APPELLATE CIVIL.

Before Buckland A. C. J.

1934

March 9.

DURGADAS DAS

v.

NALINCHANDRA NANDAN.*

Injunction—Attachment before judgment—Conditions of granting—Affidavit, Requisites of—Discretion of judge—Appeal—Appellate court's duty and powers in such cases—High Court, Interference by, when proper in such cases—Code of Civil Procedure (Act V of 1908), O. XIX, r. 3 ; O. XXXIX, r. 1(1).

Per LORT-WILLIAMS J. (BUCKLAND A. C. J. concurring):

Petitioner's affidavit in support of an application for a temporary injunction is inadequate and defective, if it merely states that his allegation is based partly on information, which he believes to be true, and partly on belief, neither stating which part is based on information and which on belief nor the grounds of his belief, contrary to the provisions of Order XIX, rule 3, of the Code of Civil Procedure.

Padmabati Dasi v. *Rasik Lal Dhar* (1) referred to.

In a suit for a declaration, an injunction should not be granted where there is no claim for consequential relief or permanent injunction.

Shiromani Gurdawara Parbandhak Committee, Nankana Sahib v. *Banta* (2) referred to.

The court must be thoroughly satisfied that the defendants had the intention of obstructing or delaying the execution of any decree, which might be passed against them, or, with such intent, were about to dispose of their property. Mere vague allegations are not sufficient.

Sennaji Kapurchand v. *Pannaji Devichand* (3) and *Nowroji Pudamji* v. *The Deccan Bank, Limited* (4) referred to.

The mere fact that a defendant has, in the past, mortgaged or disposed of his property is not a sufficient ground for levying attachment. There must be a present intention.

Manmatha Nath Sett v. *Nagendra Nath Bhattacharjya* (5) referred to.

The plaintiff must make out a *prima facie* case. This is essential before either injunction or attachment can be granted. Moreover, the court must be satisfied that interference is necessary to prevent injury which is irreparable and that the mischief or inconvenience, which is likely to arise in consequence of withholding relief, will be greater than that from granting it.

*Appeals from Original Orders, Nos. 549 and 550 of 1933, against the orders of Heeralal Mukherji, First Subordinate Judge, Alipur, dated Nov. 17, 1933.

(1) (1909) I. L. R. 37 Calc. 259.
(2) (1926) 96 Ind. Cas. 439 ; 8 Lah. L. J. 289.
(3) (1921) I. L. R. 46 Bom. 431.
(4) (1921) I. L. R. 45 Bom. 1256.
(5) (1925) 94 Ind. Cas. 880.

Daily Gazette Press Ltd. v. *Karachi Municipality* (1) and *Ramanuja Aiyangar* v. *Aiyanacharior* (2) referred to.

The procedure under the Civil Procedure Code and the machinery of the High Court are not generally appropriate to appeals in such matters as these. Though an appeal is given, in most, if not in every such case, it must be fruitless and should not, therefore, be admitted except in very exceptional circumstances. Both injunction and attachment are intended to give prompt relief from immediate or impending danger of injury which will be irreparable. The High Court ought not to admit appeals from orders refusing injunctions and attachment before judgment except in cases of serious misdirection in law or fact, when special directions might be given for expedition.

An appellate court ought not to interfere with the exercise of a judge's discretion, unless satisfied that it was not judicially exercised, *i.e.*, that the judge acted on wrong principles. The mere fact that the judges of the appellate court might have taken a different view is not a sufficient ground for interference.

Daily Gazette Press Ltd. v. *Karachi Municipality* (1), *Watson* v. *Rodwell* (3), *Sheffield* v. *Sheffield* (4), *Maass* v. *Gas Light and Coke Company* (5) and *Donald Campbell & Co.* v. *Pollak* (6) referred to.

If the judge rightly appreciates the facts and applies to those facts the true principles, that is a sound exercise of judicial discretion.

Subba Naidu v. *Badsha Sahib* (7) followed.

Neither injunction nor attachment ought to be lightly granted. It would be a serious thing, if persons in possession were restrained from making use of their property merely because a suit had been instituted about it. It is only where it is essential that property should be kept in its existing condition pending suit, that the court should interfere.

Begg, Dunlop & Co. v. *Satish Chandra Chatterjee* (8) referred to.

APPEALS FROM ORIGINAL ORDERS by the plaintiff.

The facts of the case and relevant portions of arguments of *Sharatchandra Raychaudhuri*, at the two *ex parte* preliminary hearings for admission of these appeals under Order XLI, rule 11 of the Code of Civil Procedure, appear in the separate judgments of Lort-Williams J. and M. C. Ghose J.

These appeals coming on for hearing on the 15th February, 1934 under Order XLI, rule 11, of the Code of Civil Procedure, the following dissentient judgments were delivered :—

LORT-WILLIAMS J. These are two appeals from a judgment of Mr. Heeralal Mukherji, Subordinate Judge at Alipur, refusing to grant two applications by the plaintiff, (1) for attachment of property before judgment under

(1) (1930) 127 Ind. Cas. 690.
(2) (1912) 23 Mad. L. J. 316; 17 Ind. Cas. 219.
(3) (1876) 3 Ch. D. 380.
(4) (1875) L. R. 10 Ch. 206.
(5) [1911] 2 K. B. 543.
(6) [1927] A. C. 732.
(7) (1902) I. L. R. 26 Mad. 168.
(8) (1919) I. L. R. 46 Calc. 1001.

1934

Durgadas Das v. *Nalinchandra Nandan.*

Order XXXVIII, rule 5, Civil Procedure Code, and (2) for a temporary injunction under Order XXXIX, rule 1, Civil Procedure Code. The plaintiff's father died in January, 1929, leaving considerable property both moveable and immoveable and a will, under which plaintiff became sole owner of the estate. He attained his majority in August, 1929, and took out letters of administration in November.

In 1933, when he was 22 years of age, he brought the present suit against his sister and her husband and the manager of the estate.

The plaint is a long, rambling and scandalous pleading, full of unnecessary and irrelevant matter, and deficient in particulars. It offends against all the rules of pleading contained in Order VI, Civil Procedure Code, and, if any attention were paid in the subordinate courts to the rules of pleading and procedure, it ought to have been struck out long ago under Order VI, rule 16, as tending to prejudice, embarass and delay the fair trial of the suit.

So far as it is possible to ascertain from this confused document what the plaintiff claims, he seems to allege that he was a person of weak intellect, and under the control and dominance of the defendants, who conspired together to defraud him ; that, *inter alia*, they took possession of all his properties, and used the money belonging to his estate to buy, in their own names, certain other properties, enumerated 1-6 in schedule *chha*, and induced him by fraud to execute three deeds of release for sums amounting to one *lakh* of rupees. He asks for a declaration of title to the properties in schedule *chha*, and for accounts. He does not ask for possession or for any other consequential relief or for an injunction.

The defendants deny the allegations of fraud *in toto*, admit the deeds, which were duly registered, and which, they say, the plaintiff executed voluntarily two years after he attained majority, and in accordance with the wishes of his father, and state that they purchased the properties in schedule *chha* with their own money.

The application for attachment related of course to defendants' own properties, and was in respect of plaintiff's claim for accounts. The application for an injunction related to the properties in schedule *chha*, which plaintiff sought to restrain defendants from alienating.

The pleadings and affidavits disclose the following facts.

The properties in schedule *chha* are in the possession of the defendants. They have built houses thereon and have been living there for some time, and have let out part to tenants, from whom they collect the rents. Their names are registered as owners and they pay the municipal taxes.

The title deeds to properties 1-4 were left, with other properties, in plaintiff's house, and have been misappropriated by him. The title deeds to properties 5 and 6 are in the possession of the manager to whom they belong.

He borrowed money in 1933 by hypothecating property No. 5 only, for the purpose of buying another house and transferred the title deeds to the mortgagee. Subsequently, in order to pay off the mortgage, he decided to sell the property and executed a *bâinâpatra*. This was long before the institution of the suit, but on hearing of the suit he postponed registration of the document, returned the *bâinâ* money, with costs and fees thereon, to the purchaser, recovered the document, and filed it in court.

The Subordinate Judge did not deal with the matter summarily, but heard the pleaders at considerable length and after carefully considering all the facts and documents he refused both applications. His reasons for refusing an injunction were:—

1. That the plaintiff's affidavit is inadequate and defective. He alleges, in paragraph 12 thereof, simply that the defendants are trying to dispose

of the properties in schedule *chha*, and states that his allegation is based partly on information, which he believes to be true and partly on belief. He does not say which part is based on information and which on belief, nor does he state the grounds of his belief, contrary to the provisions of Order XIX, rule 3, Civil Procedure Code [*Padmabati Dasi* v. *Rasik Lal Dhar* (1).]

No overt act towards the alienation of the properties in schedule *chha* is even suggested in the application, such for example as negotiations or offers for sale, and there is no proof that the property is in danger of alienation.

These reasons clearly are sound and unanswerable, and such proof is essential before any order can be made under the provisions of Order XXXIX, rule 1(*1*).

2. The plaintiff, in respect of the schedule *chha* properties, asks in his plaint only for a declaration of title, without any consequential relief, and without asking for an injunction.

It is clear from the pleadings and affidavits that he is out of possession, yet he does not ask for it. His claim is barred under section 42 of the Specific Relief Act.

3. The title deeds of the properties are in the possession of the plaintiff. (This statement is not quite accurate. The plaintiff has possession of the deeds of properties 1-4). In view of this and the pendency of the suit, the plaintiff cannot have any reasonable apprehension of alienation. No person would be willing to purchase property which is the subject of *lis pendens*. These reasons also are sound. In a suit for declaration, an injunction should not be granted where there is no claim for consequential relief or permanent injunction. [*Shiromani Gurdawara Parbandhak Committee, Nankana Sahib* v. *Banta* (2)].

The learned judge's reasons for refusing attachment were that the affidavit was sworn, not by the plaintiff but by an employee of the plaintiff, who states in paragraphs 4 and 6 that the defendants are trying to, and are about to, dispose of their properties with intent to obstruct and delay the execution of the decree, and that his statements are based partly on information and partly on belief, without stating which are based on which and without stating his grounds of belief. Therefore this affidavit also is inadequate and defective, and open to the same objections as the other, and offends against the order and the decision, to which I have already referred.

The learned advocate for the plaintiff argued that, in addition to plaintiff's affidavits, which he admitted were inadequate and defective, there were, in the objections filed by the defendants, admissions upon which the judge could be satisfied " otherwise " within the meaning of Order XXXVIII, rule 5(*1*).

But the court must be thoroughly satisfied, and there is nothing in these documents to show that the defendants ever had any intention of obstructing or delaying the execution of any decree, which might be passed against them, or with such intent were about to dispose of their property. Mere vague allegations are not sufficient. [*Sennaji Kapurchand* v. *Pannaji Devichand* (3).] And see *Nowroji Pudamji* v. *The Deccan Bank, Limited* (4).

(1) (1909) I. L. R. 37 Calc. 259.
(2) (1926) 96 Ind. Cas. 439; 8 Lah. L. J. 289.
(3) (1921) I. L. R. 46 Bom. 431.
(4) (1921) I. L. R. 45 Bom. 1256.

1934

Durgadas Das v. *Nalinchandra Nandan.*

And the mere fact that a defendant has, in the past, mortgaged or disposed of his property, is not a sufficient ground for levying attachment. There must be a present intention. [*Manmatha Nath Sett* v. *Nagendra Nath Bhattacharjya* (1).]

Further, the judge held, for the reasons given in his judgment, that the plaintiff had failed to make out a *prima facie* case. This is essential before either injunction or attachment can be granted. Moreover the court must be satisfied that interference is necessary to prevent injury which is irreparable, and that the mischief or inconvenience, which is likely to arise in consequence of withholding the relief, will be greater than that from granting it. [*Daily Gazette Press Ltd.* v. *Karachi Municipality* (2), *Ramanuja Aiyangar* v. *Aiyanachariar* (3) and many other cases.]

The question of appeal raises the further question whether the procedure under the Code and the machinery of the High Court are generally appropriate to appeals in such matters as these. It is true that an appeal is given, but in most, if not in every such case, it must be fruitless and should not, therefore, be admitted except in very exceptional circumstances. Both injunction and attachment are intended to give prompt relief from immediate or impending danger of injury, which will be irreparable.

These applications were heard and refused by the learned judge on the 17th November, 1933. They came before this Court for disposal under Order XLI, rule 11, Civil Procedure Code on the 15th February, 1934, no less than 3 months after the alleged danger had arisen. If admitted, these appeals will be heard some two or three years hence. (The Court is now hearing Miscellaneous Appeals of 1931 and 1932.) Long before that date, in all probability, the suit itself will have been decreed. Could any procedure be more absurd or more likely to bring the court and the administration of justice into contempt? In my opinion, the Court ought not to admit appeals from such orders, except in cases of serious misdirection in law or fact, when special directions might be given for expedition.

Moreover, it must be remembered that both these orders were discretionary, and an appellate court ought not to interfere with the exercise of a judge's discretion, unless satisfied that it was not judicially exercised, that is to say, that the judge acted on wrong principles. The mere fact that the Judges of the appellate court might have taken a different view is not a sufficient ground for interference. [*Daily Gazette Press Ltd.* v. *Karachi Municipality* (2), *Watson* v. *Rodwell* (4), *Sheffield* v. *Sheffield* (5), *Maass* v. *Gas Light and Coke Company* (6), *Donald Campbell & Co.* v. *Pollak* (7) and many other cases.]

If the judge rightly appreciates the facts, and applies to those facts the true principles, that is a sound excercise of judicial discretion. [White C. J. in *Subba Naidu* v. *Badsha Sahib* (8).] This well-established rule frequently seems to be overlooked or disregarded by appellate courts in India, or appellate Judges too readily come to the conclusion that a discretion has not been exercised judicially.

Finally, neither injunction nor attachment ought to be lightly granted. It would be a serious thing, if persons in possession were restrained from making use of the property merely because a suit had been instituted about

(1) (1925) 94 Ind. Cas. 880.
(2) (1930) 127 Ind. Cas. 690.
(3) (1912) 23 Mad. L. J. 316; 17 Ind. Cas. 219.
(4) (1876) 3 Ch. D. 380.
(5) [1875) L. R. 10 Ch. 206.
(6) [1911) 2 K. B. 543, 548.
(7) [1927] A. C. 732.
(8) (1902) I. L. R. 26 Mad. 168, 174.

it. It is only where it is essential that property should be kept in its existing condition pending suit, that the Court should interfere. [*Begg, Dunlop & Co* v. *Satish Chandra Chatterjee* (1).]

For all these reasons, I am of opinion that these appeals ought to be dismissed; but, as my learned brother does not agree, the matter must be referred for hearing by a third Judge, under the provisions of clause 36 of the Letters Patent.

M. C. GHOSE J. These two appeals were argued by Mr. Sharatchandra Ray Chaudhuri on the 15th of February last. My learned brother, on hearing him, proposed to dismiss them summarily. I proposed to admit them for hearing.

I do not propose to state more than certain of the arguments advanced by Mr. Ray Chaudhuri, which inclined me in favour of admission of these appeals. He urged that the learned Subordinate Judge committed an error in making adverse remarks on the plaintiff's case. He should have noted that the plaintiff was a small child when his mother died and his elder sister, defendant No. 2, took care of him and defendant No. 1, who married her, came to live as *ghar-jâmâi*, and during his infancy they exercised their influence on him. During his minority, his case is that they and defendant No. 3 managed the estate and embezzled large sums of money and when he was 20 years old, they induced him to execute three deeds of release to the extent of one *lakh* of rupees on the representation that his father desired that the gifts should be made, but that there was nothing in his will to that effect. The learned Subordinate Judge criticised the affidavit filed on behalf of the plaintiff; but, having regard to the provisions of Order XXXVIII, rule 5 (*1*) and Order XXXIX, rule 1(*1*), which provide that the facts might be proved by affidavit or otherwise, the learned judge should have taken into account the admission of defendant No. 3 that immediately before the suit he had been trying to dispose of one of the properties. All these properties had been bought during the time they were managing the estate. The learned judge was wrong to criticise the plaintiff for not paying sufficient court-fees for consequential relief, inasmuch as the suit should be valued according to the statement of the plaintiff. The plaintiff stated in the plaint that he was in possession of all the six properties, that he himself was in direct possession of one property and the other five properties were let out to tenants from whom he was getting rents and the learned judge was wrong in holding that the defendants were in possession of the properties.

It was suggested that the appeals were made very late. It was urged in reply that the petitions were made immediately the suit was filed and they were disposed of on the 17th November and thereafter the plaintiff made no delay but immediately obtained copies of the necessary documents and filed the appeals in the beginning of December and it was not his fault that the appeals were not heard till the middle of February.

In my view, we should admit these appeals, look at the records and hear the parties before forming our final opinion.

Thereupon the case was referred to the Hon'ble Acting Chief Justice, under clause 36 of the Letters Patent, who directed the Hon'ble Sir Philip

(1) (1919) I. L. R. 46 Calc. 1001.

1934

Durgadas Das
v.
Nalinchandra Nandan.

Buckland A. C. J. to hear the matter, and it was heard on the 9th March, 1934.

Sharatchandra Ray Chaudhuri and *Urukramdas Chakrabarti* for the appellant.

BUCKLAND A. C. J. I am not satisfied that the learned Subordinate Judge wrongly exercised his discretion; and I agree with my learned brother, Mr. Justice Lort-Williams, that these appeals should be summarily dismissed under Order XLI, rule 11, Civil Procedure Code.

Appeals dismissed.

G. S.