

C.O. 3224 of 2022

Ruby Rani Das
Vs.
Krishnendu Das & Anr.

Mr. Satyam Mukherjee
Ms. Sayani Ahmed
.... for the petitioner.

Mr. Sounak Bhattacharya,
Mr. Sounak Mondal
.... for the opposite party.

This revisional application arises out of an order dated September 19, 2022 passed by the learned Civil Judge (Junior Division) 2nd court at Barrackpore, North 24 Parganas, allowing an application under Section 151 of the Code of Civil Procedure (hereinafter referred to as the said application). The application arose out of Title Suit No.186 of 2019.

The said application was filed by the plaintiff in the suit, alleging that although, the order of ad interim injunction in the nature of *status quo* upon both the parties in respect of B schedule property had been communicated to the defendants, the defendant no.1 had taken forcible possession by breaking open the lock which had been affixed by the

plaintiff. The plaintiff claimed to be in possession of the suit property, and alleged dispossession.

The plaintiff prayed that the property should be kept in the plaintiff's possession, by allowing re-possession thereof. The plaintiff further undertook to keep the rooms in the B schedule property under lock and key, without changing the nature and character of the suit property.

Written objection was filed to the said application by the defendants. It was specifically contended by the defendant no.1 that he had been in physical possession of the B schedule property. By virtue of a deed of gift executed on August 29, 2014 and registered on September 11, 2014, by the original owner, the defendant No.1 claimed right, title and interest. The name of the defendant no.1 had been duly mutated by the municipal authority and the defendant no.1 regularly paid property tax. The statements made in paragraph 2 of said application, according to defendants, were false. The allegation that the defendant no.1 had taken forceful possession of the B schedule property, by breaking open the lock was unfounded and the question of giving back possession, would not arise. The address of the defendant in the plaint, would be an indication of the fact that the defendant no.1 was in possession

of premises No. 31 Kishore Pally, under police station Belghoria, Kolkata 700 056. The defendants relied on the documents namely, mutation certificate in the name of Ruby Rani Das, municipal tax receipt in the name of Ruby Rani Das, and electric bills in the name of Ruby Rani Das.

The petitioner/defendant no.1 has challenged the order on the following grounds:-

1. The application under Section 151 of the Code of Civil Procedure, with a vague allegation that the defendant no.1 had broken the pad lock affixed by the plaintiff and had taken possession thereof, was not maintainable in law. The proper remedy of the plaintiff if at all, would be to file an application for mandatory injunction seeking restoration of possession.
2. The allegation of the plaintiff was neither supported by either any documentary evidence or any oral evidence. The plaintiff did not narrate any incident which led to the alleged dispossession by breaking the padlock. Plaintiff did not file any document to substantiate his claim.

3. The plaintiff also did not take other steps by complaining of such incident before the police authorities.
4. The learned court allowed the said application, without considering the case of the defendant no.1 in the written statement and in the written objections filed in respect of the injunction application and also in the application under Section 151 of the Code of Civil Procedure.

5. The defendant no.1 produced documents, namely, mutation certificate, tax receipts and electricity bills, in support of the contention that the defendants were in possession of the B schedule property.

6. An earlier order of a learned coordinate bench was not followed. The learned Single Judge held that, without coming to a definite finding as to who was in possession of the suit property when the ad interim order of injunction had been passed, the trial court could not have directed restoration of possession in the manner that was done by an earlier order passed on the self-same application. The matter was remanded for further

consideration by the learned trial judge on the points stated by a learned coordinate bench. Once again, a similar order, being a verbatim reproduction of the earlier order, without determining the status of the property, was passed and the same was liable to be set aside.

7. The main relief in the suit had been allowed by the learned trial judge.

Mr. Bhattacharya, learned advocate appearing on behalf of the plaintiff submits that the learned court had held that the plaintiff had a, *prima facie*, case to go to trial and was satisfied that the plaintiff was in possession of the suit property, when the ad interim order of injunction was passed.

It is further submitted that the order impugned was in the nature of a mandatory injunction. This court should not interfere with the same, by entertaining the application under Article 227 of the Constitution of India. Rather, the petitioner/defendant no.1 should be relegated to the appellate forum.

Considering the submissions, this Court is first inclined to take into consideration the plaint case.

The plaint case is that the plaintiff is a co-owner in respect of the A schedule property which he

inherited in terms of the Hindu Succession Act, 1956. Late Swadesh Chandra Das died issueless and his wife pre-deceased him. Swadesh Chandra Das was dependent upon the plaintiff and his family members for daily needs. The defendant no.1 was a distant relative who resided far away from the suit property, but visited the property. Both the co-owners/brothers had constructed a house from their own funds. The defendant no.1 used to visit late Swadesh Chandra Das during his old age at the suit property and with the collusion of the defendant no.2, managed to get a deed of gift executed in her name, in respect of the share of Swadesh Chandra Das, sometime in 2014. The deed was registered at Cossipore, Dumdum Sub-Registry office. That Swadesh Chandra Das did not have any knowledge and did not give any consent to the execution of the deed of gift. He was not of sound health and mind, at the relevant stage. The deed was not read over and explained to the doner. Although the deed of gift was executed, no delivery of possession had taken place in favour of the defendant no.1 and there was a specific condition stated in the second line of page 6 of the deed, that the donee could neither convey nor transfer the said property to anybody. Such conditional gift was not maintainable in law. After

the death of Swadesh Chandra Das, the defendant no.1 went to the property and tried to take forceful possession. Proceedings under Section 144(2) of the Code of Criminal Procedure was initiated before the learned Sub-Divisional Executive Magistrate. The plaintiff collected certified copy of the deed of gift. The deed was obtained by way of fraud and collusion, with an intention to grab the property from the original heirs of the owner. The plaintiff prayed for a declaration that the heirs of late Binoy Kumar Das, including the plaintiff, were the rightful owners of the B schedule property, a declaration that the alleged deed of gift was null and void. Permanent injunction restraining the said defendant No.1 from alienating and/or transferring the B schedule property. Other consequential reliefs were also prayed for.

An application under Order 39 Rules 1 and 2 of the Code of Civil Procedure was filed with similar allegations. A prayer was made to restrain the defendant no.1 from conveying, transferring and/or alienating the B schedule property and from taking forceful possession, by dispossessing the plaintiff.

The plaint case clearly indicates that the defendant no.1 used to come to the B schedule property off and on, to meet the original owner and she was a distant relative. It further appears that

there is an existing registered deed of gift executed by the original owner in favour of the defendant no.1. The plaintiff has stated that the deed of gift had been executed by undue influence. The actual of delivery of possession had not taken place. The defendant no.1 with the help of hooligans, often tried to take forcible possession. Hence the suit was filed with the reliefs prayed for.

The learned trial court, by an order dated May 28, 2019, recorded that the plaintiff had prayed for an order of ad interim injunction restraining the defendant no.1 from transferring and/or alienating the B schedule property, to any third party and from taking forceful possession by dispossessing the plaintiff from the said property.

On perusal of the materials, the learned court was of the view that the plaintiff had established a prima facie case, the balance of convenience and inconvenience was also in favour of the plaintiff and if the injunction was not granted, it would cause irreparable loss and injury to the plaintiff. Considering the urgency, an ad interim order of injunction was passed with a direction upon the parties to maintain status quo with regard to the B schedule property as on that date and not to change

the nature, character and possession till June 11, 2019.

On June 11, 2019, an application was filed by the plaintiff under Section 151 of the Code of Civil Procedure, praying for a direction upon the defendant no.1 to give back the possession of B schedule property to the plaintiff, as the defendant had violated the order of ad interim injunction. It was alleged that the defendants had illegally taken possession of the B schedule property, upon breaking open the pad lock, which had affixed by the plaintiff.

By an order dated September 14, 2021, the learned trial judge, upon perusal of the documents submitted by the plaintiff and after hearing both the parties, opined that at the time of filing of the suit, the plaintiff was in possession of the schedule B property and the court had passed an ad interim order of injunction, whereby the learned trial judge directed both the parties to maintain status quo in respect of the B schedule property, till June 11, 2019. Such ad-interim injunction was further extended till September 14, 2021. The said application was allowed and the defendants were directed to restore the possession to the plaintiff in respect of the B schedule property, within a period of

two weeks from the date of receipt of the copy of order, failing which the plaintiff was granted liberty to approach the court for compliance.

The said order was challenged by the defendant no.1/petitioner, by filing C.O. No.1795 of 2021. Learned coordinate bench was of the view that the application under Section 151 of Code of Civil Procedure seeking restoration of possession, could not be allowed only on an allegation by the plaintiff that the defendant no.1 had dispossessed the plaintiff. At first, the court should have ascertained who was in possession of the suit property.

The submission of the Defendant no.1 that the defendant no.1 was in possession of the property in question, was recorded. The coordinate bench of this court was of the view that an order for restoration of possession on the allegation of dispossession, could not be passed without a detailed enquiry as to who amongst the parties to the suit, was in possession of the property in question on the date of the order of injunction. His Lordship further directed that in order to facilitate such enquiry, the petitioner should be given an opportunity to file the written objection to the said application. The order impugned was set aside and the learned trial judge was requested to decide the said application afresh, in accordance

with law, as expeditiously as possible. The defendant no.1 was permitted to file the written objection.

Consequently, the written objection was filed by the defendant no.1, and some documents, namely, mutation certificate in the name of the defendant no.1/petitioner, Xerox copy of the municipal tax receipt in the name of the defendant no.1 and electricity bill in the name of the petitioner were also filed before the learned trial court.

In the written statement as well as in the written objection, the defendant no.1 had specifically contended that Swadesh Chandra Das was never dependent upon the plaintiff. The deceased maintained himself from his own funds. They did not reside in a joint mess and they were not close to each other. Rather, the defendant no.1 and her husband took care of Swadesh Chandra Das. All of them resided in the B schedule premises. Out of love and affection, the defendant no.1 was gifted the B schedule property. Late. Swadesh Ranjan Das was the uncle-in-law of the defendant no.1. The registration of the gift deed, the mutation of the property in the land records and in the municipal records, had been clearly stated in the written statement.

It appears from the order impugned, that the learned court below again recorded a similar reason for allowing the application under Section 151 Code of Civil Procedure, directing the defendant no.1 to restore the possession to the plaintiff in respect of B schedule property, within a period of two weeks. The reasons assigned by the learned court are as follows:-

“On careful perusal of both the petitions filed by the both Plaintiff and defendants and documents submitted by both sides and after hearing of both sides, this Court opines that at the time of filing this suit the Plaintiff was in possession of the Schedule B property and this Court was passed an ad interim injunction whereby both parties are directed to maintain status quo over the suit property i.e. schedule "B" property. Moreover, plaintiff challenged the deed of gift vide no. 9718 of 2014 on the strength of which defendant no.1 became the owner of the schedule 'B' property and such matter will be adjudicated by trial by taking evidence. It is well settled law that no one should be dispossessed without due process of law. So, this Court comes to the conclusion that the possession of the Plaintiff should be restored”

It appears to this court that such reasons are a verbatim reproduction of the reasons which were given by the learned trial court by the order dated September 14, 2021. The said order had been set aside in C.O. No.1795 of 2021. Such reasons are quoted below:-

On careful perusal of the petitions filed by the Plaintiff and document submitted by plaintiff and after hearing of both sides, this Court opines that at the time of filing this suit the Plaintiff was in possession of the Schedule B property and this Court was passed an ad interim injunction whereby both parties to the suit are directed to maintain status quo in

respect of the 'B' schedule property as on today and not to change its nature, character and possession till 11.06.2019 which is further extended till today. It is well settled law that no one should be dispossessed without due process of law. So, this Court comes to the conclusion that the possession of the Plaintiff should be restored."

The court expressed an opinion with regard to the plaintiffs' possession, but such finding is not based on any evidence. It further appears that the court recorded that the question whether, on the basis of alleged deed of gift, the defendant no.1 had become the owner of the property, was a question to be adjudicated on evidence. As no one should be dispossessed without due process of law, the court arrived at a conclusion that the plaintiff should be restored possession.

In my opinion, the learned coordinate bench of this court, had already directed the trial court to cause an enquiry and determine who was in possession of the suit property in question, when the ad-interim order of injunction was passed. Such exercise was not undertaken by the learned court.

Secondly, such enquiry would be a matter of evidence. It is clear from the written objection filed by the defendant no.1, that several documents, including the electricity bill, mutation certificate, municipal tax receipts in the name of the defendant

no.1 had been relied upon, which had not been considered by the learned court below.

Thirdly, the second order is a verbatim reproduction of the earlier order, which had been set aside by this court. The order of this court was not complied with.

Fourthly, the application under Section 151 Code of Civil Procedure does not give any details as to when, how and in what manner, the plaintiff had been dispossessed. Further, the circumstances under which the defendant no.1 had allegedly broken the padlock of the plaintiff, is also not on record.

The learned court also did not take into account the specific contentions in the written statement, written objection and the objection filed in answer to the application under Section 151 of the Code of Civil Procedure. It is a fact, that the said defendants have claimed to be in possession of the suit property since long and the defendant no.1 had also got her name mutated in all the land records. The electricity bill stood in the name of the said defendant no.1.

Finally, in the plaint, the address of the defendant no.1 as stated by the plaintiff is that of the B schedule property, which appears to be a separate entity from the A schedule property. These facts were

not gone into by the learned court below. The learned court below, on an application under Section 151, with a vague allegation that the defendant no.1 had broken the padlock which the plaintiff had affixed, directed restoration of possession. Such order is erroneous and not based upon appreciation of the evidence. The next point raised by Mr. Bhattacharya that the order is an appealable order, irrespective of the nomenclature is also not accepted by the court for the reason that the order suffers from following material irregularities:-

a) The order is perverse as it does not consider the evidence available. Alternative remedy of a Miscellaneous Appeal is not a bar in this case. b) The order impugned was passed in utter disregard to the order of a learned co-ordinate bench of this court, c) The order was passed on a misconception of law that only because the plaintiff had a triable case and an ad-interim order of injunction was subsisting, possession should be restored, d) The order for restoration of possession could not have been passed in a causal manner, without evidence and without appreciation of the facts and the law.

In the matter of ***Achutananda Baidya v. Prafulla Kumar Gayen and Ors.***, reported in ***(1997) 5 SCC 76***, the Hon'ble Apex Court held as follows:-

“10. The power of superintendence of the High Court under Article 227 of the Constitution is not confined to administrative superintendence only but such power includes within its sweep the power of judicial review. The power and duty of the High Court under Article 227 is essentially to ensure that the courts and tribunals, inferior to High Court, have done what they were required to do. Law is well settled by various decisions of this Court that the High Court can interfere under Article 227 of the Constitution in cases of erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving at a finding which is perverse or based on no material, or resulting in manifest injustice. As regards finding of fact of the inferior court, the High Court should not quash the judgment of the subordinate court merely on the ground that its finding of fact was erroneous **but it will be open to the High Court in exercise of the powers under Article 227 to interfere with the finding of fact if the subordinate court came to the conclusion without any evidence or upon manifest misreading of the evidence thereby indulging in improper exercise of jurisdiction or if its conclusions are perverse.**

11. If the evidence on record in respect of a question of fact is not at all taken into consideration and without reference to such evidence, the finding of fact is arrived at by inferior court or tribunal, such finding must be held to be perverse and lacking in factual basis. In such circumstances, in exercise of the jurisdiction under Article 227, the High Court will be competent to quash such perverse finding of fact.”

In the matter of *Kishore Kumar Khaitan and Anr. v. Praveen Kumar Singh*, reported in (2006) 3 SCC 312 the Hon’ble Apex Court held as follows:-

“13. The jurisdiction under Article 227 of the Constitution may be restrictive in the sense that it is to be invoked only to correct errors of jurisdiction. But when a court asks itself a wrong question or approaches the question in

an improper manner, even if it comes to a finding of fact, the said finding of fact cannot be said to be one rendered with jurisdiction and it will still be amenable to correction at the hands of the High Court under Article 227 of the Constitution. The failure to render the necessary findings to support its order would also be a jurisdictional error liable to correction. Here the jurisdiction to grant an interim mandatory injunction could be exercised on entering a finding that on the day the order for maintaining the status quo was passed, the plaintiff was in possession and a day after the interim order was passed, he was in fact dispossessed. The interim direction to maintain status quo was an ex parte order. From the order of the Additional District Court it is not possible to come to the conclusion that on a proper advertence to the relevant materials, prima facie clear findings had been rendered by that court on these aspects. The prima facie infirmities attached to the letter said to create the tenancy cannot also be ignored, since that transaction is the foundation of the plaintiff's claim of possession."

In the decision of *M/s Puri Investments vs. M/s Young Friends and Co. & ors.* decided in *Civil Appeal No.1609 of 2022*, the Hon'ble Apex Court held that the order of the Tribunal or inferior court should not be tested through the lens of the appellate court, unless the order is (a) erroneous on account of non-consideration of material evidence, or (b) contrary to the evidence, or (c) based on inferences that were impermissible in law.

Moreover, from the averments made in the application under Section 151 of Code of Civil Procedure, it does not appear that the contents, thereof, could be interpreted as an application for

mandatory injunction rather, it appears that the plaintiff's case was that the defendant no.1 had put a padlock which should be broken and the plaintiff should be allowed to put his own padlock. The plaintiff also undertook to keep the property under lock and key until the suit is decided. This, itself, is prima facie contrary to the claim of possession.

In the case of ***Ramesh Chandra Sankla and Ors. vs. Vikram Cement and Ors.***, reported in ***(2008) 14 SCC 58***, the Apex Court held that the powers conferred upon the High Court under Articles 226 and 227 of the Constitution of India was to be exercised ex debito justitiae, that is, to meet the ends of justice.

The order impugned is, thus, set aside.

The plaintiff can always file a proper application for mandatory injunction with proper pleadings and foundational basis and if such application is filed, it shall be decided on evidence and in accordance with law.

The revisional application is hereby allowed.

There will be no order as to costs.

The order impugned is set aside.

Parties are directed to act on the server copy of this order.

(Shampa Sarkar, J.)