Tanusree Basu & Ors vs Ishani Prasad Basu & Ors on 5 March, 2008

Equivalent citations: AIR 2008 SUPREME COURT 1909, 2008 AIR SCW 2152, 2008 (4) SRJ 154, 2008 (4) SCALE 71, 2008 (4) SCC 791, (2008) 5 ALLMR 38 (SC), (2008) 1 CLR 808 (SC), 2008 (5) ALL MR 38 NOC, (2008) 3 CIVILCOURTC 1, (2008) 2 LANDLR 26, (2008) 4 MAD LJ 252, (2008) 105 REVDEC 387, (2008) 3 RECCIVR 519, (2008) 4 SCALE 71, (2008) 2 WLC(SC)CVL 58, (2008) 72 ALL LR 530, (2008) 4 ANDH LT 41, (2008) 2 ALL RENTCAS 197, (2008) 2 ALL WC 1199, (2008) 2 CAL HN 146, (2008) 2 CALLT 36, (2008) 1 CURLJ(CCR) 56

Author: S.B. Sinha

Bench: S.B. Sinha, V.S. Sirpurkar

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           CASE NO.:
Appeal (civil)  1767 of 2008

PETITIONER:
Tanusree Basu & Ors

RESPONDENT:
Ishani Prasad Basu & Ors

DATE OF JUDGMENT: 05/03/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
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J U D G M E N T CIVIL APPEAL NO 1767 OF 2008 [Arising out of SLP (Civil) No. 13852 of 2007] S.B. SINHA, J :

1. Leave granted.

2. The parties hereto are co-sharers. A suit was filed for partition.

Admittedly they had entered into a development agreement. The properties which were in possession of the owners were described in Schedule A of the plaint; whereas the properties which were subject matter of the development agreement were described in Scheduled B thereof in the plaint filed by the appellant in the Court of 8th Civil Judge (Sr. Division), Alipore registered Title Suit No. 9 of 2004.

In terms of the development agreement, three flats and parking spaces for three cars had been allotted to the parties. An application for grant of injunction in respect of Schedule A property restraining the respondents from handing over the owners the allotted flats and from selling out any flats in the premises in question, was filed in the suit on or about 14.03.2004 wherein it was inter alia averred:

> "That at present the plaintiffs and the defendant no. 1 to 6 are occupying 3 flats and 3 garages at premises no. 46A, Purna Chandra Mitra Lake, Kolkata 700033, which are also undivided property."

It was furthermore averred:

> " That at present the plaintiffs have 93/240, undivided share, the legal heirs of late Pinaki Prosad Basu (the defendant No. 2 to 6) have 54/240, undivided share and the defendant no. 6 have 93/240, undivided share of the schedule 'A' and 'B' properties. Although by amicable agreements the parties are in possession of separate flats of schedule 'B' hereunder, there has not been any demarcated possession according to the respective share of the parties."

3. However, yet again on 11.04.2005, the plaintiffs filed an application for grant of injunction in respect of the schedule B property seeking to restrain the respondents from transferring or letting out any portion of the land to any third party.

An order of injunction was issued on the said application dated 05.03.2004 but the same was refused in respect of the application dated 11.04.2005 by an order dated 16.07.2005. An appeal was preferred thereagainst which was marked as F.M.A. No. 988 of 2005.

4. The said appeal was dismissed by an order dated 10.08.2006 for default as process fee was not deposited. It was, however, restored to its original file. Immediately thereafter, however, the appellants allegedly put a padlock in flat No. 201 which was in occupation of the first respondent. On or about 14.08.2006, an application was filed by him before the 8th Civil Judge (Senior Division) Alipore inter alia praying for:

> "9. Your petitioner states that the plaintiff by show of muscle and at the instance of musclemen in their side causing obstruction to use and enjoy the flat no. 201 of the 'B' schedule property to your petitioner. Your petitioner is a bachelor and aged about 72 years and has become totally perplexed as he has not been allowed to use and enjoy in his own property. Your petitioner further states that after construction by the promoter three flats and three car parking spaces allotted to the owners of three flats and as has been observed by the ld. Court but the plaintiffs carrying a fig to court's law and order causing obstruction, inconvenience to your petitioner to use and enjoy the flat no. 201 of the 'B' schedule property by putting padlock and keeping sundry household articles."

5. By an order dated 21.09.2006, a Division Bench of the Calcutta High Court while disposing of FMA No. 988 of 2005 directed as under:

> "In such view of the matter, we dispose of this appeal and the application by holding that the parties to the suit shall be entitled to maintain their respective possession in the suit properties as on today without being entitled to make any change in the nature and character of the same. It is, however, made clear that if there be any pending application before the Trial Court by alleging that since after making of the impugned order by the trial court, a change has been made by some of the parties in respect of the respective possession by force and/ or illegality, then the trial court will be entitled to deal with the said application and to pass an appropriate orders irrespective of the above order of disposal of this appeal."

6. By an order dated 21.11.2006, the learned Civil Judge allowed the application dated 14.08.2006 holding:

> "From the order of the Hon'ble High Court it is palpably clear that full liberty has been given to the Trial Court to dispose of the application of the defendant no. 1 filed u/s 151 CPC in accordance with the law. It is already stated in my foregoing discussion that the materials on record go to show that defendant no. 1 is in possession of flat No. 201 of Schedule 'B' property while the plaintiffs are contending that they are in possession of the said flat. Considering the objection it is crystal clear that the defence version that the plaintiffs illegally put padlock and kept some sundry articles in the said flat is proved.
>
> Under the facts and circumstances I think that the plaintiff's should not be allowed to take the law in their own hands, and they are not supposed to make any obstruction to the defendant No. 1 in peaceful enjoyment of flat No. 201 of Schedule 'B' property. Therefore, the plaintiffs are hereby directed to remove the padlock and sundry articles from flat no. 201 immediately and they are hereby restrained from making any further obstruction to the defendant no. 1 in peaceful enjoyment of the said flat. "

7. In the meanwhile, however, a preliminary decree was passed in the suit.

8. Appellants filed a revision application before the High Court against the said order dated 21.11.2006 which by reason of the impugned judgment has been dismissed holding:

> " It further appears from the said reports that an interim mandatory order of injunction can be passed only in circumstances which are clear and the prima facie materials clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction "

It was furthermore observed:

> " Thus it cannot be said that in the present case there is no prima facie finding by the learned Trial Court. Therefore, in the present facts and circumstances of the case, the said reported case cannot be of any help to the petitioners. It is clear that the learned Trial Court after having recorded its prima facie finding in respect of possession by the respective parties in respect of the 'B' schedule property, the learned Trial Court disposed of the application for injunction on contest."

9. The High Court noticed the discrepancies in the averments made by the plaintiffs at different stages of the proceedings and upon consideration of the rival submissions opined:

> "It appears from the materials on record, as already discussed above, and after having considered the respective submissions made by the learned counsels for the respective parties, as already discussed above, that the defendant no. 1 has been in possession of the said flat no. 201 at all material times. Copies of certain documents which have been annexed to the affidavit-in-opposition, as discussed above, shows that the learned Trial Court was not in error in making a prima facie finding with regard to the respective possession of the parties in the 'B' schedule property. It further appears that the plaintiffs/ petitioners at the initial stage did not dispute the possession of the defendant no. 1 in respect of the said flat no. 201 but only at a later stage the plaintiffs/ petitioners became interested in denying the possession of the defendant no. 1 in respect of flat no. 201. The plaintiffs/ petitioners could not substantiate their claim in respect of the said flat no. 201 by any supporting document."

10. Mr. Haradhan Banerjee, learned counsel appearing on behalf of the appellants, submitted that keeping in view the nature of preliminary decree passed by the learned Civil Judge, the Trial Judge as also the High Court committed a serious error in passing the impugned judgment.

It was urged that the parties being co-owners and a final decree in the suit having not yet been passed, it is impermissible in law to pass an order of mandatory injunction and that too without arriving at a definite conclusion that the first respondent was in exclusive possession of Flat No. 201.

11. Mr. Animesh Kanti Ghosal, learned counsel appearing on behalf of the first respondent, on the other hand, would support the impugned judgment.

12. There cannot be any doubt or dispute as a general proposition of law that possession of one co-owner would be treated to be possession of all. This, however, in a case of this nature would not mean that where three flats have been allotted jointly to the parties, each one of them cannot be in occupation of one co-owner separately.

We have noticed hereinbefore that the plaintiffs appellants themselves in no uncertain terms admitted that by reason of mutual adjustment the parties had been in separate possession of three flats, viz., flat Nos. 201, 202 and 301. If they were in possession of the separate flats, plaintiffs as co-owners could not otherwise have made any attempt to dispossess the first respondent by putting

a padlock. The padlock, according to the first respondent, as noticed hereinbefore, was put by the plaintiffs appellants immediately after the appeal preferred by them in the High Court was dismissed.

13. The padlock was directed to be removed by the learned Civil Judge by an order dated 21.11.2006. We do not find any illegality therein.

It is now a well-settled principle of law that Order 39, Rule 1 of the Code of Civil Procedure (Code) is not the sole repository of the power of the court to grant injunction.

Section 151 of the Code confers power upon the court to grant injunction if the matter is not covered by Rules 1 and 2 of Order 39 of the Code. [See Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal AIR 1962 SC 527 and India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd. (2007) 5 SCC 510]

14. Strong reliance has been placed by Mr. Banerjee on a judgment of Bombay High Court in Bhaguji Bayaji Pokale & Ors. v. Kantilal Baban Gunjawate & Ors. [1998 (3) CCC 377 (Bom.)] wherein it was held:

> "7. With regard to second substantial question of law, i.e. the co-owner cannot claim an order of injunction against another co-owner with regard to the property owned jointly, the learned Counsel for the appellants had relied upon the Apex Court's judgment reported in Mohammad Baqar and others v. Naim-un-Nisa Bibi and others. The Apex Court has very categorically held in para No. 7 as under:
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> "The parties to the action are co-sharers, and as under the law, possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period."

It was observed :

> " Similarly, the legal position that the co-owner or co-sharer of the property can never claim ownership by adverse possession of the other share. This is also a well settled law."

We are concerned in this case with a question whether if a co-owner was in specific possession of the joint property, he could be dispossessed therefrom without the intervention of the court. In this case, the first respondent is not claiming title of adverse possession. The said decision has, therefore, no application to the fact of the present case.

15. Reliance has also been placed by Mr. Banerjee in Abu Shahid v. Abdul Hoque Dobhash and another [AIR 1940 Cal 363], Hemanta Kumar Banerjee and others v. Satish Chandra Banerjee and others [AIR 1941 Cal 635] and Jahuri Sah and others v. Dwarika Prasad Jhunjhunwala and others

[AIR 1967 SC 109].

In Abu Shahid (supra), the question which arose for consideration was in regard to plea of ouster vis-`-vis rendition of accounts. We are not concerned with such a question in this case.

In Hemanta Kumar Banerjee and others (supra), the question which arose for consideration was as to whether the rule against partition amongst co-sharers is an elastic one. Again, we are not concerned with such a question here.

In Jahuri Sah (supra), this Court opined:

> "12. What we have to consider then is whether the contract for payment of compensation is not enforceable. It is no doubt true that under the law every co-owner of undivided property is entitled to enjoy the whole of the property and is not liable to pay compensation to the other co-owners who have not chosen to enjoy the property. It is also true that liability to pay compensation arises against a co-owner who deliberately excludes the other co-owners from the enjoyment of the property. It does not, however, follow that the liability to pay compensation arises only in such a case and no other. Co-owners are legally competent to come to any kind of arrangement for the enjoyment of their undivided property and are free to lay down any terms concerning the enjoyment of the property. There is no principle of law which would exclude them from providing in the agreement that those of them as are in actual occupation and enjoyment of the property shall pay to the other co-owners compensation..."

These observations do not assist the case of the appellants. If parties by mutual agreement entered into possession of separate flats, no co-sharer should be permitted to act in breach thereof.

16. It is not the law that a party to a suit during pendency thereof shall take law into his hands and dispossess the other co-sharer.

If a party takes recourse to any contrivance to dispossess another, during pendency of the suit either in violation of the order of injunction or otherwise, the court indisputably will have jurisdiction to restore the parties back to the same position.

In Israil & Others v. Samset Rahman & Others [(1914) 18 Cal WN 176 ; AIR 1914 Cal 362], Mookerjee, J. held that a co-owner being in exclusive possession of a joint property would be entitled to injunction. If a person is entitled to a prohibitory injunction, a' fortiori he shall also be entitled to a mandatory injunction. [See also Spandan Diagnostic & Research Centre Private Limited & Ors. v. Shri Ritendra Nath Ghosh & Ors. 2000 (2) Cal LT 83]

17. We are not oblivious of a judgment of this Court in Kishore Kumar Khaitan & Anr. v. Praveen Kumar Singh [(2006) 3 SCC 312], wherein one of us (Sinha, J.) was a member, where it was held:

> "14. Thus, prima facie, we find that the tenancy claimed by the plaintiff remains to be proved in the suit. For the present, we should say that prima facie, the plaintiff has not been able to establish the foundation for the possession claimed by him. It is significant to note that not even another tenant of the building among the various tenants in the building, was examined to establish that the plaintiff while in possession, had been dispossessed on 20-6-1998 as claimed by him. Any way, the Additional District Judge has not referred to any such evidence except referring to the affidavit of Shivanand Mishra, who even according to the plaintiff was no more in occupation. Thus, the disturbance of the status quo by the defendants has not been established. Thus, prima facie it is clear that the plaintiff has not laid the foundation for the grant of an interim order of mandatory injunction in his favour. The order so passed by the Additional District Judge, and confirmed by the High Court, therefore, calls for interference in this appeal."

18. The fact situation obtaining herein, however, is absolutely different. In this case, such a foundational fact has not only been raised by the respondents, the appellants admitted the factual scenario in that behalf. No party, it is trite, ordinarily should be allowed to take benefit of his own wrong.

19. For the reasons aforementioned and particularly having regard to the fact situation obtaining herein, we are of the opinion that the impugned judgments warrant no interference. Accordingly, the appeal is dismissed with costs. Counsel's fee assessed at Rs. 10,000/-.