

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No.219 of 2016**Order reserved on 08.12.2016Order delivered on 02.01.2017

1. Hikmatunisha, W/o. Late Minhazudeen, aged about 50 year.
2. Asalam S/o. Late Minhazudeen, aged about 32 year.
3. Agajd Khan S/o. Late Minhazudeen, aged about 30 year.
4. Estkhar Khan S/o. Late Minhazudeen, aged about 28 year.
5. Navshad Khan S/o. Late Minhazudeen, aged about 24 year.

All resident of Ward No. 5, Bazarpara, Nagar Panchayat Pratappur, District Surajpur (Chhattisgarh).

---Petitioners

Defendant No.1 (a) to 1(e)

Versus

1. Sukhamen W/o. Late Ghasiram aged about 60 year.
2. Dwarika S/o. Late Ghasiram, aged about 40 year.
3. Moharmaniya W/o. Late Ramu aged about 58 year.
4. Dillu S/o. Late Ramu aged about 45 year.
5. Suresh S/o. Late Ramu aged about 35 year.
6. Santosh S/o. Sukhalal aged about 32 year.

All resident of Village Amandon, Police Station & Tahsil Pratappur, District Surguja (Chhattisgarh).

---Respondents

Plaintiff No. 1 to 6

7. Branch Manager, Sahakari Bhumi Vikas Bank (Marj) Sahakari Samiti Bank, Pratappur, District Surguja (Chhattisgarh)

---Respondent

Defendant No.2

8. State of Chhattisgarh, Through Collector, Surajpur (Chhattisgarh).

---Respondent

Defendant No.3

For petitioners	:	Mr. Vineet Kumar Pandey, Advocate.
For respondent No.1 to 6	:	Mr. Sarfaraj Khan, Advocate.
For respondent No.7	:	Mr. Sunil Tripathi, Advocate.
For respondent No.8/State	:	Mr. Avinash Singh, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Order [C.A.V.]

1. In a suit filed by respondent No. 1 to 6/plaintiffs, for declaration that auction sale dated 02.01.1993 and sale certificate dated 13.04.1993 are null and void and the plaintiffs be declared that they are title holder of the suit land and also sought permanent injunction restraining the defendants to interfere with possession of the plaintiffs in the suit land. The plaintiffs also filed an application for temporary injunction under Order 39 Rule 1 and 2 CPC read with Sections 94 and 151 CPC that the plaintiffs ancestor Shri Thibhu Kumhar mortgaged the suit land to the defendant-Bank on 15.03.1976 and obtained loan without authority of law and without consent of the plaintiffs. It is stated that Thibhu died in the year 1983. The defendant-Bank auctioned the suit land on 02.01.1993 to realize the loan amount in favour of defendant No.1 and also issued sale certificate on 13.04.1994 in favour of defendant No.1. It was further pleaded that on the basis of auction sale and sale certificate, neither mutation has been done in favour of defendant No.1 nor possession has been handed over to him and the plaintiffs are in possession of the suit land, therefore the defendants be restrained

from interfering with their possession till final disposal of the suit.

2. The defendant No.1 filed his reply to the application for temporary injunction denying the averment made therein and pleaded that the plaintiffs ancestor-Thibhu Kumhar had obtained loan from defendant-Bank with consent of the plaintiffs and at the time of obtaining loan the suit land was recorded in the name of Shri Thibhu Kumhar and when he failed to make payment, the suit land was auctioned by the defendant-Bank and sale certificate was issued on 13.03.1994, which is strictly in accordance with law and suit land has duly been recorded in his name by an order of Additional Commissioner and as such, the application for temporary injunction deserves to be rejected.

3. The trial court by its order dated 31.10.2015 rejected the application for temporary injunction filed by the respondents/plaintiffs finding no *prima facie* case and no balance of convenience holding that defendant No.1 has purchased the suit land on auction and sale certificate has already been issued in his favour by the defendant-Bank and also noticed the State amendment in Order 39 Rule 1 CPC which bars grant of temporary injunction against the auction. The trial Court finding that the suit land was auctioned by defendant No.2-Bank in favour of defendant No.1 on 02.01.1993 and the plaintiffs have not furnished any security as required, therefore, the plaintiffs are not entitled for temporary injunction.

4. Feeling aggrieved against order rejecting application for temporary injunction, the plaintiffs preferred Miscellaneous Appeal under Order 43 Rule 1(r) before the Appellate Court. The Appellate Court by its impugned order allowed the appeal, set aside the order rejecting application for temporary injunction and granted temporary injunction in favour of the plaintiffs.

5. Feeling aggrieved against the grant of temporary injunction in favour of the plaintiffs, the defendants have preferred this writ petition under Article 227 of the Constitution of India questioning the order impugned passed by the Appellate Court as bad and unsustainable in law.

6. Mr. Vineet Kumar Pandey, learned counsel for the petitioners/defendants, would submit that the Appellate Court while exercising the appellate jurisdiction could not have interfered with the order of the trial Court as the order of the trial Court rejecting temporary injunction is based on record, it is neither perverse nor contrary to the record. The Appellate Court has not kept in mind the judgment rendered by Supreme Court in the matter of **Wander Ltd. and another v. Antox India P. Ltd.**¹ which governs the exercise of jurisdiction by the appellate court while hearing the appeal against the order rejecting or granting temporary injunction.

7. On the other hand, Mr. Sarfaraz Khan, learned counsel appearing for respondent No. 1 to 6, would support the impugned order and

1 1990 (Supp) SCC 727

submit that the Appellate Court is justified in granting temporary injunction in favour of the plaintiffs and writ petition deserves to be dismissed.

8. I have heard the learned counsel for the parties, considered their rival submission made hereinabove and gone through the record with utmost circumspection.

9. In order to judge the correctness of the plea raised at the Bar, it would appropriate to notice the scope of interference by appellate court in the order of the trial Court granting or refusing temporary injunction while hearing an appeal under Order 43 Rule 1(r) of the CPC.

10. The Supreme Court in the matter of Wander Ltd. (supra) has held that in an appeal against granting or refusing temporary injunction, the Appellate Court should 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 and observed as under:-

“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 Ltd. v. Pothan Joseph*² held:

'9... These principles are well established, but as has been observed by Viscount Simon in *Charles Oseinton & Co. v. Jhanaton*³:

'...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."

11. The law laid down in Wander Ltd. (supra) has been followed by the Supreme Court with approval in Purshottam Vishandas Raheja and another v. Shrichand Vishandas Raheja (Dead) through LRs. and others⁴ and Mohd. Mehtab Khan and others v. Khushnuma Ibrahim Khan and others⁵.

12. At this stage, it would be appropriate to notice amendment made by the State of Madhya Pradesh, which is also applicable to State of Chhattisgarh in Order 39 of the First Schedule to the Principal Act

2 AIR 1960 SC 1156 : (1960) 3 SCR 713

3 1942 AC 130 : (1941) 2 All ER 245 (HL)

4 (2011) 6 SCC 73

5 (2013) 9 SCC 221

which states as under:-

“STATE AMENDMENTS

Madhya Pradesh.- In its application to the State of Madhya Pradesh, in Order XXXIX of the First Schedule to the principal Act,-

(a) in Rule 2, in sub-rule (2), the following proviso shall be inserted, namely:-

“Provided that no such injunction shall be granted-

(a) to (d) **** **** ****

(e) to restrain any auction intended to be made or, to restrain the effect of any auction made by the government; or to stay the proceedings for the recovery of any dues recoverable as land revenue unless adequate security is furnished;

and any order for injunction granted in contravention of these provisions shall be void.”

13. Thus, by virtue of the aforesaid amendment, no injunction shall be granted to restrain any auction intended to be made or to restrain the effect of any auction made by the government and any order for injunction granted in contravention of this provision shall be void.

14. After having noticed the scope of interference by the Appellate Court in the order of the trial Court granting or rejecting application for temporary injunction, coming back to the facts of the present case, it is quite evident that auction was made by defendant No.2-Bank on 02.01.1993, sale certificate was issued in favour of the Bank on 13.04.1994 and suit for declaring auction sale and sale certificate null and void was filed on 08.08.2012 *i.e.* after more than 18 years. The trial Court in its order while rejecting an application for temporary injunction filed by the plaintiffs considered the matter in detailed and clearly recorded a *prima facie* finding that on 25.05.1976, the plaintiffs ancestor-Shri Thibhu Kumhar obtained

loan of ₹ 8,000/- and mortgaged the suit land in favour of defendant No.2-Bank and when the loan was not paid, defendant No.2-Bank auctioned the suit land in favour of defendant No.1 on 02.01.1993 and sale certificate was issued on 13.04.1994.

15. The trial Court has recorded a prima-facie finding that the question whether Thibhu Kumhar had right to mortgage the land will be examined in the light of evidence adduced by the parties and further noticed the State amendment made in Order 39 Rule 2 CPC which states that no temporary injunction can be granted to arrest the effect of any auction made.

16. The First Appellate Court interfered with the order of the trial Court by setting aside the order and granted temporary injunction in favour of the plaintiffs holding that the plaintiffs are in possession in the suit land and if the temporary injunction is not granted in their favour, they will suffer irreparable loss and injury which cannot be compensated in terms of money. The Appellate Court though noticed the State amendment made in Order 39 Rule 2 CPC barring grant of temporary injunction restraining effect of auction sale, yet directed furnishing of security.

17. As it has already been noticed that auction was made way back on 02.01.1993 and sale certificate has been issued in favour of defendant No.1/auction purchaser on 13.04.1994 and the suit was filed after more than 18 years from the date of auction and issuance

of sale certificate to defendant No.1/auction purchaser, the trial Court relying upon the State amendment which bars grant of temporary injunction to restrain effect of auction and further holding that the question as to whether mortgage was made by Shri Thibhu Kumhar, ancestor of the plaintiffs, validly or not will be examined after recording the evidence by the parties and came to the specific conclusion that the plaintiffs have neither *prima facie* case nor balance of convenience lie in their favour declined to grant temporary injunction in favour of the plaintiffs. The discretion so exercised by the trial Court has neither been shown to have been exercised arbitrarily or capriciously or perversely and has not ignored the settled principle of law regulating grant or refusal of temporary injunction, therefore, it was not open to the Appellate Court to reassess the material and come to the different conclusion, even if other view was possible as held by the Supreme Court in Wonder Ltd. (supra). Thus, It is held that the Appellate Court is absolutely unjustified in interfering with the well-reasoned order of the trial Court declining temporary injunction to the plaintiffs.

18. Consequently, the impugned order passed by the Appellate Court is hereby set aside and application filed by the plaintiffs for grant of temporary injunction stands rejected. Since the suit was filed on 06.08.2012, the trial Court is directed to conclude the trial of the suit within six months from the date of receipt of copy of this order.

19. The writ petition is allowed to the extent indicated hereinabove.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-