

MAHADEO SAVLARAM SHELKE AND ORS.

v.

PUNA MUNICIPAL CORPORATION AND ANR.

JANUARY 24, 1995

[K. RAMASWAMY AND N. VENKATACHALA, JJ.]

Constitution of India—Art. 227—Civil Procedure Code, 1908—Section 115(2)—Revisional Power—Barred where party provided with right of approval—No bar to exercise revisional power u/s 115(1) against appellate order.

Civil Procedure Code, 1908—Order 39, Rules 1&2—Injunction against true owner at the instance of persons in unlawful possession—Whether can be granted—Held, No.

CPC, 1908—Order 39—Injunction—Discretionary Power—Equity jurisdiction—Power to grant adequate compensation to mitigate damages caused to defendant by grant of injunction—Pecuniary jurisdiction of court not a bar to award damages beyond its pecuniary jurisdiction.

Land Acquisition—Public purpose delayed by orders of injunction—Party ultimately losing should bear escalation of cost of project.

Proceeding u/s 4(1) of the Land Acquisition Act, 1894, were initiated for acquiring two storied building for widening of the road to remove traffic congestion. The compensation awarded was paid to the owner and pursuant thereto possession was taken and handed over to the Municipal Corporation. However, the tenants/appellants who entered into leave and licence agreements with the Corporation were allowed to get into possession. After the expiry of the period of leave and licence agreements, proceedings were initiated for eviction of the appellant. An order of eviction was passed. The tenants filed appeal and writ petition which were dismissed. The order of eviction of the appellants was affirmed by the Supreme Court. Subsequently, the appellants filed a Civil Suit and sought perpetual injunction from dispossession and for *ad interim* injunction. The Civil Judge refused to grant *ad interim* injunction. On appeal, the Joint Judge granted *ad interim* injunction pending disposal of the suit. The High Court in the Special Civil Application under Art. 227 of the Constitution set aside the appellate order and confirmed that of the Civil Judge. Hence

A this appeal.

The appellants contended that u/s 115 CPC, High Court had power of revision where the appeal was not provided for either to it or subordinate court. Since the Joint Judge had exercised the appellate power, by operation of section 115(2), the High Court was devoid of jurisdiction to exercise the revisional power. It was alleged that when statutory prohibition was imposed by CPC, the exercise of jurisdiction by the High Court under Art. 226 was not warranted. The appellant further contended that the exercise of power under Art. 226 was not an appellate power but only one of correcting errors of jurisdiction and, therefore, the High Court was not justified in interfering with the questions of fact and law. The appellants submitted that even in equity they were entitled to remain in possession since they had been continuing under the respondents since 1971 uninterruptedly and they should be allowed to continue till the disposal of the suit. It was also contended that in view of the resolutions passed by the Municipal Corporation of 11-11-1972, suitable direction might be given to the Municipality to reconsider the matter whether the building was still needed for widening the road and based thereon, they could take appropriate steps or to provide alternative shops.

The respondents submitted that the need for widening the road still subsisted and that the Corporation having taken possession of the building and the order of the eviction passed against the appellant having been allowed to become final by the Supreme Court, the appellate Judge committed palpable error of law in interfering with the order. He contended that the Civil suit was not maintainable as being barred by the provisions in the Corporation Act and the Civil Procedure Code.

The question raised for consideration was whether the appellant had shown that there was a *prima facie* case, triable issue and balance of convenience for granting *ad interim* injunction pending the suit and, secondly whether an injunction could be granted in favour of the persons who remained in possession of the property. Further question was, whether an injunction could be granted against the rightful owner in favour of the persons who remained in unlawful possession.

Dismissing the appeal, this Court

HELD : 1.1. The High Court exercised its power under Art. 227 of the Constitution of India and not under Art. 226 or u/s 115 CPC. Even

otherwise the bar u/s 115(2) CPC is to exercise revisional power where the party is provided with right of appeal to the High Court or the Subordinate Court against the impugned order. It is not a bar to exercise revisional power u/s 115(1) against appellate order. [548-B]

Aundal Ammal v. Sadasivan Pillai, [1987] 1 SCR 485, relied on.

1.2. No injunction could be granted against the true owner at the instance of persons in unlawful possession. In the instant case, the orders of eviction were passed by due process of law and had become final. Thereafter no right was created in favour of the appellants to remain in possession. Their possession was unlawful and that therefore, they could not seek any injunction against the rightful owner for evicting them. The resolutions relied upon did not furnish *prima facie* right or title to the appellants to have perpetual injunction restraining the Corporation from taking possession of the building. There was thus neither balance of convenience nor irreparable injury would be caused to the appellants.

[550-H, 551-A-C]

1.3. In a suit for perpetual injunction, the court should enquire on affidavit evidence and other material placed before the court to find strong *prima facie* case and balance of convenience in favour of granting injunction otherwise irreparable damage or damage would ensue to the plaintiff. The court should also find whether the plaintiff would adequately be compensated by damages if injunction is not granted. It is common experience that injunction normally is asked for and granted to prevent the public authorities or the respondents to proceed with execution of or implementing scheme of public utility or granted contracts for execution thereof. Public interest is, therefore, one of the material and relevant considerations in either exercising or refusing to grant *ad interim* injunction. While exercising discretionary power, the court should also adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the court that in the event of his failing in the suit to obtain the relief asked for the plaintiff, he would adequately compensate the defendant for the loss ensued due to the order of injunction granted in favour of the plaintiff. Even otherwise the court while exercising its equity jurisdiction in granting injunction has also jurisdiction and power to grant adequate compensation to mitigate the damages caused to the defendant by grant of injunction restraining the defendant to proceed with the execution of the work etc. which is restrained by an order of injunction made by the court. The

A pecuniary award of damages is consequential to the adjudication of the dispute and the result therein is incidental to the determination of the case by the court. The pecuniary jurisdiction of the court of first instance should not impede nor be a bar to award damages beyond its pecuniary jurisdiction. In this behalf, the grant or refusal of damages is not founded upon the original cause of action but the consequences of the adjudication by the conduct of the parties, the court gets inherent jurisdiction in doing *ex debito justitiae* mitigating the damage suffered by the defendant by the act of the court in granting injunction restraining the defendant from proceeding with the action complained of in the suit. It is common knowledge that injunction is invariably sought for in laying the suit in a court of lowest pecuniary jurisdiction even when the claim are much larger than the pecuniary jurisdiction of the court of first instance, may be, for diverse reasons. Therefore, the pecuniary jurisdiction is not and should not stand an impediment for the court of first instance in determining damages as a part of the adjudication and pass a decree in that behalf without relegating the parties to a further suit for damages. This procedure would act as a check on abuse of the process of the court and adequately compensate the damages or injury suffered by the defendant by act of court at the behest of the plaintiff. [553-D-H, 554-A-C]

1.4. In the instant case public purpose of removing traffic congestion was sought to be served by acquiring the building for widening the road. By orders of injunction, for 24 years the public purpose, was delayed. As a consequence execution of the project had been delayed and the costs now stand mounted. The courts in the cases where injunction were to be granted should necessarily consider the effect on public purpose thereof and also suitably mould the relief. In the event the plaintiffs losing ultimately the suit, they should necessarily bear the consequences, namely, escalation of the cost or the damages the corporation suffered on account of injunction issued by the courts. [554-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1109 of 1979.

From the Judgment and Order dated 20.12.78 of the Bombay High Court in S.C.A. No. 2521 of 1978.

Rajinder Sachher, V.N. Ganpule, S.K. Agnihotri and Ms. Punam for the Appellants.

S.B. Wad, Mrs. J.S. Wad, Manoj Wad and Mrs. Usha Reddy for the Respondents. A

The following Order of the Court was delivered :

This appeal by special leave arises from the order of the Single Judge of the High Court of Bombay in Special Civil Application No. 2521 of 1978, dated December 20, 1978 wherein the learned Single Judge set aside the order of the Joint Judge, Pune dated 29.8.1973 made in Misc. Appeal No. 92 of 1973. The facts necessary for disposal of this appeal lie in a short compass. B

The Poone Municipality has undertaken widening of the road to remove traffic congestion and initiated proceedings under s.4(1) of the Land Acquisition Act, 1894 for acquiring two storied building belonging to N.H. Naik at Kotwal Chowk. The Notification under s.4(1) was published in the Gazette in December 1966. The Land Acquisition Officer passed his award on December 14, 1970. Thereafter, the compensation was deposited and paid to the owner. Pursuant thereto possession was taken on March 13, 1971 by the competent officer and handed over to the corporation. However, the earlier 24 appellants/tenants who entered into leave and licence agreements with the Corporation were allowed to get into possession. After the expiry of the period of leave and licence, proceedings were initiated for eviction of the appellants and an order in that behalf came to be passed. Calling in question that order of eviction, they went in appeal and writ petition but were unsuccessful. Ultimately, this Court affirmed the order of eviction of the appellants. Subsequently, they filed Civil Suit No. 590/73 in the Court of the Joint Civil Judge, Poona and sought perpetual injunction from dispossession and for *ad interim* injunction. The Civil Judge by his order dated 27.4.1973 refused to grant *ad interim* injunction. The Joint Judge, as stated earlier, on appeal under s.43(r) C.P.C. allowed the appeal and granted *ad interim* injunction pending disposal of the suit. The High Court in the Special Civil Application under Art. 227 of the Constitution, by its impugned order dated 20.12.1978 set aside the appellate order and confirmed that of the Civil Judge. Thus this appeal, by special leave. C
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Shri Rajinder Sachher, the learned Senior Counsel for the appellants contended that under s.115 CPC, High Court has power of revision where the appeal is not provided for either to it or subordinate court. Since the Joint Judge had exercised the appellate power, by operation of s.115(2), H

A the High Court was devoid of jurisdiction to exercise the revisional power. When statutory prohibition was imposed by CPC which is more expeditious and efficacious remedy, the exercise of jurisdiction by the High Court under Art. 226 was not warranted. At this juncture it is necessary to point out that the High Court exercised its power under Art. 227 and not either under Art. 226 or under s.115 CPC. Even otherwise the bar under s.115(2) is to exercise revisional power where the party is provided with right of appeal to the High Court or the Subordinate Court against the impugned order. It is not a bar to exercise revisional power under s.115(1) against appellate order. The ratio in *Aundal Ammal v. Sadasivan Pillai*, [1987] 1 SCR 485, is that no second revision under s. 115(1) would lie against revisional order of the Subordinate Court.

He further contended that the exercise of power under Art. 226 is only discretionary; the appellate judge has gone into the questions of fact and law; the exercise of power under Art. 226 is not an appellate power but only one of correcting errors of jurisdiction. Appellate Judge exhaustively dealt with all the points raised by the appellants, it is one of taking an alternative view by the High Court to the one taken by the appellate Judge. The High Court in that situation was not justified in interfering with the order of the appellate Judge, in particular, when scope of the revisional power under s. 115 CPC itself is very rigid. Even in equity the appellants are entitled to remain in possession since they have been continuing under the respondents since 1971 uninterruptedly and they could be allowed to continue till the disposal of the suit by giving suitable directions for expeditious trial. He also contended that in view of the resolutions passed by the Municipal Corporation on November 11, 1972 and November 29, 1972, suitable direction may be given to the Municipality to reconsider the matter whether the building is still needed for widening the road and based thereon, they could take appropriate steps or to provide alternative shops.

Shri Wad, the learned Senior counsel appearing for the respondents, on the other hand contended that the need for widening the road still subsists and that the Corporation having taken possession of the building and the order of eviction passed against the appellant having been allowed to become final by disposing the S.L.P. by this Court, the appellate Judge had committed palpable error of law in interfering with the order. He also contended that the Civil Suit itself is not maintainable as being barred by the provisions in the Corporation Act and C.P.C.

Having heard the learned counsel for the parties, the question arises whether the appellant had shown that there was a *prima facie* case, triable issue and balance of convenience for granting *ad interim* injunction pending the suit. It is an admitted position that after the award was made by the Collector, possession was taken. Thereafter, the appellants entered into leave and licence with the Corporation. On expiry thereof, the Corporation had initiated proceedings for ejection of the appellants and the order of ejection had become final when the SLP was dismissed by this court. Thereafter, the appellants had no legal right to remain in possession of the shops. The question then is, whether an injunction could be granted in favour of the persons who remain in possession of the property. After the order of ejection had become final, their continuance will be only unlawful possession and that therefore a strong *prima facie* case needs to be made out. Further question is, whether an injunction could be granted against the rightful owner in favour of the persons who remain in unlawful possession. The appellate Court has not gone into the pertinent aspects of the matter. The foundation for action is based on the subsequent reservation of the Corporation.

In *Shiv Kumar Chadha v. Municipal Corporation of Delhi*, [1993] 3 SCC 161, a Bench of three Judges of this Court held that "a party is not entitled to an order of injunction as a matter of 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, thus, to maintain the status quo. The court grants such relief according to the legal principles - *ex debito 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. Further the court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court."

A In *Dalpat Kumar v. Prahlad Singh*, [1992] 1 SCC 719, a Bench of two
 Judges (in which K. Ramaswamy, J. was a Member) of this Court held that
 the phrases "*prima facie* case", "balance of convenience" and "irreparable
 loss" are not rhetoric phrases for incantation but words of width and
 elasticity, intended to meet myriad situations presented by men's ingenuity
 B in given facts and circumstances and should always be hedged with sound
 exercise of judicial discretion to meet the ends of justice. The court would
 be circumspect before granting the injunction and look to the conduct of
 the party, the probable injury to either party and whether the plaintiff could
 be adequately compensated if injunction is refused. The existence of *prima*
 C *facie* right and infraction of the enjoyment of him property or the right is
 a condition for the grant of temporary injunction. *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.
 D 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 dispos-
 session. Irreparable injury, however, does not mean that there must be no
 physical possibility of repairing the injury but means only that the injury
 E must be a material one, namely one that cannot be adequately compen-
 sated by way of damages. 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
 F is refused and compare it with that which 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 injunc-
 tion would be issued. The court has to exercise its sound judicial discretion
 in granting or refusing the relief of *ad interim* injunction pending the suit."
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It is settled law that no injunction could be granted against the true
 owner at the instance of persons in unlawful possession. It is true that the
 appellants placed reliance in their plaint on resolutions passed by the
 municipality on 11.11.72 and 29.11.72. A reading of those resolutions would
 H *prima facie* show that possession would be taken where the acquisition

proceedings have become final and land acquisition proceedings would not be pursued where award has not been made as on the date of the resolutions. In this case since the acquisition proceedings have become final, then necessarily possession has to be taken by the Corporation for the public purpose for which the acquisition was made. In that context the question arises whether the appellants can seek reliance on two resolutions. They furnish no *prima facie* right or title to the appellants to have perpetual injunction restraining the Corporation from taking possession of the building. The orders of eviction were passed by due process of law and had become final. Thereafter no right was created in favour of the appellants to remain in possession. Their possession is unlawful and that therefore, they cannot seek any injunction against the rightful owner for evicting them. There is thus neither balance of convenience nor irreparable injury would be caused to the appellants.

In Woodroffe's "Law Relating to Injunctions, Second revised and enlarged edition, 1992, at page 56 in para 30.01, it is stated that "an injunction will only be granted to prevent the breach of an obligation (that is a duty enforceable by law) existing in favour of the applicant who must have a personal interest in the matter. In the first place, therefore, an interference by injunction is founded on the existence of a legal right, an applicant must be able to show a fair *prima facie* case in support of the title which he asserts". At page 80 in para 33.02, it is further stated that "if the court be of opinion that looking to these principles the case is not one for which an injunction is a fitting remedy, it has a discretion to grant damages in lieu of an injunction. The grounds upon which this discretion to grant damages in lieu of an injunction should be exercised, have been subject of discussion in several reported Indian cases". At page 83, it is stated that "the court has jurisdiction to grant an injunction in those cases where pecuniary compensation would not afford adequate relief. The expression "adequate relief" is not defined, but it is probably used to mean - such a compensation as would, though not *in specie*, in effect place the plaintiffs in the same position in which they stood before. The determination of the question whether relief by injunction or by damages shall be granted depends upon the circumstances of each case.

In "Law of Injunctions" by L.C. Goyle, at page 64, it is stated that "an application for temporary injunction is in the nature of a *quia timet* action. Plaintiff must, therefore, prove that there is an imminent danger of a

A substantial kind or that the apprehended injury, if it does come, will be irreparable. The word "imminent" is used in the sense that the circumstances are such that the remedy sought is not premature. The degree of probability of future injury is not an absolute standard : what is aimed at is justice between the parties, having regard to all the relevant circumstances". At page 116, it is also stated that "in a suit for a perpetual or mandatory injunction, in addition to, or in substitution for, the plaintiff can claim damages. The court will award such damages if it thinks fit to do so. But no relief for damages will be granted, if the plaintiff has not claimed such relief in the suit."

C In "Modern Law Review", Vol 44, 1981 Edition, at page 214, R.A. Buckley stated that "a plaintiff may still be deprived of an injunction in such a case on general equitable principles under which factors such as the public interest may, in an appropriate case, be relevant. It is of interest to note, in this connection, that it has not always been regarded as altogether beyond doubt whether a plaintiff who does thus fail to substantiate a claim for equitable relief could be awarded damages". In "The Law Quarterly Review" Vol 109, at page 432 (at p.446), A.A.S. Zuckerman under Title "Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies" stated that "if the plaintiff is likely of suffer irreparable or uncompensable damage, no interlocutory injunction will be granted, then, provided that the plaintiff would be able to compensate the defendant for any unwarranted restraint on the defendant's right pending trial, the balance would tilt in favour of restraining the defendant pending trial. Where both sides are exposed to irreparable injury ending trial, the courts have to strike a just balance". At page 447, it is stated that the court considering an application for an interlocutory injunction has four factors to consider : first, whether the plaintiff would suffer irreparable harm if the injunction is denied; secondly, whether this harm outweighs any irreparable harm that the defendant would suffer from an injunction; thirdly, the parties' relative prospects of success on the merits; fourthly, any public interest involved in the decision. The central objective of interlocutory injunctions should therefore be seen as reducing the risk that rights will be irreparably harmed during the inevitable delay of litigation".

H In "Injunctions" by David Bean, 1st Edn., at page 22, it is stated that "if the plaintiff obtains an interlocutory injunction, but subsequently the case goes to trial and he fails to obtain a perpetual order, the defendant will

meanwhile have been restrained unjustly and will be entitled to damages for any loss he has sustained. The practice has therefore grown up, in almost every case where interlocutory injunction is to be granted, of requiring the plaintiff to undertake to pay any damages subsequently found due to the defendant as compensation if the injunction cannot be justified at trial. The undertaking may be required of the plaintiff in appropriate cases in that behalf". In "Joyce on Injunctions" Vol. 1 in paragraph 177 at page 293, it is stated "Upon a final judgment dissolving an injunction, a right of action upon the injunction bond immediately follows, unless the judgment is superseded. A right to damages on dissolution of the injunction would arise at the determination of the suit at law".

It would thus be clear that in a suit for perpetual injunction, the court should enquire on affidavit evidence and other material placed before the court to find strong *prima facie* case and balance of convenience in favour of granting injunction otherwise irreparable damage or damage would ensue to the plaintiff. The court should also find whether the plaintiff would adequately be compensated by damages if injunction is not granted. It is common experience that injunction normally is asked for and granted to prevent the public authorities or the respondents to proceed with execution of or implementing scheme of public utility or granted contracts for execution thereof. Public interest is, therefore, one of the material and relevant considerations in either exercising or refusing to grant *ad interim* injunction. While exercising the discretionary power, the court could also adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the court that in the event of his failing in the suit to obtain the relief asked for in the plaint, he would adequately compensate the defendant for the loss ensued due to the order of injunction granted in favour of the plaintiff. Even otherwise the court while exercising its equity jurisdiction in granting injunction has also jurisdiction and power to grant adequate compensation to mitigate the damages caused to the defendant by grant of injunction restraining the defendant to proceed with the execution of the work etc., which is restrained by an order of injunction made by the court. The pecuniary award of damages is consequential to the adjudication of the dispute and the result therein is incidental to the determination of the case by the court. The pecuniary jurisdiction of the court of first instance should not impede nor be a bar to award damages beyond its pecuniary jurisdiction. In this behalf, the grant or refusal of damages is not founded upon the original cause of action but the conse-

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- A quences of the adjudication by the conduct of the parties, the court gets inherent jurisdiction in doing *ex debito justitiae* mitigating the damage suffered by the defendant by the act of the court in granting injunction restraining the defendant from proceeding with the action complained of in the suit. It is common knowledge that injunction is invariably sought for
- B in laying the suit in a court of lowest pecuniary jurisdiction even when the claims are much larger than the pecuniary jurisdiction of the court of first instance, may be, for diverse reasons. Therefore, the pecuniary jurisdiction is not and should not stand an impediment for the court of first instance in determining damages as the part of the adjudication and pass a decree in that behalf without relegating the parties to a further suit for damages.
- C This procedure would act as a check on abuse of the process of the court and adequately compensate the damages or injury suffered by the defendant by act of court at the behest of the plaintiff.

- Public purpose of removing traffic congestion was sought to be served by acquiring the building for widening the road. By orders of
- D injunction, for 24 years the public purpose, was delayed. As a consequence execution of the project has been delayed and the costs now stand mounted. The courts in the cases where injunction are to be granted should necessarily consider the effect on public purpose thereof and also suitably mould the relief. In the event the plaintiffs losing ultimately the suit, they
- E should necessarily bear the consequences, namely, escalation of the cost or the damages the Corporation suffered on account of injunction issued by the courts. Appellate court had not adverted to any of the material aspects of the matter. Therefore, the High Court has rightly, though for different reasons, dissolved the order of *ad interim* injunction. Under these circumstances, in the event of the suit to be dismissed while disposing of the
- F suit the trial court is directed to assess the damages and pass a decree for recovering the same at pro rata against the appellants.

The appeal is accordingly dismissed with costs.

A.G.

Appeal dismissed.