

Assam Schedule VII, Form No. 132.

HIGH COURT FORM NO. (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT.

District :- Bongaigaon.

IN THE COURT OF CIVIL JUDGE :::: BONGAIGAON.

**Present :- Smti M.C.Bordoloi,  
Civil Judge,  
Bongaigaon.**

**Friday, the 22<sup>nd</sup> day of December, 2017.  
Misc(A) Case No. 01 of 2017.**

1. Akbar Ali Choudhury,  
S/O Syedur Rahman,
  2. Syedur Rahman,  
S/O Late Durjon Ali,
  3. Rahila Khatun,  
D/O Syedur Rahman,
  4. Surjya Bhanu  
W/O Syedur Rahman,
- All are the residents of  
vill- Dubachari, Part- II,  
P.S. Mererchar,  
Dist. Bongaigaon, Assam.

*M.C.*  
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Appellants/ Petitioners

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VERSUS

1. Alauddin Ahmed,  
S/O Late Kofil Uddin,  
2. Hussain Ali,  
S/O Late Kofil Uddin,  
3. Kitab Ali,  
S/O Late Kofil Uddin,  
All are the residents of  
vill- Dubachari, Part- II,  
P.S. Mererchar,  
Dist. Bongaigaon, Assam.

Respondents/Opposite parties.

This suit coming for final hearing on 19.09.2017, 15.12.2017.

(I) Given date or dates  
in the presence of

Mr. Afzal Hussain,

Advocate for petitioners.

Mr. Abdus Samad,

Advocate for Opposite parties.

and having stood for consideration to this Court on the  
22<sup>nd</sup> day of December, 2017 the Court delivered the following Judgment:

Misc(A) Case No. 01/2017.

**::: J U D G M E N T :::**

1. The present appeal is one under Order 43 Rule 1(r) of the  
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CPC directed against the order dated 7.12.2016 passed by the Learned Munsiff, North Salmara, Abhayapuri, in Misc(J) Case No. 13/16, arising out of Misc(J) Case No. 37/14, whereby and whereunder the learned Court had refused to set aside the order of temporary injunction passed in Misc(J) Case No. 37/14 or vary the same as prayed for.

2. Being highly aggrieved by the aforesaid order of refusal by the learned Court below to exercise, its power to vary, discharge or set aside the order of temporary injunction passed in Misc(J) Case No. 37/14, the petitioners in Misc(J) Case No. 13/16, have preferred the present appeal impugning the aforesaid judgment.

3. Upon admission of appeal, the case record of Misc(J) Case No. 13/16, have been requisitioned from the Court of learned Munsiff, North Salmara, Abhayapuri and notices were directed upon the respondents.


4. The respondents entered appearance and contested the appeal.

5. The facts leading to the instant appeal is narrated hereinunder :

**Petitioner's case :**

That petitioners filed petition under Order 39 Rule 4 CPC read with Section 95/151 CPC against the opposite parties praying for

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discharge, variation or in the alternative, setting aside the order of temporary injunction dated 16.3.2015 passed in Misc(J) Case No. 37/14, which petition had been registered as Misc(J) Case No. 13/16.

It was the petitioner's case that opposite parties that is the plaintiffs in Title Suit No. 92/14 filed an application for permanent injunction and the learned Court upon motion passed an order of status-quo on 15.12.2014 and after full fledged hearing and upon consideration of the report of Amin Commission appointed for the purpose of survey of the suit land passed an order of temporary injunction dated 16.3.2015.

It was alleged by the petitioner that the Amin Commission appointed by the learned trial Court submitted its report on 18.11.2015, which indicated that the suit land measuring 2 bigha 3 katha 15 lecha was under the possession of the opposite party, plaintiff and 4 others while land measuring 3 bigha 19 lecha scheduled in the counter-claim of the petition was recorded in the name of the petitioner/ defendant and land measuring 4 bigha 1 katha 2 lecha covered by dag no. 175 was recorded as road ("rasta") and the said road had been shown to be running over the patta land covered by dag no. 269 instead of the original road measuring 1 katha 2 lecha which is on the southern side of the said road. It was averred that being dissatisfied with the report of the said commission, a further commission was appointed at the instance of the petitioner and the said commission submitted its report on 10.3.2016, reporting to the effect that the A schedule land and the C schedule land do not have the same boundary as shown in the plaint and as found in the field and that the Government road is running over the land of dag no. 269 of

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patta no. 17 which ought to have been covered by dag no. 175.

It was the further case of the petitioner that the opposite parties have been possessing more lands including the 'sarkari rasta' covered by dag no. 175 and also the land of the petitioner/opposite parties. Hence, the petition for varying the order of temporary injunction dated 16.3.2015. The petitioners considering the actual status of possession of the suit land as revealed in the report of the Amin Commissioner had prayed for discharge and variation of the order of temporary injunction dated 16.3.2015.

6. **Opposite parties's Plea :**

The opposite parties entered appearance pursuant to notice and filed their written objection. In their written objection, opposite parties raised the pleas of non-maintainability of the petition. Opposite parties averred that they purchased a plot of land measuring 1 bigha in the year 1996 vide registered sale deed no. 1966 from the petitioner No. 1 and also secured possession of the same and since thereafter the opposite party had been possessing the same and that on the northern boundary of his purchased land was the land of Syedur Rahman and the opposite party had been possessing his land within the said boundary.

That opposite party had another plot of land measuring 2 katha 3 lecha inherited from his father being his homestead land and same is contiguously situated to the southern side of the A schedule land and that opposite party had also purchased land measuring 1 bigha 1 katha 12 lecha vide

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registered sale deed no. 1269/14, which is situated on the western side of the schedule A and B lands i.e. the C schedule land.

The opposite party further averred that the field verification report was in their favour that is in respect of possession of the entire B schedule land by the opposite party and 4 others and question of their possessing excessive land does not arise. The opposite party averred that the restraint order has been rightly passed and accordingly prayed for dismissal of the petition.

7. Upon perusal of the case record in its entirety and having heard the submissions forwarded by the learned counsels of both sides the learned Munsiff, North Salmara, Abhayapuri, vide order dated 7.12.2016 rejected the petitioner's petition, holding that the petitioners having failed to show the change in circumstances or undue hardship upon them due to the continuation of the restraint order and thus lacked merit.

8. **It is this order which is impugned in the instant appeal.**

9. The appellants have assailed the aforesaid order on the following grounds amongst others :

**Grounds :**

a) *That the learned trial Court passed the impugned order perfunctorily without sound reasoning and thereby caused miscarriage of justice;*

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b) That the learned trial Court failed to appreciate the fact that the petitioners in Misc(J) 37/14 had succeeded in securing the order of injunction by suppressing the material facts and also ignoring the report of commission dated 18.11.2015, which disclosed the fact of possession of more lands by the respondents/opposite parties and thereby passed the order of rejection of the petition seeking variation, discharge etc of the injunction order dated 7.12.2016 causing miscarriage of justice;

c) That the learned trial Court passed the impugned order without giving any opportunity of adducing evidence to the petitioner for which the same is liable to be set aside;

d) That the impugned order is mechanical, illegal and liable to be set aside;

**Arguments :**

10. Heard the arguments advanced by the learned counsels of both sides.

10.(i). Learned counsel for the appellant submits that impugned order is erroneous and same is liable to be interfered with in appeal.

10.(ii). Controverting the above submissions, learned counsel for the respondent side submits that question of variation of the injunctive order does not arise, on the basis of alleged report of Amin Commission. The said report being part of record, it will be incumbent upon the learned Court to

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appreciate the same on the conclusion of the trial alongwith other evidence available on record. The same by itself cannot be accepted as the ultimate proof and acted upon to cause variance in the order of injunction. Learned counsel prays for dismissal of the appeal.

8. Heard. Perused the case record.

9. The point for determination that has arisen in the instant appeal is as follows :

**Points for determination :**

***1) Whether the order dated 7.12.2016 passed by the Learned Munsiff, North Salmara, Abhayapuri, in Misc(J) Case No. 13/16, and in sustainable in law and facts or whether it lacks propriety warranting interference ?***

10. My decision on the above point for determination along with reasons is given hereinunder :

**Discussion, Decision, Reasons Therefor :**

Before proceeding to determine the points which has arisen for consideration, it is to be understood that Order 39 Rule 4 CPC gives power to the Court to discharge, vary or set aside the order of temporary injunction under certain circumstances. The proviso envisages as hereunder :-

Any order for injunction may be varied, discharged or set aside by the Court on application made thereto by any party dis-satisfied with such order.

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Provided that if an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless for reasons to be recorded, it considers that it is not necessary to do so in the interest of justice.

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party, except where such discharge, variation or setting aside has been necessitated by a change in the circumstances or unless the Court is satisfied that the order has caused undue hardship to that parties.

With the understanding of the provisions of Order 39 rule 4 CPC when the impugned order is perused, it is seen that the learned trial Court had refused to vary the order dated 16.03.2015 passed in Misc(J) case No. 37/2014 as it was passed after full length hearing and also for the fact that the petition had failed to show any change in circumstances or that undue hardship was caused to them for the said order.

Before addressing the question regarding propriety of the order, it is necessary to understand the scope of this Court sitting in appeal against an order under Order 39 Rule 4 CPC. The instant appeal essentially is one under Order 43 Rule 1 (r) CPC. This appeal is therefore an appeal against the exercise of discretion and is therefore a appeal on principle.

The appellate Court will not interfere with the exercise of

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discretion of the Court of the first instance and substitutes its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court had ignored the settled principle of law ignoring grant or refusal of the temporary injunction.

In a decision, **Manju Nath Anadappa -vs- Tammanasa reported in (2003)10 SCC 390** it was held by the Hon'ble Supreme Court that Court of appeal should not ordinarily interfere with the discretion exercised by the Courts below. The scope of the appellate power to interfere with the discretion exercised by the Court of first instance in granting or refusing the prayer of temporary injunction has been laid down in the case of **Wander Ltd. & Another -vs- Antox India Pvt. Ltd. reported in 1990 (Supp) SC 727.**

Now having understood the scope of this Court, to interfere with a discretion exercised by the learned Court when the impugned order is perused and the C/R requisitioned, is revisited, it is seen that learned trial Court did not admit the alleged report of the Commission while passing the impugned order, as the petitioner, failed to submit certified copy of the report of Commission or the certified copy of injunction.

Now perusal of the certified copy of the order of injunction dated 16.03.2015 passed in Misc (J) 37/2014 discloses that same was passed by the learned Munsiff, North Salmara, Abhayapuri, on finding that the petitioner could successfully prove the presence of prima-facie case, balance of inconvenience, irreparable loss or injury in his favour. **The said order do not indicate that the injunction had been passed on the basis of the report of the Amin Commission.**

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In fact there is not a whisper about the appointment of **Amin Commission for the purpose of arriving at a decision in respect of exercising its discretion to allow or refuse injunction** as claimed by the appellant.

The appointment of Amin Commission is not disputed by the other side. The Commission apparently had been appointed by the Court below to ascertain facts relating to the real controversy but there is no certified copy of "writ", filed in the instant appeal, which would have indicated the purpose of the appointment of such Commission.

There is also no evidence on record as to the rejection of the report of the earlier appointed Commission either.

**Further it needs to be borne in mind that the question of acceptance of rejection of a report of Amin Commission does not arise and it always forms the part of the record and the report of Commission does not conclude the matter in issue. Such report is only one piece of evidence which ultimately would have to be appreciated alongwith other evidence in the case before the Court can come to a conclusion.**

In the instant case, the appellant had relied exclusively on the report of Amin Commission dated 10.03.2016 seeking variance but as discussed above the said report cannot be held to be a final report and be acted upon to vary the impugned order.

**The appellant has failed to show that the subsistence of the impugned order had brought about undue hardship to them. The report of Amin Commission cannot be construed as a change in circumstance.**

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Further the learned trial Court had discussed all the cardinal principles while granting the relief of injunction. Hence, it cannot be said that such discretion has exercised capriciously and arbitrarily by the learned Court below.

Accordingly, I am but to hold that the learned Trial Court had not committed any illegality in rejecting the petition seeking variance of the order dated 16.03.2015 passed in Misc (j) 37/2014.

The point for determination stands answered in the negative.

The appeal is devoid of merit.

**O R D E R**

In the light of the above discussions, the Misc (Appeal) is dismissed on contest with costs.

Order dated 17.12.2016 passed by the learned trial Court in Misc(J) 13/2016 is upheld and affirmed.

Prepare a decree accordingly.

Send down the case record with a copy of this judgment to the learned Court below.

Given under my hand and the seal of this Court on the 22<sup>nd</sup> day of December, 2017.

*Bardoloi*  
( M. C. Bordoloi ) 22/12/17  
CIVIL JUDGE,  
BONGAIGAON. Civil Judg.  
Bongaigaon

Dictated & corrected by me,  
*Bardoloi*  
( M.C. Bordoloi ) 22/12/17  
Civil Judge,  
Bongaigaon. Civil Judge  
Bongaigaon

