

IN THE COURT OF THE II ADDL. CIVIL JUDGE & J.M.F.C.
HARIHAR

:: PRESENT::

Sri. Avinash Chindu.H, B.A.L. LL.B.
II Addl.Civil Judge & J.M.F.C.
Harihar

Dated this the 5th day June 2020

O.S. No.12/2019

Plaintiff : R.Dadapeer S/o R. Jaleel Sab
63 years, R/o 1st Main, 8th Cross,
J.C. Extention, Harihara,
Davanagere District

Vs -

Defendants : Aslam Basha S/o R. Jaleel Sab,
Aged 50 years,
R/o 1st Main, Kalidas Nagara,
Behind Selfie Maszid, Harihara
Davanagere District

Parties to I.A. No. III

Applicant : R.Dadapeer S/o R. Jaleel Sab
63 years, R/o 1st Main, 8th Cross,
J.C. Extention, Harihara,
DavanagereDistrict

Vs -

Opponents : Aslam Basha S/o R. Jaleel Sab,
Aged 50 years,
R/o 1st Main, Kalidas Nagara,
Behind Selfie Maszid, Harihara
Davanagere District

**ORDER ON I.A. No.III FILED UNDER ORDER 39 RULE 1
AND 2 OF CPC BY THE PLAINTIFF**

The plaintiff has filed the present application U/sec 39 Rule 1 and 2 of C.P.C seeking an order of interim mandatory injunction to direct the defendant to produce boiler ,Generator , drilling machine , grinding machine, welding motor and other machineries before the court.

2. In the affidavit filed in support of the IA No.III, the plaintiff has stated that, he has filed the present suit for the relief of permanent injunction and with other consequential reliefs against the defendants and he has started Foundry business in the year 1997 and thereafter he was appointed as an employee of the Birla Grassim Factory and hence he has handed over the entire business to the defendant. The plaintiff further stated in the affidavit that, in the year 2014 the pollution control board has stopped their foundry business and in the year 2019 the defendant once again tried to start the foundry business in the suit schedule property without permission from the pollution control board and hence the plaintiff has filed the present suit and thereafter IA no.1 filed by the plaintiff U/O 39 Rule 1 and 2 of

C.P.C was dismissed by this court by making observation that, defendant is a tenant in the suit schedule property and directed the defendant to start his foundry business after obtaining permission .

3. The plaintiff further stated in the affidavit that, he got the knowledge about all these things on 16-08-2019 and the defendant broke open the lock of the foundry shop and has removed all the machineries in the suit schedule property and has shifted the same to some other place in Harihara and thereafter the plaintiff has taken photo at the time of removing machineries from the suit schedule property and the defendant made galata and hence the plaintiff has given complaint to the jurisdictional police station and thereafter the plaintiff having no other alternative has filed the present application seeking an order of interim mandatory injunction as sought for in IA no.III.

4. The defendant has filed common objection to IA No. 3 and 4 and contended that, IA No. 3 is not maintainable and the plaintiff has sworn to false affidavit filed in support of IA No. III. The defendant further contended that, he is a tenant in the suit schedule property and IA No.1 filed by the plaintiff was dismissed

by this court by directing the defendant to run foundry business with permission of Karnataka pollution control board and hence he has shifted his machineries to some other place and the plaintiff has filed the application to harass the defendant and hence he prays to dismiss the IA no.3.

5. Heard both sides on IA no.III. Perused the materials on record .

6. The points that arise for my consideration are,

- 1. Whether the plaintiff has made out prima-facie case to grant an order of interim mandatory injunction ?**
- 2. Whether the plaintiff suffers irreparable injury, if his prayer for interim mandatory injunction is not granted?**
- 3. Whether the balance of convenience lies in favour of the plaintiff?**
- 4. What Order?**

7. My findings to the above points are as under:

- | | |
|-------------------|--|
| Point No.1 | : In the Negative |
| Point No.2 | : In the Negative |
| Point No.3 | : In the Negative |
| Point No.4 | : As per final order for the following, |

--:: REASONS ::--

8. POINT NO.1:

First rule to be considered while granting an order of interim mandatory injunction is that, the applicant must make out a prima facie case in support of his right claimed by him. The court must be satisfied that, there is a bona-fide dispute raised by the applicant, that there is an arguable case for trial which needs the investigation and a decision on merits and on the facts before the court there is a probability of the applicant being the entitled to the relief claimed by him. The existence of a prima facie right and infraction of such right is a condition precedent for grant of interim mandatory injunction.

9. Initially the plaintiff has filed the present suit for permanent injunction to restrain the defendant from interfering with his alleged possession over the suit schedule property and also submitted his arguments on IA No. 1 filed by him U/sec 39 Rule 1 and 2 of C.P.C seeking an order of temporary injunction to restrain the defendant from interfering with his possession over the suit schedule property and the said application was dismissed by this court by making an observation that, the defendant is a

tenant in the suit schedule property and the defendant is in possession of the suit schedule property as tenant and the plaintiff is not in possession of the suit schedule property. Thereafter the plaintiff has amended the plaint and sought additional relief of declaration of his title and possession of suit schedule property and damages .

10. Now the present application is filed by the plaintiff seeking an order of interim mandatory injunction to direct the defendant to produce boiler ,Generator , drilling machine , grinding machine, welding motor and other machineries before the court and he contended that, he has sought for damages against the defendant and the said machineries belongs to him. The specific contention of the plaintiff is that, he has started foundry business in 1997 and thereafter he was appointed as an employee of the Birla Grassim Factory. But the plaintiff has not produced any document before the court to show that, the said foundry belongs to him and not produced any invoice bills , purchase bills and other documents to show that, the said foundry belongs to him and the machineries were purchased by him. The plaintiff has not produced any document to show that, he was running foundry

business in the suit schedule property. On the other hand, the defendant has taken contention that, he is in possession of suit schedule property as a tenant.

11. Initially the plaintiff has contended that, he is in possession of suit schedule property and in the affidavit filed in support of IA No. III, he has contended that, in 1997 he has started foundry business and thereafter he was appointed as an employee at Grassim Industries and hence he has handed over the business to his brother defendant . On the other hand, the defendant has produced lease agreement dated 25-06-1999 it shows that, the plaintiff has given suit schedule property to the defendant on lease for the period of 5 years and other documents submitted by the defendant like invoice bills , Form no.1, Form No. 6 and certificate issued by commercial tax department, vat registration certificate , delivery notice , invoice bills , form No.4- A sales tax returns and other tax invoice bills, income tax returns clearly shows that, the defendant is running foundry business in the suit schedule property since 1999. but the plaintiff has not made out any grounds to grant interim mandatory injunction at this stage . Because the plaintiff has not

produced prima facie document to show that, the said foundry business and the machineries of the said business belongs to him. In the absence of documentary evidence, it cannot be held that, the said machineries belongs to the plaintiff. Hence the plaintiff has not made out any grounds to grant interim mandatory injunction at this stage . Moreover the plaintiff has sought for damages and it requires trial.

12. The learned counsel for the plaintiff has relied on the judgment passed by the Civil Court of Delhi in C.S.84021/2015 in the case of Tahir Ali Vs. Abid Ali. I have carefully perused the said judgment . No doubt the said case was filed by the plaintiff bearing for the relief of possession and permanent injunction . But this court is not going to pass judgment on merits in this case, but considering the interlocutory applications in this case and hence the above cited decision is not helpful for the plaintiff at stage.

13. In this case if it is established that, the said machineries belongs to the plaintiff, he is entitled for damages as claimed in this suit. But at this stage the plaintiff has not made out prima facie case to grant interim mandatory injunction by producing

necessary documents to show that, the machineries belongs to him. The plaintiff has not produced any documentary evidence to show that, he has a prima facie case to grant interim mandatory injunction. On the other hand, documents submitted by the defendant prima facie establishes that, the defendant is running foundry business in the suit schedule property as a tenant by purchasing materials and machineries. Hence the plaintiff is not entitled for grant of interim mandatory injunction at the hands of this court. Accordingly the point No. 1 is answered in the **Negative.**

14. Point No.2 & 3: Since these two point are inter connected to each other, they are taken together for common discussion to avoid repetition of facts and appreciation of evidence. The second condition for grant of interim mandatory injunction is that, the balance of convenience must in favour of the applicant/plaintiff. In other words court must be satisfied that comparative mischief, hardship or inconvenience , which is likely to be caused to the applicant, by refusing the injunction will be greater than that which is likely to be caused to the opposite party by granting it.

15. The existence of the prima facie case alone does not entitle the applicant for an order of interim mandatory injunction. The applicant must further satisfy the court by showing that he will suffer irreparable injury if the injunction as prayed is not granted and that there is no other remedy open to him by which he could protect himself from the consequences of apprehended injury. In other words, the court must be satisfied that refusal to grant injunction would result in irreparable injury to the party seeking relief and he needs to be protected from the consequences of apprehended injury. The grant of interim mandatory injunction is an equitable relief and such power can be exercised when judicial intervention is absolutely necessary to protect the rights and interest of the applicant.

16. The plaintiff has contended that, the defendant has shifted all the machineries from the suit schedule property to some other place. Hence he has sought for interim mandatory injunction . If the order of interim mandatory injunction is granted more hardship will be caused to the defendant. Because plaintiff has not made out prima facie case and not produced any document to show that, the said machineries belongs to him. If the defendant

is directed to produce the said machineries before the court, he will be put to hardship as he cannot make use of said machineries. On the other hand, the documents submitted by the defendant clearly shows that, he is a tenant under the plaintiff in respect of the suit schedule property and was running foundry business and the pollution control boards has stopped the said business. The defendant has clearly contended that, as per the direction of the court, he has to start his business in the suit schedule property only after obtaining permission from the pollution control board . Hence he has shifted the entire materials to some other place in Harihara.

17. The plaintiff has not made out any grounds to grant interim mandatory injunction to produce the said machineries before the court. If an order of interim mandatory injunction is granted more hardship will be caused to the defendant than the plaintiff. Moreover , whether the said machineries belongs to the plaintiff or not will be decided after full fledged trial. At this stage the plaintiff has failed to prove that, said machineries belongs to him and balance of convenience lies in favour of the defendant and not lies in favour of the plaintiff. Accordingly I answered

point no.2 and 3 in the **Negative.**

18. Point No.4:

In view of the above discussed reasons on point no.1 to 3 , I proceed to pass the the following,

:: ORDER ::

I.A No.III filed by the plaintiff U/o 39 Rule 1 and 2 of CPC seeking an order of interim mandatory injunction to direct the defendant to produce machineries before the court is hereby dismissed.

(Dictated to the Stenographer, script translated and typed by her, corrected and signed by me, then order pronounced in the open court on this the 5th **day of June, 2020**)

(Avinash Chindu.H)
II Addl. Civil Judge & J.M.F.C,
Harihar.

ORDER ON IA NO.IV

The plaintiff has filed the IA No. IV U/O 26 Rule 9 R/w section 151 of CPC to appoint the commissioner to make investigation and identify the machineries which were removed by the defendant from the suit schedule property and to submit his report to the court.

2. In the affidavit filed in support of the IA No. IV, the plaintiff has stated that, he has filed the present suit for permanent injunction and for consequential reliefs against the defendant and he was running foundry business in the suit schedule property from 1997 and he was appointed as an employee at the Birla Grassim Industry and hence he has handed over the entire business to the defendant. The plaintiff further stated in the affidavit that, in the year 2014 the pollution control board has stopped their foundry business. The plaintiff further stated that, after dismissal of IA No. 1 by this court without the permission of plaintiff, the defendant has removed all the machineries from the suit schedule property and has caused loss to the plaintiff. The plaintiff further contended that, the defendant has no right or interest over the said machineries, but has shifted all

the machineries to some other place in Harihara and hence he has filed application seeking appointment of court commissioner.

3. The defendant has filed objection to IA no.IV and contended that, the present application is not maintainable and the plaintiff has not approached the court with clean hands. The defendant further contended that, he is in possession of suit schedule property as a tenant and plaintiff was nowhere concerned with the foundry business which was run by the defendant in the schedule of the plaint and he has stopped the foundry business in the suit schedule property as permission was not granted by the pollution control board and this court also directed him to start the said business only after obtaining necessary permission from the pollution control board . Hence he contended that, the IA no.4 is liable to be rejected.

4. Heard both sides on IA No. IV.Perused the materials on record.

5. The points that arise for my consideration are,

1. Whether the plaintiff has made out grounds for appointment of court commissioner U/O 26 Rule 9 of CPC as sought for in IA No.IV?

2. What Order?

6. My findings on the above points are as under:

Point No.1: In the Negative,

Point No.2 : As per final order for the following,

--:: REASONS ::--

7. POINT NO.1: Initially the plaintiff has filed the present suit for permanent injunction to restrain the defendant from interfering with his alleged possession over the suit schedule property. After appearance of the defendant this court heard both sides and dismissed the IA no.1 filed by the plaintiff U/O 39 rule 1 and 2 of C.P.C seeking an order of temporary injunction. Thereafter the plaintiff has got amended the plaint and sought for the relief of declaration and possession of suit schedule property and for damages. Now the present application is filed by the plaintiff contending that, the defendant has removed all the machineries from the suit schedule property belongs to him and shifted to some other place. Hence he has filed the present application to appoint court commissioner to make investigation and to submit his report about the machineries.

8. The application filed by the plaintiff is in the form of collection of evidence . It is well settled that, commissioner cannot be appointed for collection of evidence. When there is contrary evidence or if there is a ambiguity in the evidence aduced by both parties ,

and if the court feels that, it is not possible to determine the issues framed in this case without the report of commissioner, then under such circumstances court can appoint the commissioner. But in this case the plaintiff has sought for damages and the trial is not yet commenced. Hence at this stage the appointment of court commissioner is not necessary. Moreover plaintiff has not made out grounds to appoint court commissioner and the application filed by the plaintiff is premature one. While passing order on IA No. III this court comes to the conclusion that, the plaintiff has not produced prima facie materials to show that, machineries which were removed by the defendant from the suit schedule proeprty belongs to him. On the other hand, the documents submitted by the defendant clearly shows that, he was running foundry business by entering into lease agreement with the plaintiff . The documents submitted by the defendant is not disputed by the plaintiff. Moreover at this stage the present application is not maintainable as the same is filed for collection of evidence. Hence Accordingly I answered point No. 1 in the negative.

9. Point No.2: In view of my above discussion, I proceed to pass the following,

:: ORDER ::

I.A No.IV filed by the plaintiff U/O 26 Rule
9 of CPC is hereby dismissed.

II Addl.Civil Judge & JMFC
Harihar

(Order pronounced in the open court,
Vide Separate order)

ORDER

**I.A No.III filed by the plaintiff U/o 39 Rule 1 and 2 of
CPC seeking an order of interim mandatory injunction to
direct the defendant to produce machineries before the court
is hereby dismissed.**

**II Addl.Civil Judge & J.M.F.C,
Harihar.**