

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.835 of 2018

Nabo Narayan Jha, Son of Late Asharfi Lal Jha, Resident of Village-
Shubhankarpur, P.S.- Kaluahi, District- Madhubani, Bihar.

... .. Petitioner/s

Versus

1. Kamlesh Jha
2. Mithilesh Jha, Both Sons of Late Durga Narayan Jha, Both residents of
Village- Shubhankarpur, P.S. Kaluahi, District- Madhubani, Bihar.
3. Purushottam Jha, S/o Late Asharfi Lal Jha
4. Dabita Devi
5. Sarita Devi, Both Daughters of Late Satya Narayan Jha
6. Bimlesh Jha
7. Sudhesh Jha, Both Sons of Late Bijoy Krishna Jha
8. Rekha Devi, W/o Dhaneshwar Jha, (D/o Late Bijoy Krishna Jha), All Sl.No.
3 to 8 are Residents of Village- Shubhankarpur, P.S.- Kaluahi, District-
Madhubani, Bihar.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Shashi Nath Jha, Advocate
For the Respondent/s	:	Mr. Ray Saurabh Nath, Advocate
	:	Mr. Ratnakar Jha, Advocate

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
CAV JUDGMENT

Date : 05-07-2023

Heard the learned counsel for the parties.

2. This Civil Miscellaneous application has been filed against the order dated 16.04.2018 passed by the learned Additional District Judge VII, Madhubani in Misc. Appeal No. 46 of 2014 by which he has allowed the miscellaneous appeal filed on behalf of the respondent 1st set (respondent nos. 1 and 2/ defendant nos. 5 and 6) and set aside the order dated 06.05.2014 passed by learned Trial Court in the matter of injunction in



Partition Suit No. 167 of 2012.

Brief facts:-

3. The petitioner who is sole respondent, filed Partition Suit No. 167 of 2012 in the Court of learned Sub-Judge 1st, Madhubani against the defendants for a decree of partition of the land mentioned in Schedule No. I of the plaint and if prior partition is not being proved, the lands mentioned in Schedule Nos. II, III, IV, V & VI be also partitioned among the parties. Subsequently the plaintiff/petitioner filed an injunction petition under Order 39 Rule 1 and 2 and Section 151 of the CPC in the said partition suit praying *inter alia* for restraining the defendants from alienating the land as detailed in Schedule I of the plaint which has not been partitioned. The same was opposed by the defendant nos. 5, 6 and 7 by filing the show cause. It appears that their claim is that on the basis of mutual partition the disputed plot no. 456 which is a part of schedule I of the plaint was allotted to the exclusive share of the father of the defendant nos. 5, 6 and 7 namely Late Durga Narayan Jha and accordingly R.S. Khatiyani was prepared in his name and after his death the same is their exclusive property which is not required for partition. After hearing the parties, the learned Trial Court allowed the said injunction petition dated 20.09.2012 of



the plaintiff and ordered not to sell or alienate the suit land as detailed in Schedule - I of the plaint till final adjudication of the instant suit. All the concerned parties were also directed to maintain *status quo* with respect to the lands as detailed in Schedule II, III, IV, V and VI of the plaint.

4. Subsequently, having aggrieved by the said order of injunction the defendant nos. 5 and 6 filed a Miscellaneous Appeal in the Court of learned District Judge, Madhubani, bearing Miscellaneous Appeal No. 46 of 2014 (07 of 2014). The plaintiff filed the rejoinder and also subsequently filed a registered sale deed dated 29.06.2012 in order to show that the defendant nos. 8 and 9 have alienated the suit land especially Plot No. 456 (Schedule I of the plaint) in favour of one stranger during the pendency of the present partition suit.

5. The Additional District Judge VII, Madhubani allowed the said appeal setting aside the order dated 16.04.2018 passed by the Trial Court. The learned Lower Appellate Court given finding that *prima facie* case is in favour of appellants and observed that so far as the balance of convenience and irreparable loss is concerned it cannot be said that if the appellants will sell the suit land then irreparable loss will be sustained by the respondent because it can be compensated in



terms of money and it is settled principle of law that no one can give better title himself. Further, according to Section 52 of the Transfer of Property Act during the pendency of suit any sell comes in the principle of lis pendence to restrain the transferability of a property should be avoided because state obtain revenue if a registry is executed by anybody of any land. It is a case of partition suit and in this case no one can be prohibited from his fundamental use, maintain or sell of the suit land.

Submissions on behalf of the parties:-

6. Learned counsel for the petitioner has submitted that the learned Lower Appellate Court failed to protect the rights and interest of the plaintiff who has brought the partition suit for his separate share in the joint family property and the learned Appellate Court has cared much about the interest of the defendants and the loss of government revenue and the learned Lower Appellate Court failed to appreciate that the defendants are trying to alienate the suit property which would cause irreparable loss to the plaintiff. He has further submitted that the injunction order passed by the Trial Court was well reasoned order and the Lower Appellate Court was not required to interfere in the said order ignoring the well settled legal



principle that suit property be preserved and injunction be granted till disposal of the partition suit. The Appellate Court has not considered the reasons advanced by the learned Trial Court and the grounds taken in impugned order to set aside the Trial Court order is unreasonable, cryptic and unsustainable.

7. Further, learned counsel for the petitioner has submitted that the learned Lower Appellate Court while passing the impugned order, has not decided the comparative hardship of the plaintiff who will be incapable of recovering the suit land after the suit is decreed because once the suit property is sold out in favour of a stranger especially in absence of the definite share of the parties, the plaintiff will have to fight against a third person who might have changed the nature of the suit property itself as per his own wishes. He has further submitted that the Lower Appellate Court exceeded his jurisdiction by holding that the transfer of property should not be restrained because by transfer the government obtains revenue.

8. Learned counsel for the petitioner has further submitted that it is well settled that the court cannot give a third case irrespective of pleadings and evidence of the parties. In the present case, there is no question of loss of revenue to the



government but the question before the Court was to preserve the suit property from being transferred until the shares of the parties are defined/ allotted through the present partition suit.

9. On the other hand, learned counsel for the respondents has submitted that there is no illegality in the impugned Judgment/ order passed by the learned Lower Appellate Court while deciding the said Misc. Appeal. It is submitted that the learned Trial Court while allowing the injunction petition has not considered the basic three ingredients for granting temporary injunction i.e. prima facie case, balance of convenience and irreparable loss. The learned Trial Court has failed to consider that on mutual partition Plot No. 456 of the Schedule I was allotted in the share of the father of the respondent which was recorded in the R.S. Khatiyani in his name and after death of his father respondent nos. 1 and 2 came in peaceful possession over the land in question. No irreparable loss can be sustained by the plaintiff, if suit property can be sold out keeping in view the fact that none can give better title himself. He has further submitted that it is well settled that if transfer is made out during the pendency of a litigation, the same is hit by the doctrine of *pendente lite* and prayer for grant of injunction should not be allowed.



Principle with respect to interim injunction:-

10. Interim injunction becomes a very important component of a Civil litigation. In the present case also application for interim injunction was allowed by the trial court, but the decision has been reversed by the Lower Appellate Court.

11. The law regarding grant of temporary injunction and interlocutory order is covered by Order 39 of the CPC. It is now well settled that before a court grants a temporary injunction, it needs to be satisfied that a person seeking an injunction has a *prima facie* case in his favour and that balance of convenience and irreparable injury also lies in his favour.

12. The Hon'ble Supreme Court in **Kishoresinh Ratansinh Jadeja v. Maruti Corpn**, (2009) 11 SCC 229 held that it is well established that while passing an interim order of injunction under order 39 Rules 1 and 2 CPC, the Court is required to consider:

- (i) whether there is a *prima facie* case in favour of the plaintiff;
- (ii) whether the balance of convenience is in favour of passing the order of injunction; and
- (iii) whether the plaintiff will suffer irreparable



injury if an order of injunction would not be passed as prayed for.

13. The Hon'ble Supreme Court in the case of **Hazrat Surat Shah Urdu Education Society Vs. Abdul Saheb** reported in 1988 (4) Judgments Today 232 : MANU/ SC/0651/ 1988 observed that no temporary injunction should be issued unless the three essential ingredients are made out, namely (1) *Prima facie* case, (ii) balance of convenience (iii) irreparable injury which could not be compensated in terms of money. If a party fails to make out any of the three ingredients he would not be entitled to the injunction and the Court will be justified in declining to issue injunction.

14. The word 'prima facie case' apparently indicates something which at first impression makes out a triable case. The term 'prima facie case' should not be confused with the term 'prima facie title' which has to be established at the trial upon permitting the parties to lead evidence. Thus, it means a substantial question which has been raised and which upon first sight needs to be investigated and decided on merits.

15. The word 'balance of convenience' denotes that the court must be satisfied that the comparative mischief and hardship which is likely to be caused to the person seeking



injunction is more than the inconvenience likely to be caused to the other party by granting such injunction.

16. The word 'irreparable injury' guides the court to be satisfied that the refusal to grant injunction would result in such injury which cannot be compensated in term of costs or otherwise and the person seeking injunction needs to be protected from the consequences of apprehended injury.

17. While dealing with aforesaid three ingredients, the court must refrain from holding a mini trial. The court should make an endeavor to test the relevant pleadings in the light of the principles as noted above and if it finds that there is a contestable issue which requires evidence of the parties to be decided and balance of convenience and irreparable injury is in favour of the party seeking the injunction then the status be preserved, as at the initial stage the rights of the parties are in an inchoate stage. The court would require the evidence to determine the rights of the parties which can only be crystallized after trial and can enable the court to form a definite opinion whether the plaintiff has a strong enough to enable the court to pass a decree in his favour and if not, the dismiss the suit.

18. Considerations of equity and interests of justice would justify preservation of status quo in respect of corpus of



the dispute. This is simply because, if ultimately, the case of the plaintiff is found to be without merit, the defendant could deal with property as it chooses and also be adequately re-compensated for the prejudice, if any, which has been caused by its inability to do so in the interregnum whereas, if the status of the property, whether in respect of title or possession, alters during the pendency of lis, the resultant prejudice to the plaintiff might be irremediable. Principles of balance of convenience too, therefore, normally justify maintenance of the status quo during the pendency of the litigation.

19. In **Dalpat Kumar & Anr. Vs. Prahlad Singh & Ors. reported in (1992) 1 SCC 719**, the Hon'ble Supreme Court has held that Rule 1 primarily concerned with the preservation of property in dispute till legal rights are adjudicated. Injunction is a judicial process by which a party is required to do or to refrain from doing any particular act. It is in the nature of preventive relief to a litigant to prevent future possible injury. In other words, the Court, on exercise of power of granting ad interim injunction, is to preserve the subject matter of the suit in the *status quo* for the time being. Grant of injunction is a discretionary relief. The exercise thereof is subject to the Court satisfying that (1) there is serious disputed



question to be tried in the suit and that an act, on the facts before the Court, there is probability of his being entitled to the relief asked for by the plaintiff/ defendants, (2) the court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.

20. The Hon'ble Apex Court further held that there should be *prima facie* case in favour of applicants which needs adjudication at the trial. The existence of the *prima facie* right and infraction of the enjoyment of his property or right is a condition for the grant of temporary injunction. *Prima Facie* case is not to be confused with *prima facie* title which has to be established, on evidence at the trial.

21. This Court in **Dular Chand Sah & Ors. vs. Devnath Sah & Ors.** reported in MANU/BH/0794/2015 observed as follows:-

“ The person who is seeking injunction has to satisfy the Court three ingredients, namely, *prima facie* case, balance of convenience and irreparable loss. If any of the



ingredients is missing the Court would refuse to grant injunction. Satisfaction of *prima facie* case by itself is not sufficient to grant injunction. The Court has to satisfy itself that non-interference by the Court would result in irreparable injury to the party seeking relief and there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the injury must be a material one, namely, one that cannot be adequately compensated in terms of money. Even where *prima facie* case is made out in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable...”.

Principle with respect to Section 52 of T.P. Act:-

22. It is settled legal position that the effect of Section 52 is not to render transfers effected during the pendency of a suit by a party to the suit void, but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit.



The *pendente lite* purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the Court. The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject matter of the suit. The Section only postulates a condition that the alienation will be no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court.

23. In **Jagan Singh Vs. Dhanwanti (2012) 2 SCC 628** the Hon'ble Supreme Court held that the broad principle underlying Section 52 of the Transfer of Property Act is to maintain the *status quo* unaffected by any an act of party to the litigation pending its determination. Even after dismissed of a suit, a purchaser is subject to lis pendens, if an appeal is afterward filed. The doctrine of lis pendens is founded in public policy and equity.

24. This Court in case of **Kanhaiyaji Sahay & Ors. Vs. Kamla Prasad & Anr.**, reported in **Manu/BH/0330/1989 : 1990 (1) PLJR 661** observed that it is a settled law that if a transfer is made during the pendency of a litigation, the said sale is hit by the doctrine of lis- pendens and in that event it



is open for a plaintiff not to implead such persons as party to the suit. The suit also cannot be thrown out on account of a transfer being made during the pendency of the suit.

25. In **Madhukar Nivrutti Jagtap Vs. Pramila Bai Chandulal Parandekar (2020) 15 SCC 731** the Hon'ble Apex Court reiterated that the effect of Section 52 of T.P. Act would not be that every transaction on being hit by Section 52 of T.P. Act is illegal or void. The effect of doctrine of lis pendens is not to annul all transfers effected by the parties to a suit but only to render them servient to the rights of the parties under the decree or order which may be made in that suit. Its effect is only to make the decree passed in the suit binding on the transferee i.e. subsequent purchaser. The transfer remains valid subject to the result of the suit. So far as the point raised that Section 52 of T.P. Act operates at par to grant temporary injunction under Order 39 Rule 1 & 2 CPC, it would be appropriate to consider the scope of Section 52 of the T.P. Act and Order 39 Rule 1 & 2 CPC. Normally, as a public policy once a suit has been filed pertaining to any subject matter of the property, in order to put an end to such kind of litigation, the principle of lis pendens has been evolved so that litigation may finally terminate without intervention of a third party. This is because



of public policy otherwise no litigation will come to an end. Therefore, in order to discourage that same subject matter of property being subjected to subsequent sale to a third person, this kind of transaction is to be checked.

Scope of interference by the Appellate Court in interim order:-

26. In the case of **Esha Ekta Apartments Ltd. Vs. Municipal Corporation of Mumbai (2021) 4 SCC 689**, the Hon'ble Supreme Court considered the scope of interference by the Appellate Court in interim order passed by the Court at the first instance. The Appellate Court's power to interfere with the interim order passed by the court of first instance has been considered by the Hon'ble Apex Court in several cases.

27. The Apex Court in **Wander Ltd. Vs. Antox India (P) Ltd. 1990 Supp SCC 727** had the occasion to consider the principles regarding grants of injunction wherein the Apex Court made the observation that 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. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that Appellate Court would have been taken a different view may not justify interference with the Trial Court's exercise of discretion. This case was referred in **Skyline Education Institute (India) Pvt. Ltd. Vs. S.L. Vaswani (2010) 2 SCC 142**, wherein the three Judge Bench of Hon'ble Supreme Court observed that:

“ The ratio of the abovenoted Judgment is that once the Court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before the Court and is supported by cogent reasons, the Appellate Court will be loath to interfere simply because on a *de novo* consideration of the matter it is possible opinion on the issues of *prima facie* case, balance of convenience, irreparable injury and equity.”

Distinction between Section 52 of T.P. Act and Order 39 Rule 1 & 2 CPC:-

28. The distinction between Section 52 of T.P. Act and Order 39 Rule 1 & 2 CPC is that an order of temporary injunction is of pre-emptive nature restraining the act of



alienation by party to the suit where there is such danger, whereas Section 52 of T.P. Act comes into play after alienation takes place during pendency of the suit. Section 52 provides the consequences of a transfer taking place pending litigation i.e. that the pendent lite purchaser would be entitled to or suffer the same legal rights and obligation of his vendor that may be finally determined by the Court. Section 52 does not come in the way of applicability of Order 39 Rule 1 & 2 CPC. In other words, notwithstanding Section 52 of T.P. Act making the transfers during pendency of the suit, the Court, may pass an order of temporary injunction, if all the requisites pre-condition for such grant are satisfied.

Conclusion:-

29. Taking a holistic view of the matter and considering the decision of the Lower Appellate Court, this Court finds that the Appellate Court deviated from the consideration of the proposition for grant of injunction and has erred in reversing the judgment and order of the Trial Court for grant of injunction especially where the remedy of injunction was equitable in nature. In such circumstances, the Court ought to have been slow in interfering with the order which is discretionary and discretion exercised by the trial Court was not



such which could allow the Appellate Court to intervene in the facts and circumstances as adumbrated above.

30. The Lower Appellate Court found that *prima facie* case was not in favour of the petitioner. The manner in which the lower Appellate Court has considered the issue of grant of injunction and its approach towards the issue of balance of convenience and irreparable injury is not as settled by the Apex Court. This Court is of the view that the Appellate Court did not consider the issue of grant of injunction in proper perspective.

31. This court is of the view that necessary ingredients for grant of injunction were present and though it may not have been elaborately dealt by the Trial Court nevertheless it was not required for the Appellate Court to enter into the material available before it to holding mini trial.

32. In the light of the aforesaid discussion, the impugned order dated 16.04.2018 passed in Misc. Appeal No. 46/2014 is set aside. The order of trial court stand restored. Resultantly, this Civil Miscellaneous Application stands allowed, however, in the facts and circumstances, there shall be no order as costs.

33. It is appropriate to direct the trial Court to



expedite the trial and conclude the same preferably within a period of one year from the date a copy of this judgment and order is received/ placed before the court concerned and no unnecessary adjournment be granted by the learned trial court to either of the parties.

(Sunil Dutta Mishra, J)

khushbu/-

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