

DISTRICT: JORHAT

IN THE COURT OF ADDL. DISTRICT JUDGE, JORHAT

PRESENT: Smt. Poli Kataki, A.J.S.

Misc. Appeal No. 01 of 2017

(This appeal has been filed under Order 43 (1)(r) of Civil Procedure, Code, 1908 challenging the order dated 22.12.2016 passed by the learned Civil Judge, Jorhat, namely Shri J.M. Barman, in Misc(J) No. 42/2016 under Order 39 Rule 1 and 2 CPC)

Shri Bishwajit Bordoloi
S/o Late Suresh Bordoloi
R/o Jogduar Sonari Gaon
PO & PS –Teok
District-Jorhat, Assam

... Appellant

-Versus -

Shri Krishanu Kumar Mishra
S/o Late Krishna Kumar Mishra
R/o AT Road, Teok
Midhakhat Tini Ali,
PO & PS –Teok
District-Jorhat, Assam

...Respondent

Arguments heard on: 04.02.2021

Judgment Delivered on: 18.03.2021

ADVOCATES WHO APPEARED IN THIS CASE ARE:

Shri Rintu Goswami, Learned advocate for the Appellant

Shri Anup Kumar Dutta, advocate for the Respondent(NP)

JUDGMENT

1. The subject miscellaneous appeal filed under Order 43 Rule (1)(r) of Civil Procedure, Code, 1908 is directed against the order dated 22.12.2016 passed by the learned Civil Judge, Jorhat, namely Shri J.M. Barman, in Misc(J) No. 42/2016 under Order 39 Rule 1 and 2 CPC whereby the Plaintiff's/ Respondent's application filed under Order 39 Rule 1 & 2 read with Section 151 of the CPC for temporary injunction was allowed and the Learned Trial Court granted temporary injunction in favour of the Plaintiff/ Respondent by restraining the Appellant/Defendant and his agent from entering into the suit land till disposal of the main suit.

2. The subject appeal emanates from Misc (J) Case No.42/2016 filed under Order 39 Rule 1 and 2 read with Section 151 of CPC filed by the Respondent (Plaintiff) praying for grant of ad-interim temporary injunction restraining the Appellant (Defendant), his workmen and agents claiming through him from entering into the suit land for any purpose pending disposal of Title Suit TS No. 30/2016. (Re-numbered as TS No. 46/2021).

3. The Respondent (Plaintiff) had filed a Title Suit TS No. 30/2016. (Renumbered as TS No. 46/2021) for declaration of right, title and interest as well as confirmation of possession over the suit land as well as for declaration that the acts and deeds of occupying the suit land by the Appellant (Defendant) is void and illegal.

4. It is the case of the Respondent (Plaintiff) that Late Krishna Misra was the absolute owner of the suit land which is more specifically described in the schedule of the petition/plaint and after the death of his father, he has become the absolute owner in respect of the suit land measuring 01 katha out of total 4 Bighas 03 kathas 01 Lechas covered by Dag No. 484 of P.P No. 42 situated at Bongali gaon under Teok Mouza, Jorhat and his name is in process of mutation before the concerned authority. The Respondent (Plaintiff) has further submitted that the schedule-B is his ancestral property which was inherited from his deceased father and his deceased father inherited the said property along with his two younger brothers, namely Shri Keshav Misra and Shri Madhav Misra after the death of their father Late Golap Chandra Misra and the said land was under their uninterrupted, absolute and peaceful possession till date. Further, said Schedule -B land is located in front of the residence of the Respondent (Plaintiff) within their residential campus and the said entire landed property was bounded by bamboo fencing by the Respondent (Plaintiff) while the Schedule -A land is situated at the roadside of the NH-37 and is a part of the Schedule-B land. According to the Respondent (Plaintiff), on 17.04.2016, the Appellant(Defendant) tried to enter into the Schedule-A land by damaging the bamboo fencing and cutting down trees growing thereon and they also gathered some sand, brick and iron over the Schedule -A land without taking his consent. When the Respondent (Plaintiff) asked the reason, then the Appellant (Defendant) threatened him with dire consequences and started construction of pucca houses by engaging some of his workmen over the Schedule-A land. According to the Respondent (Plaintiff), the Appellant (Defendant) has no right, title and interest over the suit land. The Appellant (Defendant) is trying to dispossess the Respondent (Plaintiff) from the suit land by digging land and by constructing pucca houses thereon forcefully. The Respondent (Plaintiff) has a good prima facie case in his favour, the balance of convenience is in his favour and if the Appellant (Defendant) is not restrained by way of granting ex-parte interim injunction, Respondent (Plaintiff) shall suffer irreparable loss and injury which cannot be compensated in terms of money.

5. Pursuant to receipt of summons, the Appellant (Defendant) appeared and contested the case by way of filing written objection raising question on the maintainability of the Petition both on facts as well as on law. The Appellant (Defendant) has contended that no documents have been furnished regarding the status of Shri Keshab Misra and Shri Madhab Mishra claiming to be the legal heirs of Late Golap Ch. Mishra. The daughter of Late Golap Ch. Misra is not impleaded as a party and they have also inherited the suit property along with other legal heirs of Late Golap Ch. Misra. It is the claim of the Appellant (Defendant) that the Respondent (Plaintiff) is never in possession of the suit property. The Appellant (Defendant) has further submitted that the Respondent (Plaintiff) has made a false imaginary story in his petition and no such incident was taken place on 17.04.2016 as cited by the Respondent (Plaintiff). The claim of the Respondent (Plaintiff) is that he has been in possession over the suit property for 30 years. As per the Appellant (Defendant), the Respondent (Plaintiff) has no any prima facie case in his favour as claimed in his petition.

Further, balance of convenience is also not in his favour. Hence, the Appellant (Defendant) prayed for rejecting the petition for grant of temporary injunction.

6. On the basis of the materials on record and hearing the submissions of the learned counsel of the Respondent (Plaintiff) and the learned counsel for the Appellant (Defendant), vide order dated 22.12.2016 passed in Misc(J) No. 42/2016, learned Trial Court allowed the prayer of temporary injunction and granted temporary injunction in favour of the Plaintiff/ Respondent by restraining the Appellant/Defendant and his agent from entering into the suit land till disposal of the main suit inter-alia observing as under:

"I have heard the submission of the learned counsel and gone through the case record along with the relevant documents. According to the petitioner his father, along with his two uncles namely Keshav Chandra Misra and Madhav Chandra Misra inherited the ancestral property of late Golap Chandra Misra, their deceased father. From the Jamabandi copy it reveals the name of the Father of the petitioner, and his uncle Keshav Chandra Misra and Madhav Chandra Misra were mutated in the record of right in place of their father. It also from the document furnished by the petitioner side along with the petition that he has been paying the land revenue of the aforesaid land. The allegation of the petitioner is that the opposite party on 17.04.2016 tried to encroached a plot of land measuring 1 K, covered by P.P No. 42, Dag No. 484 situated at Bongali Gaon, Teok Mouza under Teok Revenue Circle in Jorhat District out of total land measuring 4B-3K-1L of same dag and patta number mentioned above. On the other hand opposite party claimed that opposite party is in the possession of the suit land and petitioner was never in possession of the aforesaid land. But the opposite party failed to show any documents basing upon which they have been possessing the aforesaid land. On the other hand, prima-facie it appears the father and the two uncles of the petitioner being the legal heir of late Golap Chandra Misra and have possessed the same may be land Revenue.

The opposite party in a written objection alleged that the daughter of Golap Chandra Misra is not impleaded in the instant case who is a necessary party in the instant case. The present petition filed by the petitioner is under order 39 Rule 1 & 2 of CPC read with section 151 CPC for injunction for protection of the suit property. Hence in my opinion inclusion or non-injunction of any necessary party does not affect an injunction petition as same is only for protection of the suit property, not for the declaring right, title and interest of the party.

From the above discussion, in my considered opinion there is prima-facie case in favour of the petitioner and balance of convenience also lies in favour of the petitioner for granting the injunction in favour of him. If injunction is not granted to the petitioner to protect the suit property from encroachment of the opposite party, then the petitioner will have to face irreparable loss and injury. In my opinion the petitioner is able to show the existence of three golden principal i.e prima-facie case, balance of convenience and irreparable loss for granting the injunction in his favour.

Hence, considering the facts and circumstances, temporary injunction is granted in favour of the petitioner by restraining the opposite party, and his agent from entering into the suit land till disposal of the main suit."

7. Being aggrieved by the said order of the learned Trial Court dated 22.12.2016 granting temporary injunction in favour of the Plaintiff/ Respondent by restraining the Appellant/Defendant and his agent from entering into the suit land till disposal of the main suit, the Appellant (Defendant) challenged the same by way of Misc. Appeal No. 01/2017 before the Hon'ble District Judge, Jorhat. Vide order dated 26.01.2017, the instant case was transferred to this Court for disposal.

8. I have heard Shri Rintu Goswami, Learned advocate for the Appellant/Defendant. I have also perused the pleadings of the parties in the main suit and also the documents available in the case record, case record of Title Suit TS No. 30/2016(Re-numbered as TS No. 46/2021) and Misc (J) No. 42/2016.

9. Shri Rintu Goswami, Learned advocate for the Appellant/Defendant submitted that the Respondent (Plaintiff) is not the title holder of the suit land, he has not furnished any documents regarding the status of Shri Keshab Misra and Shri Madhab Mishra claiming to be the legal heirs of Late Golap Ch. Mishra and also that the daughter of Late Golap Ch. Misra is not impleaded as a party in the instant case. As per the learned counsel for the Appellant (Defendant), the Respondent (Plaintiff) has no locus standi to file the instant proceedings. Learned counsel for the Appellant (Defendant) further submitted that even if the case of the Respondent (Plaintiff) is accepted as correct, the Appellant (Defendant) is admittedly an encroacher and as per law, even an encroacher in possession has a right to be evicted by a proper process of law. Moreover, the learned Trial Court had granted the injunction order in favour of the Respondent (Plaintiff) only the basis of revenue receipt which cannot determine the possession of a person. As per the learned counsel, the Appellant (Defendant) is in possession of the suit land which is clear from the evidence of the Respondent (Plaintiff) adduced before the Learned Trial Court in the Title Suit. Hence, learned counsel prayed that the impugned order dated 22.12.2016 granting injunction to the Respondent (Plaintiff) may be set aside.

10. On the other hand, Shri Anup Kumar Dutta, learned advocate for the Respondent (Plaintiff) is physically not present when the matter was called out for hearing. Hence, in view of the provisions of Order 41 Rule 17(2) of CPC, the appeal is heard ex-parte.

11. Having embarked upon the factual aspect and materials on record, let me now discuss the legal position regarding the law governing the grant of injunction under Order 39 Rule 1 and 2 of CPC.

12. In the case of **Guajrat Bottling Co. Ltd. Vs Coca Cola Co.[1995(5)SCC545]**, the Hon'ble Supreme Court while discussing the factors to be considered by the Courts in exercise of the discretion under Order 39 Rules 1 and 2 CPC has observed as follows:

"The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the discretion the court. While exercising the discretion the court applies the following tests –

(i) whether the plaintiff has a prima facie case;

(ii) whether the balance of convenience is in favour of the plaintiff; and

(iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.

*The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience' lies. [see: **Wander Ltd.& Anr. vs. Antox India P. Ltd., 1990 (supp) SCC 727 at pp. 731-32**]. In order to protect the defendant while granting an interlocutory injunction in his favour the Court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial. "*

13. In **Colgate Palmolive (India) Ltd Vs Hindustan Lever Ltd.[AIR 1999SC3105]**, the Hon'ble Supreme Court observed that the other considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below:-

"(i) Extent of damages being an adequate remedy;

(ii) Protect the plaintiff's interest for violation of his rights though however having regard to the injury that may be suffered by the defendants by reason therefor;

(iii) The court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others;

(iv) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case - the relief being kept flexible;

(v) The issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties case;

(vi) Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) Whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise."

14. In the case of **Dalpat Kumar Vs. Prahlad Singh [AIR 1993 SC 276]**, the Hon'ble Supreme Court held that the phrases "Prima facie case," "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but the words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The relevant portion of the observations of the Hon'ble Supreme Court in the said case states as under:-

".....It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the Court satisfying that; (1) There is a 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/defendant. (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) 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." The Supreme Court further held: ".....Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in 'irreparable injury' to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequence of apprehended injury or dispossession 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 on that cannot be adequately compensated by way of damages. The third condition also is that 'the balance of convenience' must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibility or probabilities of likelihood of injury and if

the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

15. From the aforesaid judgments, it is clear that the grant of injunction is a discretionary relief which is granted on the basis of settled principles.

16. **Prima-facie case:** In the instant case, from the pleadings of the parties it is seen that the case of the Respondent (Plaintiff) before the Learned Trial Court that the Appellant (Defendant) on 17.04.2016 tried to encroached a plot of land measuring 1 K, covered by P.P No. 42, Dag No. 484 situated at Bongali Gaon, Teok Mouza under Teok Revenue Circle in Jorhat District out of total land measuring 4B-3K-1L of same dag and patta number mentioned above. On the other hand, the Appellant (Defendant) claimed that he is in the possession of the suit land and the Respondent (Plaintiff) was never in possession of the aforesaid land. The Learned Trial Court after considering the submission of the parties, came to the specific conclusion that there is a prima-facie case in favour of the Respondent (Plaintiff) as the Appellant (Defendant) failed to show any documents basing upon which they have been possessing the aforesaid land whereas the father and the two uncles of the Respondent (Plaintiff) being the legal heir of late Golap Chandra Misra and have possessed the same by paying land Revenue.

17. In Title Suit TS No. 30/2016(Re-numbered as TS No. 46/2021), the deposition of the Respondent (Plaintiff) Shri Krishanu Kumar Mishra was recorded on 17.07.2018 wherein he has on solemn affirmation stated inter-alia as follows:

"I am the Plaintiff of the suit. I have filed the suit in respect of land measuring 01 katha out of 4 bighas 3 kathas 1 lechas under Dag no.484 of PP No. 42 situated at Bongaligaon , Midhakhat , Mouza –Teok . I have filed another suit TS 44/17 in respect of the same land against the Secretary and President, Governing Body of Jyoti Bidyapith, Teok. In the aforesaid suit land measuring 4 bighas 3 kathas 1 lecha of land is under the possession of the defendant. In the said suit , I have prayed that defendant has to execute registered gift deed in respect of land measuring 2 bighas and the other 2 bighas 3 kathas 1 lechas should be in my name or in alternative, I have claimed Rs.79,67,808/-. The aforesaid suit has been filed by Madhab Mishra , Keshab Mishra and myself. "

Thus, from the deposition of the Respondent (Plaintiff) it can be seen that there is clear admission of the Respondent (Plaintiff) that the Appellant (Defendant) is in possession of the suit land. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Whether the Respondent (Plaintiff) has prima facie title over the suit land is something which has to be established at trial after evidence. However, what appears from the materials on record in the instant case is that rightly or wrongly, the Appellant (Defendant) is in possession over the suit land.

18. The law in this regard is clear that a person in possession can be evicted only by a due process of law and hence even a rightful owner cannot

eject him by force. If the rightful owner threatens his peaceful possession, he can approach courts of law and pray for the equitable relief of injunction to protect his possession. In the latest decision of a three judge bench of the Hon'ble Supreme Court in **A. Subramanian Vs R. Pannarselvam [Civil Appeal No.9472 of 2010 decided on 08.02. 2021]** , it has been held inter-alia that even a trespasser, who is in established possession of the property could obtain injunction in the following words:

"The High Court was also right in its view that it is a common principle of law that even trespasser, who is in established possession of the property could obtain an injunction. However, the matter would be different, if the plaintiff himself elaborates in the plaint about title dispute and fails to make a prayer for declaration of the title along with injunction relief."

19. **Balance of Convenience:** On the basis of prima facie evidence especially in view of the admission of the Respondent(Plaintiff) it is seen that the Appellant (Defendant) is in physical possession of the suit land. In fact, the Respondent (Plaintiff) has categorically stated in deposition dated 17.07.2018 the Appellant (Defendant) is in possession of the suit land. He has further stated that Exhibit-2 does not show that his name has been mutated in the suit patta and he has also not submitted any document showing that his name has been mutated in the record of rights in respect of the suit patta land. Also, it is seen from the deposition of the Respondent (Plaintiff) that there is no mention of the date from which the Appellant (Plaintiff) has started the alleged construction over the suit land and in fact the construction carried over on the Schedule-A suit land by the Appellant (Defendant) is in possession of the Appellant (Defendant). In such a situation no inconvenience would be caused to the Respondent (Plaintiff) because there would be no course of action which might adversely affect any prima facie right of the Respondent (Plaintiff) over the suit property. Hence, I am of the opinion that balance of convenience does not tilt towards the Respondent (Plaintiff).

20. **Irreparable Loss or Injury:** Also it is seen that the application allowing the grant of temporary injunction is passed on dated 22.12.2016. The subject appeal against the said order was filed on 24.01.2017 and is pending for disposal for more than 4 years. Vide order dated 27.01.2017, my learned predecessor while staying the operation of the impugned order dated 22.12.2016 observed as follows:

"Perused the impugned order dated 22.12.2016 and other documents submitted by the appellants. Filing of appeal against an order under Order 39 Rule 1 and 2 CPC is a statutory right of the appellant's/Petitioner's in terms of Order 43 Rule1 CPC which cannot be denied to him. At the same time if the appeal is admitted and operation of the impugned order not stayed, the entire exercise of appellate Court becomes meaningless. It is a settled position of law that even a trespasser in settled possession cannot be dispossessed without the due process of law. The impugned order reveals that the appellants/opposite parties have been in possession of the suit land. Naturally, if they are evicted before adjudication of the main suit, it would cause grave prejudice to them. The balance of convenience appears to be apparently in favour of the appellants. Considering the matter in its entirety, this

appeal is admitted for hearing. Issue notice upon the respondents. Steps to be taken by the appellants immediately. Call for the LCR from the learned Court below. In the interim, it is provided that the operation of the impugned order dated 22.12.2016 shall remain stayed."

On the basis of the aforesaid discussions, prima facie it is seen that the Respondent (Plaintiff) is not in physical possession the suit property. There is also no averment in Misc.(J) No.42/2016 that Appellant (Defendant) has attempted to transfer or sale the suit property to any third party. In such a situation, I do not find that any irreparable loss or injury would be caused to the Respondent (Plaintiff) that may adversely affect his right. Hence, I am of the opinion that there is no irreparable loss or injury to the Respondent (Plaintiff).

21. In **Shiv Kumar Chadha Etc. Etc vs Municipal Corporation Of Delhi [1993 SCC (3) 161]**, the Hon'ble Supreme Court has held that a party is not entitled to an order of injunction as a matter of right or course. Grant of injunction is within the discretion of the Court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the Court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. The purpose of temporary injunction is, to maintain the status quo. The Court grants such relief according to the legal principles- "*ex debite justitiae*". Before any such order is passed the Court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him.

22. It is no longer res-intergra that the appeal under Order 43 Rule 1(r) of the CPC against refusal or grant of application for temporary injunction is an appeal against the exercise of discretion and as such an appeal on principle. The Appellate Court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where discretion has been shown to have been exercised arbitrarily or capaciously or perversely or where the Court had ignored the settled principle of law ignoring grant or refusal of the temporary injunction.

23. Hence, considering the facts and circumstances of the case and the reasons discussed above, I am of the considered opinion that all the three golden principles, i.e, existence of prima facie case, balance of convenience and irreparable loss and injury which are required to be fulfilled for granting of ad-interim temporary injunction have not been fulfilled and this is not a fit case for granting of ad-interim temporary injunction. As such, I am of the considered opinion that the order of the learned Trial Court granting temporary injunction in favour of the Plaintiff/ Respondent by restraining the Appellant/Defendant and his agent from entering into the suit land till disposal of the main suit needs to be interfered with by this Court in exercising of jurisdiction under Order 43 Rule 1 (r) of CPC.

24. In view of the aforesaid discussion, the appeal is allowed on contest. Any observation made in this judgment and shall leave no reflection on the merits of the case. The Title Suit will be decided as per its own merits without any influence of this judgment and order. However, at the same time, it is made clear that any action/step taken by the Appellant (Defendant) in respect of the suit

property will be subject to the outcome of the Title Suit TS No. 30/2016(Re-numbered as TS No. 46/2021)pending before the Learned Trial Court.

ORDER

25. In view of the aforesaid discussion, appeal is allowed on contest.

26. The impugned order dated order dated 22.12.2016 passed by the learned Civil Judge, Jorhat, namely Shri J.M. Barman, in Misc(J) No. 42/2016 is hereby set aside. The order of stay, if any, is hereby vacated.

27. Send back the case record along with the copy of the judgment to the learned Trial court immediately.

28. Learned Trial court shall endeavor to dispose of the Title Suit TS No. 30/2016(Re-numbered as TS No. 46/2021)as expeditiously as possible.

29. Signed, sealed and delivered in the open Court on this the 18th day of March, 2021 in Jorhat.

(Smt P. Kataki)

Addl. District Judge, Jorhat