



THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

Dated : 15.10.2015

S.B. : HON'BLE MR. JUSTICE SONAM PHINTSO WANGDI, JUDGE

FAO NO.01 OF 2015

Appellants : 1. Smt. Laxmi Devi,
Wife of Late Bishwanath Prasad,
R/o Next to Trivedi Store,
Singtam Bazaar,
East Sikkim.

2. Smt. Archana Prasad,
D/o Late Bishwanath Prasad,
R/o Next to Trivedi Store,
Singtam Bazaar,
P.O. & P.S. Singtam,
East Sikkim.

3. Smt. Arpana Prasad,
D/o Late Bishwanath Prasad,
R/o Next to Trivedi Store,
Singtam Bazaar,
P.O. & P.S. Singtam,
East Sikkim.

versus

Respondents : 1. Smt. Saraswati Prasad,
Wife of Late Mahesh Prasad,
R/o Souvenir Shop, M.G. Marg,
P.O. & P.S. Gangtok,
East Sikkim.

2. Miss Sandhya Rani Prasad,
D/o Late Mahesh Prasad,
R/o Souvenir Shop,
M.G. Marg,
P.O. & P.S. Gangtok,
East Sikkim.



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3. Smt. Vidhya Rani Prasad,
D/o Late Mahesh Prasad,
R/o Souvenir Shop,
M.G. Marg,
P.O. & P.S. Gangtok,
East Sikkim.
4. Shri Nakul Raj Prasad,
S/o Late Mahesh Prasad,
R/o Souvenir Shop,
M. G. Marg,
P.O. & P.S. Gangtok,
East Sikkim.
5. Dr. Rameshwar Prasad,
S/o Late B. Prasad,
R/o M. G. Marg,
P.O. & P.S. Gangtok,
East Sikkim.
6. Dr. Jogendra Prasad,
S/o Late B. Prasad,
R/o M. G. Marg,
P.O. & P.S. Gangtok,
East Sikkim.
7. Dr. Sanjeev Kumar Prasad,
S/o Late Kailash Prasad,
R/o M. G. Marg.
P.O. & P.S. Gangtok,
East Sikkim
8. Shri Rajeev Prasad,
S/o Late Kailash Prasad,
R/o M. G. Marg.
P.O. & P.S. Gangtok,
East Sikkim
9. Smt. Geeta Prasad,
D/o Late Kailash Prasad,
W/o Rajendra Prasad,
R/o Jaigaon, Dist. Jalpaiguri,
West Bengal.
10. Smt. Sarita Devi,
D/o Late Kailash Prasad,
W/o Dr. Suman Prasad,
R/o Raxaul, Bihar.



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11. Smt. Kavita Prasad,
D/o Late Kailash Prasad,
R/o Gurung Busty,
Siliguri,
District Darjeeling,
West Bengal.

**Appeal under Section XLIII Rule 1(r) read
with Section 104 and 151 of C.P.C., 1908.**

Appearance

Mr. Sudipto Mazumdar, Advocate for the Appellants.

Mr. K. T. Bhutia, Senior Advocate with Ms. Bandana Pradhan and Ms. Sarita Bhusal, Advocates for Respondent Nos.1, 2, 3 and 4.

Mr. B. Sharma, Senior Advocate with Mr. Sudhir Prasad, Advocate for Respondents No.5, 6 and 7.

None for the other Respondents.

J U D G M E N T (ORAL)

Wangdi, J.

1. This Appeal is directed against the order of the Learned Principal District Judge, East Sikkim at Gangtok dated 10-04-2015, in Title Suit No.04 of 2015, by which application for injunction filed by the Appellants under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 (for short "CPC"), was dismissed.



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2. The primary contention raised to assail the impugned order is that the Learned Principal District Judge had passed the impugned order at the stage when prayer for an interim injunction was sought for. It is stated that before passing any order of the nature which is being assailed, it was mandatory for the Court to have issued notice upon the Respondents under Order XXXIX of Rule 3 CPC. This having not done the order, as per the Appellants/Plaintiffs, was liable to be set aside.

3. I have perused the impugned order and I find that the Learned Trial Court appears to have considered the entire facts and circumstances and had also taken note of the fact that it was considering a prayer of the Appellants for an *ad interim ex parte* order of injunction.

4. At paragraphs 15 to 18 of the impugned order dated 10-04-2015, the Learned Trial Court has set out the principle of law governing Order XXXIX of Rules 1 and 2 of the CPC. At paragraph 21, it has been noted that the Appellants had been indolent and lackadaisical in seeking remedy. That (i) no *prima facie* case had been made out by the Appellants/Plaintiffs; (ii) that the balance of convenience and inconvenience was not in their favour;



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and (iii) irreparable losses and injuries could not be made out by them, thus leading to the dismissal of the application for injunction at the very stage when prayer for *ad interim* injunction was under consideration.

5. Mr. Sudipto Mazumdar, Learned Counsel, appearing on behalf of the Appellants, strenuously argued that under Order XXXIX Rule 3 CPC, it is mandatory for the Court to direct notice to the opposite party before granting injunction and that, this provision ought to have been followed by the Trial Court instead of summarily rejecting the application for injunction itself at the threshold.

6. I am unable to accept this argument *inasmuch* as it is for the Plaintiffs/Appellants to make out a case for injunction for which it would be necessary to satisfy certain essential principles, namely, (a) that the Plaintiffs/Appellants have a *prima facie* good case to go to trial; (b) that the balance of convenience and inconvenience is in their favour and (c) irreparable losses and injuries shall be caused to the Plaintiffs/Appellants if an order of injunction is not passed. These are the three ingredients which are mandatorily required to be fulfilled



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in order to entitle a party to an order of temporary injunction. For obtaining an *ad interim ex parte* interim order it is essential to satisfy the Court that there is grave urgency in addition to satisfying the other ingredients.

7. Otherwise also, Rule 3 of Order XXXIX CPC contemplates issue of notice to the Defendant before granting injunction generally but, such notice can be dispensed with where it appears to the Court that the object of granting injunction would be defeated by delay and by the proviso to Rule 3 an order of injunction may be granted without notice. The Rule does not mandate that a notice has to be issued in every case and that issuance of such notice is a vested right of the Plaintiff. The Court is within its power to consider as to whether the party seeking the relief of injunction has been able to make out a case. Interim injunction being an ancillary prayer to the main relief of temporary injunction, the burden is upon the party seeking such relief to satisfy the Court that the principles governing injunction is fully satisfied.

8. I have no reason to disagree with the findings of the Learned Principal District Judge on the facts of the



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case as revealed from the records and find the impugned order to be a well considered one.

9. Moreover, it is submitted by Mr. K. T. Bhutia, Learned Senior Counsel, appearing for the Respondents No.1 to 4, that the construction of the building on the suit land by the Defendant Respondents which was the primary cause of the suit, has since been completed and, therefore, the application for injunction has now been rendered infructuous. This fact could not be disputed by the other side.

10. For these reasons, I find no purpose of keeping this matter pending as firstly, I find no merit in the appeal and secondly, the prayer for application for injunction has been rendered infructuous.

11. In the result, the Appeal is dismissed.

12. No order as to costs.

Sd/-
(**S.P. Wangdi**)
Judge
15.10.2015

Approved for reporting : **Yes**

Internet : **Yes**