

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CMPMO No. 4170/2013

Reserved on: 7.4.2014

Decided on: 16.4.2014

Kalu Ram and others

...**Petitioners/Plaintiffs**

Versus

Pritam Chand

...**Respondent/Defendant**

Coram

Hon'ble Mr. Justice Rajiv Sharma, Judge

Whether approved for reporting? Yes

For the Petitioners : Mr. Karan Singh Kanwar, Advocate.

For the Respondent : Mr. Ashok K. Tyagi, Advocate.

Justice Rajiv Sharma Judge:

This petition is instituted against the order dated 8.7.2013, rendered by learned Addl. District Judge, Sirmaur District at Nahan in Civil Misc. Appeal No. 2-N/14 of 2013.

2. "Key facts" necessary for the adjudication of the present petition are that the petitioners-plaintiffs (herein after referred to as 'plaintiffs' for convenience sake) have instituted a suit against the respondent-defendant-Pritam Chand (herein after referred to as 'defendant' for convenience sake) seeking a decree of declaration that they are co-owners in possession of the half share of the land i.e. 0-15 Bigha and the land comprised in Khata Khatauni No. 1/38 khasra No. 39, measuring 1-10 Bigha situate in Mauza Ghunglon, Tehsil Paonta Sahib, District Sirmaur, Himachal Pradesh by virtue of HP. Tenancy and Land Reforms Act, 1972

and the revenue entries showing the State Government as owner in possession are wrong, illegal and are not as per actual position on the spot. In the alternative, plaintiffs have prayed for a decree of declaration to the effect that they have become owners of the suit land by way of adverse possession alongwith consequential relief of permanent prohibitory injunction restraining defendant Pritam Chand from interfering and dispossessing the plaintiffs from the suit land in any manner whatsoever, from the half share of the plaintiffs.

3. Written statement was filed by defendant-Pritam Chand.

4. Plaintiffs have moved an application under Order 39 Rules 1 and 2 read with section 151 of the Civil Procedure Code in Civil Suit No. 146/1 of 2009 seeking ex-parte ad-interim injunction restraining defendant Pritam Chand from dispossessing, interfering or blocking the path of the plaintiffs by raising construction on the half share of the plaintiffs on the land comprised in Khata Khatauni No. 1/38 khasra No. 39 measuring 1-10 Bigha situate in Mauza Ghunglon, Tehsil Paonta Sahib, District Sirmaur, Himachal Pradesh.

5. Reply was filed by defendant-Pritam Chand.

6. Learned Trial Court dismissed the application on 15.11.2012. Plaintiffs preferred an appeal before the learned Addl. District Judge, Sirmaur District at Nahan bearing Civil Misc. Appeal No. 2-N/14 of 2013. He dismissed the same on 8.7.2013, hence, present appeal.

7. Mr. Karan Singh Kanwar, learned Advocate, has vehemently argued that learned courts below have not taken into

consideration the specific admission made by defendant Pritam Chand in para 4 of preliminary objections read in conjunction with para 5 on merits. He then contended that the plaintiffs have a prima facie case and balance of convenience is also in their favour. He lastly contended that plaintiff will suffer irreparable loss and injury in case ad-interim order is not granted.

8. Mr. Ashok K. Tyagi, learned Advocate has supported the order and judgment passed by the courts below.

9. I have heard the learned counsel for the parties and have also gone through the pleadings carefully.

10. According to the plaintiffs, Rani Kalindra Devi was the original owner of the land comprised in Khata Khatauni No. 1/22, Khasra No. 39, alongwith other Khasra numbers in Mauza Ghunglon, Tehsil Paonta Sahib, District Sirmaur, Himachal Pradesh. She inducted various tenants of the village Rampur Banjaran alongwith ancestors of the plaintiffs and defendant Pritam Chand as Gair Mairussi Doyam of Khasra No. 39 measuring 1-10 Bigha situate in Mauza Ghunglon, Tehsil Paonta Sahib, District Sirmaur, H.P. Ancestors of the plaintiffs and defendant Pritam Chand became owners of the other land but the suit land could not be mutated in favour of the ancestors of the plaintiffs and the same was vested in favour of defendant No. 2, i.e. State of Himachal Pradesh, in an illegal manner. Their ancestors remained in possession of the suit land as tenants.

11. According to the averments contained in the written statement filed on behalf of defendant Pritam Chand, his father was separated from the family. He took the suit land on tenancy prior to 1961-1962 and since then father of the plaintiffs remained

in possession of the suit land as tenant and after his death plaintiffs as tenants and now as owners. It was also admitted in the written statement that the plaintiffs generally used to go to their adjoining land through the *Dol* as per common practice for ingress and egress.

12. Learned Courts below have not taken into consideration the specific admission made in the preliminary submissions and para 5 on merits of the written statement filed by defendant Pritam Chand. It is true that in the revenue record, there is no entry of the path. In the revenue record, pertaining to the year 1962-63, name of one Shri Haria Ram, father of defendant-Pritam Chand is recorded in possession column as non-occupancy tenant over the suit land. However, fact of the matter is that as per admission of the defendant Pritam Chand, plaintiffs have been using adjoining land through *Dol*. Plaintiffs have made out a prima facie case in their favour and balance of convenience is also in their favour. Filing of the suit by Pritam Chand against the State of Himachal Pradesh and the plaintiffs moving an application under Order 1 Rule 10 of the Civil Procedure Code for impleadment has no bearing in this case. Plaintiffs will suffer irreparable loss and injury in case ad-interim injunction is not granted in their favour and against defendant Pritam Chand.

13. Their Lordships of the Hon'ble Supreme Court in ***Gujarat Bottling Co. Ltd. and others vs. Coca Cola Co. and others***, (1995) 5 SCC 545 have held that while exercising the discretion, the court generally applies the following tests for granting interim injunction:

“46. 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 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 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 to 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. v. 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."

14. Learned Single Judge of Madhya Pradesh High Court in *Kanraj Khatri v. Nathuram Jain*, AIR 1997 M.P. 92 has laid down the following tests to find a prima facie case as under:

"13. It was held in *Mahadeo Savalram Shelke's case*, (supra) that :--

"..... 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"

So, we have to look into whether any substantial question has been raised in this case. In case, this Court comes to the conclusion that no substantial question has been raised or no serious question has to be tried for grant of easement, as claimed by the non-applicant,

then there would be no option but to hold that the non-applicant had no prima facie case and he is not entitled to any injunction. It is often forgotten that in order to find a prima facie case or a serious or substantial question involved in a case, it may be examined from two points of view. One is that it should appear to the Court that on the facts stated in the plaint, the plaintiff has chance to get a decree. If the facts are not properly pleaded and they have no relation to the relief sought by' the plaintiff, then the only' result would be that the suit would be liable to be dismissed. In the state of such pleadings no Court can come to the conclusion that the plaintiff has a prima facie case in his favour. However, there may be another situation that may arise that apparently, there appears to be no flaw in the facts pleaded as they are logically related to the relief claimed but by application of law the suit may not be maintainable. If such a situation arise then the Court may face some difficulty in deciding the question. It may be totally certain without an iota of doubt that the suit would not be maintainable or it may not succeed in accordance with the law obtaining on the subject matter of the suit. Can it still be said that the plaintiff has a prima facie case? The answer is clearly -- No. There may be another contingency when the allegations, if made, in the plaint are proved or assumed to be correct then still there remains a doubt that the plaintiff may or may not succeed. The necessary doubt gives the right to the plaintiff to claim that he has a serious question of law to be tried. In such cases, the Court may consider the case of the plaintiff and hold it that he has a prima facie case because, the question of law involved in the suit, has to be tried. The Court may then grant temporary injunction, if the plaintiff proves that irreparable injury shall be caused to him which cannot be compensated by money and the balance of convenience was in his favour.

14. It may be remembered that the aforesaid two categories were stated on the assumption that facts stated in plaint and application under Order 39, Rule 1 and 2 of the Code of Civil Procedure are positively true or appear to be true. There may be another category of cases where it appears to the Court that the defendant has brought material on record to controvert the material placed by the plaintiff that on facts probably, there is no or there could be no prima facie case in plaintiffs favour then obviously, temporary injunction has to be refused. On the other hand even if the plaintiff may have a strong case on facts, he may have probably weak case on law then also temporary injunction has to be refused. In all other

cases, if the plaintiff has placed such material on record so as to create reasonable possibility of his success then temporary injunction may be granted, provided he proves other well known conditions. However, in absence of strong prima facie material on record in favour of plaintiff suggesting that on facts, he may succeed, there is no case for grant of temporary injunction. So far as question of law is concerned, the test indicated in the previous paragraph should be applied, if the plaintiff has a strong case on facts. ◇

15. These are, however, only broad general observations. Each case has to be examined carefully to see if there is a prima facie case. However, on going through the plaint allegations on the face of it, if it appears to the Court, and there is no room for any doubt, that the plaintiff should not succeed in accordance with law on the subject matter of the plaint, the Court shall hold that there is no prima facie case in favour of the plaintiff. In other words, he has filed a suit without there being any serious question to be tried. The Court will not then grant temporary injunction.”

15. Learned Single Judge in ***Gramophone Company of India Limited v. Shanti Films Corporation and others***, AIR 1997 Calcutta 63 has laid down the following guiding principles to be considered at the time of considering application under order 39 rules 1 and 2 of the Code of Civil Procedure. Learned Single Judge has held as under:

“16. In a suit for permanent injunction while the Court is considering an interlocutory application, the Court is not called upon to decide the real disputes between the parties. The Court is called upon to see whether the party who has approached the Court has a plausible case and whether there is a possibility of such case succeeding at the trial. If that test is satisfied then it is the duty of the Court to see whether the damages the plaintiff is likely to suffer for the action of the defendants complained of can be compensated in money and if so whether there is a standard for ascertaining such compensation. If such compensation can be ascertained and afforded in money then the interlocutory order of injunction should normally be refused. But if, on the other hand, the Court is of the view that such compensation cannot be ascertained and afforded in money then it is the duty of the Court to see the balance of convenience and inconvenience of the parties. If the balance "of

convenience is in favour of grant then the Court shall normally issue an interlocutory order of injunction upon undertaking of the plaintiff to compensate the defendant against whom the order of injunction is passed if at the trial it is held that the plaintiff is not entitled to such permanent injunction. On the other hand, if it is found that the balance of convenience is against passing of such order, the Court will normally refuse to pass interlocutory injunction. The aforesaid are broadly the principles on which the Court acts while exercising discretion in deciding an interlocutory application for temporary injunction made in a suit for permanent injunction. I think, it is also the duty of the Court to preserve the status quo as far as practicable, while dealing with such a matter."

16. In *M/s Graftek Pvt. Ltd. and others v. Shri Lord Lingaraj Mahaprabhu*, AIR 1999 Orissa 49 has culled out the following principles while granting temporary injunction:

"(i) Plaintiff has a prima facie case,

(ii) If interim injunction is refused he will suffer an irreparable injury.

(iii) The balance of convenience is in his favour."

The Supreme Court in the decision reported in AIR 1993 SC 276 : (1992 AIR SCW 3128), *Dalpat Kumar v. Prahlad Singh* while considering the principle relating to grant of temporary injunction, observed :--

".. 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 a 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) 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." ◇

The Supreme Court further observed (at page 277 (of AIR):

:".... 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 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 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 possibilities 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."

In subsequent paragraph, the Supreme Court further observed (at page 278'(of AIR):

".... The phrases 'prima facie case', 'balance of convenience' and 'irreparable loss' are not rhetoric phrases for incantation, but words of width and electicity, to meet myriad situations presented by man's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice,.... "

17. Learned Single Judge of the Madras High Court in ***Multichannel (India) Limited, Mumbai v. Kavitalaya***

Productions Pvt. Ltd., AIR 1999 Madras 59 have explained the irreparable injury to mean which is substantial and could never be adequately remedied or atoned for by damages and the injury which cannot possibly be repaired. Learned Single Judge has held as under:

“25. Therefore, it is well settled that it is only if the discretion is not exercised applying the tests on the point, fairly or honestly or according to the rules or reason and justice, then alone, the order can be reversed. Where the conclusion is right and discretion is exercised properly and the crucial facts not ignored and even certain grounds not considered, which are not essential, even then, the appellate Court must defer to the Judge's exercise of his discretion and must not interfere with it. merely upon the ground that the appellate Court would have exercised the discretion differently. It is only if and after the appellate Court had reached a conclusion that the Judge's exercise of his discretion be set aside for one or the other of these reasons, then the appellate Court can exercise an original jurisdiction of its own. Since the learned Judge has kept in view the nature of the right, conduct of the parties and the consequences of the grant of injunction, we do not see that it is a fit case to interfere with the impugned order.

26. It is not in every case of breach of contract or covenant that the Court will interfere by way of injunction. In exercising its jurisdiction by way of interlocutory injunction, the Court acts upon the principle of preventing irreparable injury. If a covenant is clear and the breach clear and serious injury is likely to arise from the breach, the Court will interfere before the hearing to restrain the breach; but if the covenant is obscure or the breach doubtful, and no irreparable damage can arise to the plaintiff/appellant, then the question resolves itself into a question of comparative injury, whether the defendant will be more damnified by the injunction being granted or the plaintiff by its being withheld. Mere interference with a legal right does not, however, ipso' facto entitle a plaintiff to an injunction and mere inconvenience is not enough to entitle a party to an injunction. There must be violation of an enforceable right and the violation must be of a substantial character. An injunction will not be granted where the plaintiff has a remedy by way of damages. The injury must be irreparable and it must be continuous. By the term irreparable injury is meant injury

which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired. If, however, by the conduct of the appellant having regard to the nature of transaction being commercial and the injury complained of is one which may in some way be compensated by money, the Court may decline to grant the injunction. Keeping these principles in view, it has to be noticed that whenever the Court grants an injunction restraining the breach of any express or implied term of the contract, thereby, the Court specifically enforces the performance of the contract. Where the contract contains express terms, negative as well as positive, and positive terms are capable of specific performance by the Court, the Court may naturally well enforce an injunction. The observations of the negative terms, for by so being, promote the complete performance of the contract as a whole. It may here be noticed that whenever in such cases, a person is compelled by an injunction to observe some negative term of a contract, the whole benefit of the injunction is conditionally upon the plaintiff performing his part of the contract, and the moment he fails to do any acts which he has engaged to do and which were the considerations for the negative term, the injunction is liable to be withheld.”

18. Learned Single Judge in ***C.J. International Hotels Ltd. and others v. N.D.M.C. and others***, AIR 2001 Delhi 435 has laid down the following factors which are required to be considered before granting temporary injunction:

“11. At the state of deciding the application for temporary injunction, the Court is not required to go into the merit of the case in detail. What the court has to examine is: i) the plaintiff has a prima facie case to go for trial: ii) protection is necessary from that species of injuries known as irreparable before his legal right can be established. and iii) that the mischief of inconvenience likely to arise from withholding injection will be greater than what is likely to arise from granting it. The principles governing the grant of injection are well settled. The power is discretionary and is to be exercised on sound judicial principles. Where no violation of the rights of the plaintiff was involved, the interim injunction should not be granted. It is on these principles that the Court has to examine the respective case of the parties.”

19. Their Lordships of the Hon'ble Supreme Court in **Zenit Mataplast Private Limited vs. State of Maharashtra and others**, (2009) 10 SCC 388 have again reiterated that the interim order generally governed by three principles, viz prima facie case, balance of convenience and irreparable loss. Their Lordships have held as under:

“31. Grant of an interim relief in regard to the nature and extent thereof depends upon the facts and formula can be laid down. There may be a situation wherein the defendant/respondent may use the suit property in such a manner that the situation becomes irretrievable. In such a fact situation, interim relief should be granted (vide M. Gurudas & Ors. Vs. Rasaranjan & Ors. AIR 2006 SC 3275; and Shridevi & Anr. vs. Muralidhar & Anr. (2007) 14 SCC 721. Grant of temporary injunction, is governed by three basic principles, i.e. prima facie case; balance of convenience; and irreparable injury, which are required to be considered in a proper perspective in the facts and circumstances of a particular case. But it may not be appropriate for any court to hold a mini trial at the stage of grant of temporary injunction (Vide S.M. Dyechem Ltd. Vs. M/s. Cadbury (India) Ltd., AIR 2000 SC 2114; and Anand Prasad Agarwalla (supra).

37. Thus, the law on the issue emerges to the effect that interim injunction should be granted by the Court after considering all the pros and cons of the case in a given set of facts involved therein on the risk and responsibility of the party or, in case he loses the case, he cannot take any advantage of the same. The order can be passed on settled principles taking into account the three basic grounds i.e. prima facie case, balance of convenience and irreparable loss.”

20. Their Lordships of the Hon'ble Supreme Court in **M/s Joy Auto Works and others v. Sumer Builder (P) Ltd. & another**, AIR 2009 SC (Supp) 1429 have held that access to motorable road should be preserved till the disposal of suit since the plaintiff cannot be compensated by damages. Their Lordships have held as under:

“26. Since the appellants have come up against the refusal of the High Court to grant their interim prayer to have motorable access to plot No.878 and a portion of plot No.879 under their possession

from the main road through plot No.879 during the pendency of the suit, we can only consider the case of the parties on a prima facie basis, inasmuch as, the suit is yet to be decided on merits. The case being argued on behalf of the appellants, may not ultimately be dependent upon whether the appellants run any commercial venture on plot No.878 and the portion of plot No.879 under their possession, but the question of such a right of passage may ultimately be relevant if it is established that there is no other access to the said premises. Accordingly, having regard to Exh.A in the suit, which is a site plan which has been referred to as Exh.C in the paper book at page 120, some provision has to be made even at the interim stage to preserve a motorable access from the main road to the premises under the occupation of the appellants so that upon development of plot No.879 such a right is not totally extinguished. While the Trial Court has allowed access on foot from the main road to the said premises, in our view, a motorable access should be preserved at least till the 40 feet wide DP road adjacent to plot No.878 is available to the appellants for egress and ingress from their portion of the premises, which is otherwise land-locked, on till the disposal of the suit.

27. It would not be appropriate on our part to make any observation on the merits of the case of the parties since the same is yet to be decided. We are only required to ensure the balance of convenience and inconvenience and the equities between the parties at this stage. We are also required to consider if any of the parties will suffer irreparable loss and injury unless an interim order, as prayed for by the appellants, is allowed or denied. This is not one of those cases where the appellants may be suitably compensated by damages in case their suit succeeds.

28. Having considered the submissions advanced on behalf of the respective parties, including that of the Bombay Municipal Corporation, we are of the view that ad- interim protection, as prayed for by the appellants, should be given in the facts and circumstances of the case.”

21. In the case in hand also, plaintiffs have prayed for their access to the adjoining land by using the Dol. They cannot be compensated by way of damages in case ad-interim injunction is denied to them at this stage.

22. Accordingly, in view of the discussion and analysis made herein above, the petition is allowed. Judgment dated

8.7.2013 passed by the Additional District Judge, Sirmaur at Nahan in Civil Misc. Appeal no. 2-N/14 of 2013 and order dated 15.11.2012 passed by the Civil Judge (Senior Division), Court No.1, Paonta Sahib are set aside. Defendant Pritam Chand is restrained from interfering and blocking the path by raising construction on land comprised in Khata Khatauni No. 1/38 khasra No. 39, measuring 1-10 Bigha situate in Mauza Ghunglon, Tehsil Paonta Sahib, District Sirmaur, HP. Plaintiffs are permitted to use the *Dol* for ingress and egress till the disposal of the main suit. It is made clear that the observations made herein above shall have no bearing on the merits of the case.

(Justice Rajiv Sharma)
Judge

16.4.2014
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