ALLAHABAD HIGH COURT

Dhaneshwar Nath Tewari

Vs.

Ghanshyam Dhar Misra

(Verma, J.)

07.12.1939

JUDGMENT

Verma, J.

1. This is an appeal against an order directing a temporary injunction to issue against the appellant restraining him "from transferring the properties in dispute except so far as may be necessary for ordinary enjoyment of the same," and restraining him "from receiving the amounts in dispute from the post office and the Court of Wards till 6th August 1938" which date was fixed for hearing the objections of the post office and the Court of Wards to whom notices were directed to issue.

2. The matter has arisen thus. One Nath Prakash Dhar Misra died some years ago leaving him surviving a widow Mt. Moharmani Kunwari. Nath Prakash Dhar Misra seems to have been possessed of considerable property, movable and immovable. His widow died on 23rd August 1935. The respondent, Ghanshyam Dhar Misra, on 28th April 1938, presented a plaint in the Court of the Civil Judge of Gorakhpur claiming the property left by Nath Prakash Dhar Misra on the allegation that he was the reversioner and that the succession had opened to him on 23rd August 1935, when Mt. Moharmani Kunwar died. Ghanshyam Dhar Misra alleged that he was a pauper and was unable to pay the court-fee prescribed by the law on the plaint and prayed for leave to sue as a pauper. On 30th May 1938, Ghanshyam Dhar Misra presented an application praying that an injunction be issued to the appellant restraining him from damaging or alienating and removing the properties in suit and from doing various other things. The appellant is named in the plaint as defendant 1, and it is averred by Ghanshyam Das Misra that defendant 1 has without any right and title taken possession of the estate of Nath Prakash Dhar Misra on the false allegation that he is an adopted son of Nath Prakash Dhar. He has also alleged that the appellant was anxious to alienate the properties and to remove and appropriate the movables and the cash. This application for an injunction being issued to the appellant was taken up for hearing by the Court below before the question of the plaintiff's pauperism had been decided. The application was contested by the appellant. He did not however file any written reply to the application of the respondent dated 30th May 1938. The main objection which seems to have been taken by the appellant before the Court below was that as the question of pauperism had not yet been decided the application was not maintainable. The Court below has overruled this objection and has passed the order mentioned above.

3. The learned Counsel for the appellant has referred to the provisions of Order 39, Civil Procedure Code, and has urged that there must be a 'suit' before the Court can have jurisdiction to issue an injunction. His contention is that until the application for leave to sue as a pauper has been granted, or the necessary court-fee has been paid by the respondent on his plaint, there is no suit. It has, on the other hand, been argued by the learned Counsel for the respondent that the Court below had jurisdiction to pass the order complained of at the stage at which the proceedings were in the Court below when that order was passed. The question that has been raised is not free from difficulty. The word 'suit' has not been defined in the Code. Order 33, Rule 1 lays down that "any suit may be instituted by a pauper" subject to the provisions which follow. Rule 2 of that Order directs that every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits...and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

4. It is provided by Rule 8 that where the application is granted it shall be numbered and registered and it shall be deemed the plaint in the suit and the suit shall proceed in all other respects as a suit instituted in the ordinary manner except that the plaintiff shall not be liable to pay any court-fee....

5. On the one hand, it is clear that when the application is so numbered and registered, the suit shall be deemed to have been instituted on the date on which the application for leave to sue as a pauper was presented. On the other, the contention of the learned Counsel for the appellant that until the application has been granted and has been numbered and registered, there is strictly speaking, no regular 'suit' is not quite without force. We do not however consider it necessary to express any opinion on the question whether there was or was not a 'suit' before the Court below on the date on which the order appealed against was passed. The Court below does not purport to have acted under Order 39. It has been urged on behalf of the respondent that the Court below has really passed the order in question in the exercise of its inherent powers under Section 151 of the Code. It is not necessary to consider the question whether in these circumstances an appeal lies to this Court against the order of the Court below and whether it would not be more appropriate to treat the appeal as a petition for revision for, having heard learned Counsel, we have come to the conclusion that no sufficient grounds have been made out for interference with the order of the Court below, whether we treat the petition of the appellant as an appeal or as a revision.

6. It seems to us that, apart altogether from Order 39 of the Code, the Court below had ample jurisdiction to pass an order providing for the protection and security of the property which is the subject-matter of the litigation. It has been held in this Court that the Civil Procedure Code is not exhaustive: *Durga Dihal Das v. Anoraji*[1] This view has been followed in the other High Courts. The Courts have therefore in many cases, where the circumstances require it, to proceed upon the assumption of the possession of inherent power to act ex debito justitia and to do that real and substantial justice for the administration of which alone they exist. It is obvious that the law cannot make express provisions against all contingencies, and it has therefore been held that it is the duty of the Court to apply the provisions of the law not only to what appears to be regulated by them expressly but to all the cases to which a just application of them may be made and which

[1](1895) 17 All 29 at p. 31

appear to be comprehended either within the express sense of the law or within the consequences

that may be gathered from it. This topic has been the subject of numerous decisions given in cases arising out of a variety of circumstances. So far as this question of the power to issue temporary injunctions is concerned, we would refer to the decision of the High Court at Lahore in *Manohar Lal Mahabir Pershad v. Jainarain Babu Lal*[2] Reference is made in the judgment of that case to the decision of Calcutta High Court in *Hukum Chand Boid v. Kamalanand Singh*[3] The observations of Woodroffe J. at p. 930 et seq and of Mookerjee J. at p. 940 et seq, are in point. We need only quote this observation of Woodroffe J.:

> For my part I am always slow to believe that the Court's powers are unequal to its desire to order that which it believes to be just.

7. The Lahore High Court has consistently followed the rule laid down in *Manohar Lal Mahabir Pershad v. Jainarain Babu Lal*[4], mentioned above: vide *Kanshi Ram v. Sharfdin*[5] and *New Delhi Theatres Ltd. v. Kailash Chand*[6] The Madras High Court, on the other hand, is inclined to the view that unless the matter comes strictly within the provisions laid down in Order 39 of the Code, a Court has no power to issue an injunction: *Varadacharlu v. Narasimha Charlu*[7], and *Ayyamperumal Nadar v. Muthuswami Pillai*[8], They are both decisions of single Judges. It is to be noted however that in both of these cases the question that arose for decision was whether the Court should have granted an injunction restraining the execution of a decree passed by a competent Court. Reference has also been made to the case in *Kn. Pr. Periakaruppan Chettiar v. R.M.S.R.M. Ramaswami Chettiar and Another*[9], which is a Bench decision. But the question which arose for decision in that case was whether a subordinate Court in British India has power to restrain by injunction a party from prosecuting a suit in a foreign Court, and it was observed that it was doubtful whether such a power existed. So far as this Court is concerned, only three cases have been cited. One of them is *Muhammad Inamullah Khan v. Narain Das*[10] It was assumed there that "it was intended to give the Court powers outside the orders and rules in exceptional cases," and the case was decided on the merits and it was held that on the facts the order could not be justified. The other case is that in *Harnand Lal v. Chaturbhuj*[11], An interpretation of a far-reaching character was placed on Section 151 in that case. The principle underlying the decision of Mahmood J. in *Beni Prasad v. Gomata Kuar*[12] is in favour of the view that the Court below had the power to grant the injunction. It would thus appear that there is no case in this Court which runs counter to the decisions of the High Court at Lahore which support the contention put forward by the respondent. Apart from the Madras cases mentioned above, no authority has been cited in support of the proposition that the Court below was powerless to pass such orders as it considered necessary for the preservation of the property in respect of which the respondent had filed a plaint and had applied for leave to sue as a pauper, and which in the opinion of the Court below were necessary in the interests of justice. We agree with the view that has been taken in Lahore. In our opinion therefore the Court below had jurisdiction to make the order complained of.

[2] AIR(1920) Lah 436. [4] AIR (1920) Lah 436 [6] AIR (1933) Lah 73.
[3](1906) 33 Cal 927. [5] AIR (1923) Lah 144 [7] AIR 1926 Madras 258 : 1926-23-LW 85
[8] AIR 1927 Mad 687 : 1927-26-LW 899 [10] AIR(1915) All 277.
[9] AIR 1928 Mad 491 : 1928-27-LW 418 [11] AIR 1926 All 212 : (1926) ILR 48 All 356
[12](1890) AWN 167

8. On the merits it has been suggested that the order restraining the appellant from receiving the money which the Bettiah Court of Wards pays periodically would operate harshly against him. No materials have however been placed before us to show that the decision of the Court below is

wrong. As stated above, the appellant did not even file a written reply to the application of the respondent, who had not only filed a written application stating facts which, according to him, entitled him to the injunction claimed, but had also filed an affidavit in support of that application. The position thus is that the allegations made by the respondent in his application and affidavit have not been controverted. Consequently it is not possible for us to say that the Court below was wrong. We cannot therefore interfere. We have no doubt however that if the appellant applies to the Court below for a modification of the order with regard to the payments by the Bettiah Court of Wards, the Court below will give to the application such consideration as it deserves. For the foregoing reasons we dismiss this appeal with costs.

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