dwelling house belonging to an undivided family and the transfer is a share in the same to a person who is not a member of the family. Therefore, in order to satisfy the first ingredient of clear existence of the right and its infringement, the plaintiff will have to show a probable case that the suit property is a dwelling-house and if belonged to an undivided family. In other words, on the facts before the court there is a strong probability of the plaintiff getting the relief prayed for by him in the suit. On the second and third ingredients having regard to the restriction on the rights of a transferee for joint possession and the dominant purpose of the second paragraph of Section 44 of the Act, there is danger of an injury or violation of the corresponding rights of the other members of the family and an irreparable harm to the plaintiff and the Court's interference is necessary to protect the interest of the plaintiff. Since the relief of an interim injunction is all the same an equitable relief the Court shall also consider whether the comparative mischief or inconvenience which is likely to issue from withholding the injunction will be greater than that which is likely to arise from granting it, which means that the balance of convenience is in favour of the plaintiff.

20. The first point that has to be considered, therefore, is whether one can have a reasonably certain view at this stage before the actual trial that the suit property is a 'dwelling house belonging to an undivided family' within the meaning of Section 44 of the Act. As to what is the meaning of these words in the section the leading case is the one decided by the Full Bench of the Allahabad High Court in *Sultan Begam v. Debi Prasad*, (1908) ILR 30 All 324 (FB). That was concerned with the meaning of the phrase "dwelling house belonging to an undivided family" in Section 4 of the Partnership Act, 1893. That section provides that where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family, being a shareholder shall undertake to buy the share of such transferee make a valuation of such share in such manner as it thinks fit and direct the sale of such

share to such share-holder. The argument was that the words 'undivided family' as used in the section mean a joint family and are confined to Hindus or to Muhammadans, who have adopted the Hindu rule as to joint family property. The counter argument was that the expression is of general application and means a family whether Hindu, Muhammadan, Christian etc. possessed of a dwelling house which has not been divided or partitioned among the members of the family. The case itself related to a Muslim family to whom the house belonged. The Full Bench observed:

"..... In it (section 4 of the Partition Act) we find nothing to indicate that it was intended to apply to any limited class of the community. The words 'undivided family' as used in this section appear to be borrowed from Section 44 of the Transfer of Property Act. The last clause of that section prescribes that where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the dwelling house. This provision of the Statute is clearly of general application, and the effect of it is to compel the transferee of a dwelling house belonging to an undivided family, who is a stranger to the family, to enforce his rights in regard to such share by, partition. There appears to me to be no reason why the words 'undivided family' as used in Section 4 of the Partition Act, should have a narrower meaning than they have in Section 44 of the Transfer of Property Act. If the Legislature intended that Section 4 should have limited operation, we should expect to find some indication of this in the language of the section. For example, instead of the words 'undivided family' the expression 'undivided Hindu Family, or 'Joint family' might have been used."

With reference to the object and purpose of such a provision the Full Bench further observed :

"as was pointed out by Mr. Wells, Judicial Commissioner, in the case of Kalka Parshad v. Bankey Lall (1906) 9 Oudh Cases 158 is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which

other members of his transferor's family have a right to live, and that the words 'undivided family' must be taken to mean 'undivided qua the dwelling house in question, and to be a family which owns the house but has not divided' it."

21. Again in construing the word "family" and 'undivided family' a Division Bench of the Calcutta High Court in *Khironde Chandra Ghoshal v. Saroda Prosad Mitra* (1910) 7 Ind Cas 436, observed :

"The word 'family' as used in the Partition Act, ought to be given a liberal and comprehensive meaning, and it does include a group of persons related in blood, who live in one house or under one head or management. There is nothing in the Partition Act to support the suggestion that the term 'family' was intended to be used in a very narrow and restricted sense, namely, a body of persons who can trace their descent from a common ancestor."

30. These facts in our view clearly establish that not only a refusal to grant an interim mandatory injunction will do irreparable injury to the appellant but also balance of convenience is in favour of the appellant for the grant of such injunction. In the result we allow the appeal, set aside the judgment of The High Court and restore that of the Trial Court with costs in this appeal.

11. In the case of *Delhi Development Authority v.*

Skipper Construction Co (P) Ltd as reported in (1996)4 SC 622

whereunder, it has been held:-

17. "The contemner should not be allowed to enjoy or retain the fruits of his contempt" :

The principle that a contemner ought not to be permitted to enjoy and/or keep the fruits of his contempt is well-settled. In *Mohd. Idris v. R. J. Babuji*, (1985) 1 SCR 598 : (AIR 1984 SC 1826), this Court held clearly that undergoing the punishment for contempt does not mean that the Court is not entitled to give appropriate directions for remedying and rectifying the things done in violation of its Orders. The petitioners therein had given an undertaking to

the Bombay High Court. They acted in breach of it. A learned Single Judge held them guilty of contempt and imposed a sentence of one months' imprisonment. In addition thereto, the learned Single Judge made appropriate directions to remedy the breach of undertaking. It was contended before this Court that the learned Judge was not justified in giving the aforesaid directions in addition to punishing the petitioners for contempt of Court. The argument was rejected holding that "the Single Judge was quite right in giving appropriate directions to close the breach (of undertaking)".

18. The above principle has been applied even in the case of violation of orders of injunction issued by Civil Courts. In *Clarke v. Chadburn*, (1985) 1 All ER 211, Sir, Robert Megarry V-C observed :

"I need not cite authority for the proposition that it is of high importance that orders of the Court should be obeyed. Wilful disobedience to an order of the Court is punishable as a contempt of Court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of Court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach in law. If a meeting is held in breach of an injunction, it cannot be said that the meeting has not been held. But the legal consequence of what has been done in breach of the law may plainly be very much affected by the illegality. It seems to be on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."

19. To the same effect are the decisions of the Madras and Calcutta High Courts in *Century Flour Mills Limited v. S. Suppiah*, AIR 1975 Madras 270 (FB) and *Sujit Pal v. Prabir Kumar Sun*, AIR 1986 Calcutta 220. In *Century Flour Mills Limited*, it was held by a Full Bench of the Madras High Court that where an act is done in violation of an order of stay



or injunction, it is the duty of the Court, as a policy, to set the wrong right and not allow the perpetuation of the wrong-doing. The inherent power of the Court, it was held, is not only available in such a case, but it is bound to be exercise it to undo the wrong in the interest of justice. That was a case where a meeting was held contrary to an order of injunction. The Court refused to recognise that the holding of the meeting is a legal one. It put back the parties in the same position as they stood immediately prior to the service of the interim order.

20. In *Sujit Pal* (AIR 1986 Cal 220), a Division Bench of the Calcutta High Court has taken then same view. There, the defendant forcibly dispossessed the plaintiff in violation of the order of injunction and took possession of the property. The Court directed the restoration of possession to the plaintiff with the aid of police. The Court observed that no technicality can prevent the Court from doing justice in exercise of its inherent powers. It held that the object of Rule 2-A of Order 39 will be fulfilled only where such mandatory direction is given for restoration of possession to the aggrieved party. This was necessary, it observed, to prevent the abuse of process of law.

21. There is no doubt that this salutary rule has to be applied and given effect to by this Court, if necessary, by overruling any procedural or other technical objections. Article 129 is a constitutional power and when exercised in tandem with Article 142, all such objections should give away. The Court must ensure full justice between the parties before it.

Claims of Prabhjot Singh and Prabhjit Singh (Sons of Tejwant Singh):

12. Therefore, from the aforesaid judicial pronouncements, it is crystal clear that the nature of order as passed by the learned lower court is permissible to preserve and retain the lis to its original position.

13. Consequent thereupon, the instant petition is found devoid of merit and is, accordingly, rejected. Accordingly, stay so granted vide order dated 10.08.2011, is vacated.

(Aditya Kumar Trivedi, J)

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