M. Gurudas & Ors vs Rasaranjan & Ors on 13 September, 2006

Equivalent citations: AIR 2006 SUPREME COURT 3275, 2006 (8) SCC 367, 2006 AIR SCW 4773, 2006 (6) AIR KANT HCR 130, (2007) 1 WLC(SC)CVL 313, (2007) 1 ALLMR 435 (SC), (2007) 1 CIVLJ 784, (2007) 2 MARRILJ 441, (2007) 1 MARRILJ 472, (2007) 1 MAH LJ 898, (2007) 4 BOM CR 425, (2007) 1 MAD LJ 41, 2007 (1) ALL MR 435, (2006) 2 CLR 626 (SC), (2006) 46 ALLINDCAS 12 (SC), (2007) 2 MAD LW 743, (2007) 1 RECCIVR 341, 2006 (2) CLR 626, 2006 (10) SRJ 394, 2006 (9) SCALE 275, (2006) 2 ORISSA LR 749, (2006) 9 SCALE 275, (2006) 6 ANDH LT 53, (2006) 7 SUPREME 289, (2006) 4 CIVILCOURTC 584, (2006) 101 REVDEC 822, (2006) 4 ALL WC 3907, (2006) 4 CURCC 31, (2006) 6 KANT LJ 337, (2006) 3 PUN LR 724, (2006) 4 ICC 608, (2006) 65 ALL LR 331, (2006) 3 ALL RENTCAS 766, (2006) 8 SCJ 401

Author: S.B. Sinha

Bench: S.B. Sinha, Dalveer Bhandari

```
           CASE NO.:
Appeal (civil)  4101 of 2006

PETITIONER:
M. Gurudas & Ors.

RESPONDENT:
Rasaranjan & Ors.

DATE OF JUDGMENT: 13/09/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:
```

J U D G M E N T [Arising out of SLP (Civil) No. 12 of 2006] WITH CIVIL APPEAL NO. 4102 OF 2006 [Arising out of SLP (Civil) No. 843-844 of 2006] S.B. SINHA, J :

Leave granted in S.L.Ps.

These appeals involving common questions of law and fact and having arisen from a common judgment were taken up for hearing together and are being disposed of by this common judgment.

> One M. Obalappa was the owner of the property. He had three sons, viz., Nagappa, Obalappa and Kadarappa. M. Obalappa died in 1889. Nagappa separated himself in the year 1913. Obalappa and Kadarappa were, thus, in joint possession of the properties in suit. Obalappa died in 1949. He had no issue. The plaintiffs-respondents are said to be the heirs of the natural daughter of Kadarappa, viz., Nirmala. Allegedly, she was adopted by Obalappa during his life time. Kadarappa died in 1961 leaving seven sons and one daughter Nirmala, whose heirs and legal representatives of the plaintiffs claimed themselves, she died in the year 1999. The children of Kadarappa, Gurudas and Others, and their sons, Sagunarthy and Shivarthy, are the Appellants in Civil Appeals arising out of SLP (C) No. 12 of 2006 and 843-44 of 2006 respectively.
>
> The properties involve Survey No. 97/2 Old No. 46-C, Doddabylakhana, Lalbagh Road, Bangalore and Survey No. 66 and 75/1, Sarakki, Uttarhalli Hobli, Bangalore.
>
> The purported adoption of Nirmala by Obalappa is in question in the suit. It is, however, not in dispute that on or about 12.9.1947, Obalappa had executed a deed of gift in favour of Nirmala showing her as daughter of Kadarappa but under his guardianship whereas the heirs of Nirmala claimed that Nirmala inherited the property on his death, which as noticed hereinbefore took place in 1949. According to the Appellants, the joint family property devolved by survivorship to Kadarappa. A purported partition took place between Kadarappa and his sons on 15.6.1954. Nirmala was not given any share therein. It is stated that she was not entitled thereto.

The property bearing Survey No. 97/2 is said to have been acquired by Brahmanandadas by way of a deed of sale executed by Khaja Ghulam Sheriff from 18.07.1955. It is furthermore not disputed that Kadrappa has transferred three properties in favour of Nirmala as a trustee, referring her to be the foster daughter of Oblappa and describing the said properties to be held in trust. The Appellants herein contend that Nirmala, during her life time, never claimed to be an adopted daughter and she did not have any interest in the joint family properties. In fact in a writ petition questioning acquisition of some properties which were the subject matter of writ petition No. 15217-21 of 1987, she had allegedly admitted that the properties which were subject matter of acquisition were separate and distinct.

The claim that Nirmala was the adopted daughter, however, was specifically pleaded by the plaintiffs.

The suit was filed by the Respondents on 7.09.2000 wherein the following reliefs were prayed for:

> "WHEREFOR, the plaintiff prays for a judgment and decree for partition of their share in the schedule property:
>
> a) Directing the partition of the suit Schedule and to allot them in favour of plaintiffs

b) Restrain the defendants, their agents or any person claiming through from alienating the suit properties, by granting an order of permanent injunction.

c) To order directing enquiry into mesne profits under order XX Rule 12 Code of Civil Procedure.

d) Awards costs of this suit and

e) Grant such other relief/s, at this Hon'ble Court deems fit to grant under the facts and circumstances of the case, in the interest of justice."

The said reliefs were claimed inter alia on the premise that Nirmala was the adopted daughter of Obalappa. However, an application for amendment of plaint was filed on or about 5.08.2002 stating that the parties being belonging to Brahmo Samaj faith, Nirmala could claim as natural daughter of Kadarappa. In the said application for amendment, however it was averred that Nirmala was adopted when she was about three years old.

It is relevant to mention that in the original plaint the subject matter thereof was : (i) a self acquired property of Obalappa; (ii) the properties transferred by Kadarappa; and (iii) new properties acquired by the family. However, in the amended plaint, the properties allotted to Kadarappa and joint family purportedly not partitioned in 1954 had also been included as Schedule D and E of the Plaint.

An application for injunction was filed and by an order dated 16.01.2003, the Appellants herein were restrained in dealing with the properties directing:

"I.A. No. 1 is allowed. No costs.

Order of temporary injunction is passed in favour of the plaintiffs restraining defendant No. 25 from putting up any construction on Item No. 1 of Schedule A and further not alienate any portion thereof in favour of any one by himself or through hits agents.

I.A. No. XI is allowed. No costs.

Order of temporary injunction is passed in favour of the plaintiffs restraining the defendants, their men, from alienating or altering the nature of the suit schedule properties."

On or about 18.03.2003, the High Court passed an interim order directing that no alienation would take place, save and except the share of the builders.

The said order was modified by an order dated 29.09.2005 directing that the development of the said property would be subject to restriction in regard to dealing therewith. An application for

modification of the said order was filed which has been dismissed by an order dated 15.11.2005.

Mr. Mukul Rohtagi and Dr. Rajeev Dhawan, learned senior counsel appearing on behalf of the Appellants, inter alia would submit that the High Court misdirected itself in passing the impugned order restraining the Respondents in alienating the property. The learned counsel would urge that the properties shall be allowed to be utilized as the constructions thereof had been permitted to be completed.

Mr. Rohtagi, at the outset, offered that the number of apartments constructed on the disputed land being 59 and the builders having been permitted to dispose of their share, only 21 flats remain to be sold, and thus having regard to the claim of the plaintiffs- respondents, the order of injunction may be confined to only 3 flats.

The submission of Dr. Rajeev Dhawan, on the other hand, was that the property which was the subject matter of Civil Appeal arising out of SLP(C) Nos. 843-44 of 2006 being self-acquired property and being commercial in nature, the same may be allowed to be transferred subject to the condition that 50% of the rents and other profits arising out of the same upon deducting the expenses may be directed to be deposited.

The submissions raised on behalf of the Appellants are:

(i) The suit was barred by limitation

(ii) Nirmala having admitted the nature of her interest in writ petition No. 15217-21 of 1987, the plaintiffs respondents could not take a stand contrary thereto or inconsistent therewith.

(iii) Adoption of Nirmala by Obalappa has neither been proved nor was permissible in law.

(iv) The question of there being joint family would not arise, having regard to the fact that the properties had been transferred in the year 1954, and, thus, the share of Nirmala would be only 1/64th. In any event, Nirmala has no interest in the self-acquired properties of the parties.

Mr. Mahabir Singh, learned senior counsel appearing on behalf of the Respondents, however, would not agree to the said offer. The learned counsel contended that both the Trial Judge as also the High Court having found that the plaintiffs not only have a prima facie case but also balance of convenience lay in their favour, this Court should not exercise its discretionary jurisdiction under Article 136 of the Constitution of India. The learned counsel urged that from a perusal of the records, it would appear that the learned Trial Judge as also the High Court had taken serious note of the conduct of the Appellants herein insofar as they disposed of some properties in violation of the order of status quo passed by the court. It was argued that the question as regard illegality of adoption cannot be permitted to be raised for the first time before this Court. In any event, the

Appellants having filed an application for rejection of the plaint in terms of Order VII, Rule 11 of the Code of Civil Procedure, the same having been dismissed, they should not be permitted to raise the said contention once again. It was contended that before the appellate court an interim order was passed on the basis of agreement between the parties, it is, therefore, inequitable to allow the parties to take a different stand before this Court.

While considering an application for injunction, it is well-settled, the courts would pass an order thereupon having regard to:

(i) Prima facie

(ii) Balance of convenience

(iii) Irreparable injury.

A finding on 'prima facie case' would be a finding of fact. However, while arriving at such finding of fact, the court not only must arrive at a conclusion that a case for trial has been made out but also other factors requisite for grant of injunction exist. There may be a debate as has been sought to be raised by Dr. Rajeev Dhawan that the decision of House of Lords in American Cyanamid v. Ethicon Ltd. [1975] 1 All ER 504 would have no application in a case of this nature as was opined by this Court in Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd. [(1999) 7 SCC 1] and S.M. Dyechem Ltd. v. Cadbury (India) Ltd. [(2000) 5 SCC 573], but we are not persuaded to delve thereinto.

We may only notice that the decisions of this Court in Colgate Palmolive (supra) and S.M. Dyechem Ltd (supra) relate to intellectual property rights. The question, however, has been taken into consideration by a Bench of this Court in Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd. [(2006) 1 SCC 540] stating:

> "The Respondent, therefore, has raised triable issues. What would constitute triable issues has succinctly been dealt with by the House of Lords in its well-known decision in American Cyanamid Co v. Ethicon Ltd. [(1975) 1 AER 504], holding :
>
> "Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expression as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."

It was further observed :

> "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is

> enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.
>
> * * * The factors which he took into consideration, and in my view properly, were that Ethicon's sutures XLG were not yet on the market; so that had no business which would be brought to a stop by the injunction; no factories would be closed and no workpeople would be thrown out of work. They held a dominant position in the United Kingdom market for absorbable surgical sutures and adopted an aggressive sales policy."

We are, however, not oblivious of the subsequent development of law both in England as well as in this jurisdiction. The Chancery Division in Series 5 Software v. Clarke [(1996) 1 All ER 853] opined:

> "In many cases before American Cyanamid the prospect of success was one of the important factors taken into account in assessing the balance of convenience. The courts would be less willing to subject the plaintiff to the risk of irrecoverable loss which would befall him if an interlocutory injunction was refused in those cases where it thought he was likely to win at the trial than in those cases where it thought he was likely to lose. The assessment of the prospects of success therefore was an important factor in deciding whether the court should exercise its discretion to grant interlocutory relief. It is this consideration which American Cyanamid is said to have prohibited in all but the most exceptional case. So it is necessary to consider with some care what was said in the House of Lords on this issue."

In Colgate Palmolive (India) Ltd. v.

Hindustan Lever Ltd. [(1999) 7 SCC 1], this Court observed that Laddie, J. in Series 5 Software (supra) had been able to resolve the issue without any departure from the true perspective of the judgment in American Cyanamid. In that case, however, this Court was considering a matter under Monopolies and Restrictive Trade Practices Act, 1969.

In S.M. Dyechem Ltd. v. Cadbury (India) Ltd. [(2000) 5 SCC 573], Jagannadha Rao, J. in a case arising under Trade and Merchandise Marks Act, 1958 reiterated the same principle stating that even the comparative strength and weaknesses of the parties may be a subject matter of consideration for the purpose of grant of injunction in trade mark matters stating :

> "21 Therefore, in trademark matters, it is now necessary to go into the question of "comparable strength" of the cases of either party, apart from balance of convenience. Point 4 is decided accordingly."

The said decisions were noticed yet again in a case involving infringement of trade mark in Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd. [(2001) 5 SCC 73]."

While considering the question of granting an order of injunction one way or the other, evidently, the court, apart from finding out a prima facie case, would consider the question in regard to the balance of convenience of the parties as also irreparable injury which might be suffered by the plaintiffs if the prayer for injunction is to be refused. The contention of the plaintiffs must be bona fide. The question sought to be tried must be a serious question and not only on a mere triable issue. [See Dorab Cawasji Warden v. Coomi Sorab Warden and Others , (1990) 2 SCC 117, Dalpat Kumar and Another v. Prahlad Singh and Others (1992) 1 SCC 719, United Commercial Bank v. Bank of India and Others (1981) 2 SCC 766, Gujarat Bottling Co. Ltd. and Others v. Coca Cola Co. and Others (1995) 5 SCC 545, Bina Murlidhar Hemdev and Others v. Kanhaiyalal Lokram Hemdev and Others (1999) 5 SCC 222 and Transmission Corpn. of A.P. Ltd (supra)] Mr. Mahabir Singh may not be right in contending that the adoption of Nirmala was never in question. In fact, the Trial Court in its judgment noticed:

> " Hence, if the family of Obalappa had followed Brahmo Samaj, Kadarappa could not have get any property by survivorship and the adoption of Nirmala Dhari is valid under law. Under the circumstances, the issue as to the ancient Hindu Adoption has to be investigated during the trial. The plaintiffs have established a trivial case i.e. prima-facie case in my opinion."

While arriving at the said finding, the court referred the following passage from Mayne's Treatise on Hindu Law and Usage, 13th edition, pages 429-430:

> "Adoption of daughters Nandapandita in his Dattaka Mimamsa would construe 'putra' (or son) as including a daughter and he draws the inference that on failure of a daughter, a daughter of another could be adopted. He supports his conclusion by referring to ancient precedents, such as the adoption of Shanta, the daughter of King Dasaratha by King Lomapada and the adoption of Pritha or Kunti, the daughter of Sura by Kunti Bhoja. This view is sharply criticized by Nilakantha in the Vyavahara Mayukha. It is now settled that the adoption of a daughter is invalid under the Hindu law."

(Underlining is ours for emphasis) However, it appears that the learned Judge missed the last sentence of the said passage i.e. "It is now settled that the adoption of a daughter is invalid under the Hindu law."

Even otherwise prima facie, Nirmala does not appear to have been adopted by Obalappa which is evident from the deed of gift executed by him. Even in the transfer deed executed by Kadarappa, Nirmala was described as a foster daughter of Obalappa and not as an adopted daughter.

To prove valid adoption, it would be necessary to bring on records that there had been an actual giving and taking ceremony. Performance of 'datta homam' was imperative, subject to just

exceptions. Above all, as noticed hereinbefore, the question would arise as to whether adoption of a daughter was permissible in law.

In Mulla's Principles of Hindu Law, 17th edition, page 710, it is stated:

> "488. Ceremonies relating to adoption (1) The ceremonies relating to an adoption are
>
> (a) the physical act of giving and receiving, with intent to transfer the boy from one family into another;
>
> (b) the datta homam, that is, oblations of clarified butter to fire; and
>
> (c) other minor ceremonies, such as putresti jag (sacrifice for male issue).
>
> (2) They physical act of giving and receiving is essential to the validity of an adoption;

As to datta homam it is not settled whether its performance is essential to the validity of an adoption in every case.

As to the other ceremonies, their performance is not necessary to the validity of an adoption.

(3) No religious ceremonies, not even datta homam, are necessary in the case of Shudras. Nor are religious ceremonies necessary amongst Jains or in the Punjab."

In Section 480 of the said treatise, it is categorically stated that the person to be adopted must be a male.

Prima facie, therefore, Nirmala was not validly adopted daughter of Obalappa. If that be so, she would inherit only the property which fell to the share of Kadarappa on partition. Nirmala as a daughter of Kadarappa can claim interest in his share in the properties only. In terms of Section 8 of the Hindu Succession Act, as Kadarappa died in the year 1961, she will have 1/8th share but what was the extent of Kadarappa's property would inevitably depend upon the effect of deed of partition executed by the parties in the year 1954. However, as the matter is required to be dealt with by the Trial Court finally, we do not intend to say anything further at this stage lest we may be understood to have expressed our views one way or the other.

At the stage of grant of injunction, however, the effect of dismissal of an application under Order VII, Rule 11 of the Code of Civil Procedure would not be of much significance. The plaint in question could not have been rejected under Order VII, Rule 11 of the Code of Civil Procedure. The Court at that stage could not have been gone into any disputed question of fact but while passing an order on grant of injunction indisputably it can. In other words, while making endeavours to find out a prima facie case, the court could take into consideration the extent of plaintiffs' share in the property, if any.

It is no doubt true in view of several decisions of this Court, some of which has been referred to in Transmission Corpn. of A.P. Ltd (supra) that an appellate court would not ordinarily interfere with but then there are certain exceptions thereto.

In Board of Control for Cricket in India and Another v. Netaji Cricket Club and Others [(2005) 4 SCC 741], it has been held:

> "95. Furthermore, the impugned order is interlocutory in nature. The order is not wholly without jurisdiction so as to warrant interference of this Court at this stage. The Division Bench of the High Court had jurisdiction to admit the review application and examine the contention as to whether it can have a relook over the matter. This Court, it is trite, ordinarily would not interfere with an interlocutory order admitting a review petition. The contentions raised before us as regards the justification or otherwise of the Division Bench exercising its power of review can be raised before it. Furthermore, the Court having regard to clause
>
> (ii) of its order dated 29-9-2004 may have to consider as to whether the election was held in accordance with the constitution of the Board and the Rules and Bye-laws framed by it."

In this case, in our opinion, the courts below have not applied their mind as regards balance of convenience and irreparable injury which may be suffered by the Appellants. The question which may be posed is what would happen if the plaintiffs' suit is to be dismissed or if their share is found only to be 1/64th ? Prima facie their share is not more than 1/8th in the properties in suit.

The properties may be valuable but would it be proper to issue an order of injunction restraining the Appellants herein from dealing with the properties in any manner whatsoever is the core question. They have not been able to enjoy the fruits of the development agreements. The properties have not been sold for a long time. The commercial property has not been put to any use. The condition of the properties being remaining wholly unused could deteriorate. These issues are relevant. The courts below did not pose these questions unto themselves and, thus, misdirected themselves in law.

Another question of some importance which was required to be posed and answered was as to whether in a situation of this nature the plaintiffs would be asked to furnish any security in the event of dismissal of the suit in respect of any of the properties would the defendants be sufficiently compensated? We have asked Mr. Mahabir Singh as to whether his clients were ready and willing to furnish any security. He responded in the negative.

The conduct of the defendants was indisputably relevant as has been held by this Court in Gujarat Bottling Co. Ltd. (supra) in the following terms "47. In this context, it would be relevant to mention that in the instant case GBC had approached the High Court for the injunction order, granted earlier, to be vacated. Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of

the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings."

In Board of Control for Cricket in India (supra), it is stated:

> "96. The conduct of the Board furthermore is not above board. The manner in which the Board had acted leaves much to desire."

But, then conduct of the plaintiffs would also be relevant. The court while granting an order of injunction, therefore, would take into consideration as to whether the plaintiffs have pre-varicated their stand from stage to stage. Even this question had not been adverted to by the learned courts below.

While doing so, the courts, as has been noticed in Dhariwal Industries Ltd. and Another v. M.S.S. Food Products [(2005) 3 SCC 63] whereupon Mr. Mahabir Singh relied upon, would look into the documents produced before the Trial Court as also the Appellate Court in terms of Order 41, Rule 27 of the Code of Civil Procedure but the same would not mean that this Court must confine itself only to the questions which were raised before the courts below and preclude itself from considering other relevant questions although explicit on the face of the records. Questions of law in a given case may be considered by this Court although raised for the first time. The question as to whether this Court would permit the parties to raise fresh contentions, however, must be based on the materials placed on records.

Having regard to the facts and circumstances of this case, we are of the opinion that the interest of justice would be subserved if these appeals are disposed of with the following directions:

> I. (i) The Appellants in Civil Appeal arising out of SLP (C) No. 12 of 2006 will be permitted to sell 18 flats in their possession. The plaintiffs- respondents would be shown all the 21 flats and they may choose any of the 3 flats, whereupon they may offer to purchase the said flats themselves. In the event such an offer is made, the same shall be sold at the price which is being offered by the Appellants to any other buyer. (ii) While transferring the flats, however, the Appellants must indicate to the buyer that the same shall be subject to the ultimate result of the suit. (iii) The Appellants may choose, in the event the Respondents fail and/or neglect to exercise their option, to keep 3 flats with themselves.

(iv) They, however, may sell the same, if they choose to do so in presence of one of the officers of the court who may be appointed for the purpose of fixing the market price thereof. However, the price fetched by way of sale of three flats shall be invested in a fixed deposit in a nationalized bank and the interest accruing thereupon shall enure to the benefit of successful party in the suit..

II. (i) The Appellants in Civil Appeal arising out of SLP (C) Nos. 843- 44 of 2006 may let out the commercial property in their possession. However, as offered by the Appellants themselves, they shall deposit 50% of the amount after deducting expenditure therefrom and the requisite amount of tax in a fixed deposit in a nationalized bank as may be directed by the learned Trial Judge. (ii) Even for the said purpose, a receiver may be appointed by the learned Trial Judge.

III. It would be open to the learned Trial Judge to pass any other or further order if and when any occasion arises therefor. IV. We are informed that the plaintiffs have filed affidavits of their witnesses. The learned Trial Judge may complete the hearing of the suit as expeditiously as possible. Save and except for cogent reasons, the hearing of the suit may not be adjourned. We would request the learned Trial Judge to dispose of the suit expeditiously and preferably within six months from the date of receipt of a copy of this order.

The appeals are allowed to the extent mentioned hereinabove. Costs of these appeals shall abide by the result of the suit.