

GAHC010074692024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/126/2024

JAHANGIR ALOM SIKDAR
S/O- LATE ABDUS SATTAR SIKDAR,
R/O- VILLAGE- BALADMARI, WARD NO.- 7,
P.S. AND DISTRICT- GOALPARA, ASSAM.

VERSUS

SHAHJAHAN SIKDAR AND ANR
S/O- LATE ABDUS SATTAR SIKDAR,
RESIDENT OF VILLAGE- BALADMARI, WARD NO. 7,
P.S. AND DISTRICT- GOALPARA, ASSAM.

2: SHAHRAM NIZE SIKDAR
S/O- SHAHJAHAN SIKDAR

RESIDENT OF VILLAGE- BALADMARI
WARD NO. 7

P.S. AND DISTRICT- GOALPARA
ASSAM

Advocate for the Petitioner : Mr. B. D. Deka, Advocate

Advocate for the Respondents : Mr. K. N. Choudhury,
Sr. Advocate
Mr. R. J. Das, Advocate

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 31.05.2024

Date of Judgment : 31.05.2024

JUDGMENT AND ORDER (ORAL)

This is an application under Article 227 of the Constitution challenging the order dated 27.03.2024 passed by the Court of the Additional District Judge, Goalpara in Misc. Appeal No.06/2023 whereby the learned First Appellate Court had set aside the order of temporary injunction dated 21.08.2023 passed by the learned Civil Judge (Senior Division), Goalpara in Misc.(J) Case No.29/2023 arising out of Title Suit No.34/2023.

2. For the purpose of deciding as to whether the learned First Appellate Court was within its jurisdiction to interfere with the order passed by the learned Trial Court, this Court would like to take note of the brief facts which led to the filing of the instant proceedings.

3. The petitioner herein as plaintiff had instituted a suit claiming inter-alia that a plot of land measuring 2 kathas 8 lechas originally belonged to the father of both the plaintiff as well as the defendant No.1. Upon the death of their father, it was mutually agreed that the brothers, i.e. the plaintiff and the defendant No.1 would claim right in respect to 1 katha 1 lecha of land each and the remaining land which is around 6 lechas would be a suit path. This suit path has been specifically described in Schedule-C to the plaint.

4. In the instant proceedings, a material aspect has been duly admitted by the plaintiff that there was a boundary wall on the northern side of the plaintiff's land abutting the land of the defendant No.1 which was also the specific case of the defendant No.1 in the written statement. This aspect came into light upon filing of an additional affidavit to bring to the notice of the Court that in view of the construction raised by the defendant No.1, the boundary wall had fallen.

5. The dispute between the plaintiff and the defendant No.1 is primarily the Schedule-C land or for that matter as to whether there exists a common path beyond the boundary wall on the northern side of the plaintiff's land. It is also seen that in the suit, the plaintiff had sought for declaration of his right, title and interest over the suit land though at paragraph Nos.5 & 6 of the plaint, it is the categorical case of the plaintiff that this suit land is a common land between the plaintiff and the defendant No.1. In addition to that, the plaintiff has challenged the Deed of Sale executed by the defendant No.1 in favour of the defendant No.2 on the ground that this 4 lechas of land which forms the Schedule-C land was sold by the defendant No.1 to the defendant No.2 vide the said Sale Deed. The plaintiff also sought for permanent injunction and also for correction of the records. It is however interesting to mention that although the Goalpara Municipal Authorities have been made a party to the said proceedings, there has been no relief sought for against the said Municipal Body.

6. The defendants filed their written statement-cum-counterclaim denying the case of the plaintiff. It is however interesting to mention that in the counterclaim, the land owned by the father of the plaintiff and the defendant No.1 was stated to be 3 kathas 1 lecha and has been specifically described in Schedule-A to the counterclaim. It was also mentioned that the plaintiff has encroached upon 5.5 lechas of land including a portion of 4 feet width land of the common passage, and as such, sought for declaring that the counter claimant No.1 has every right, title and interest in respect to Schedule-D, 5.5 lechas excess land and for recovery of the said Schedule-D land. In addition to that, the defendant/counter claimant has also sought for partition of the Schedule-A land on equal basis and other reliefs.

7. The learned Trial Court during the pendency of the injunction proceedings, instituted a proceedings under Order XXXIX Rule 7 of the Code of Civil Procedure, 1908 and sought for a report upon inspection. An inspection report was submitted to that effect that the setback maintained by the defendant on the north and the east side was in accordance with the Building Byelaws. However, on the west and the south

side, it was the less than what was required as per the permissible limits as per the Building Byelaws. But the fact however remains, taking into account the dispute involved herein that if there is a mention in the inspection report that there was some setback maintained it would impliedly be understood that the construction was done within the land by defendants immaterial of the fact whether it violates the Building Byelaws which is a separate aspect.

8. The learned Trial Court vide an order dated 21.08.2023 disposed of the injunction application thereby restraining the defendant Nos.1 & 2 from occupying the suit land which would be the Schedule-C land and undertaking any construction over the suit land till the disposal of the suit. In addition to that, the defendant Nos.1 & 2 were also restrained from causing any damage, alteration or transfer of the suit land in any form or manner until disposal of the suit or until further orders.

9. Being aggrieved, an Appeal was preferred by the defendant Nos.1 & 2 before the Court of the District Judge, Goalpara which was registered as Misc. Appeal No.06/2023. The said Appeal was endorsed to the Court of the Additional District Judge, Goalpara for disposal. The learned First Appellate Court allowed the said Appeal by setting aside the order passed by the learned Trial Court dated 21.08.2023 and it is under such circumstances, the instant proceedings have been initiated. It is also very pertinent herein to mention that pursuant to the filing of the instant petition, an application was filed which was registered and numbered as I.A.(C) No.1109/2024 seeking an injunction thereby restraining the defendant Nos.1 & 2, their men, agents, assigns etc. from carry out constructions over the suit land, i.e. the Schedule-C land and/or changing/altering the nature and character of the suit land, i.e. the Schedule-C land and/or creating any third party interest over the same.

10. This Court vide an order dated 10.04.2024 directed that status quo be maintained in respect to the suit property. In addition to that, there was also a direction that no construction work shall be undertaken in respect to the suit property till the returnable date.

11. In the backdrop of the above, let this Court to consider as to whether the learned First Appellate Court had exercised its jurisdiction within the powers conferred upon it in passing the impugned order thereby setting aside the injunction order passed by the learned Trial Court. The learned First Appellate Court while deciding the said Appeal observed that the plaintiff did not have a prima-facie case in so far the suit land was concerned for grant of an injunction taking into account that the Schedule-C land was not described in the manner in which it ought to have been. Taking into account that for the purpose of granting of an injunction, the three golden principles as to co-exist, the learned First Appellate Court interfered with the injunction order on the ground that there was no prima-facie case for going into trial.

12. In the previous segments of the instant judgment, this Court has duly taken note of an admission of the plaintiff which had come into light in respect to a boundary wall on the north of the plaintiff's land. It is not clear from the plaintiff as to whether the suit land stands on the north of the boundary wall or not. It is not understood as to why the plaintiff did not precisely state that the suit land was towards the north of the boundary wall. In the opinion of this Court, the learned First Appellate Court was therefore justified in arriving at the findings that the plaintiff did not have a prima-facie case for going for a trial in so far as for granting of an injunction in respect to the suit land on account of the vagueness or lack of clarity in the description of the suit land.

13. Now let this Court take note of the balance of convenience. Although the learned First Appellate Court did not go into the said aspect of the matter, but this Court taking into account that there is an injunction application filed in the instant proceedings would like to deal with the same.

14. From a perusal of the various photographs which have been placed before this Court, it transpires that the building in question is in advance stage of construction. The walls have also been constructed. It is also seen that there is no mandatory injunction sought for in respect to demolition of the building. Under such

circumstances, in the opinion of this Court, the balance of convenience would be in not stalling the further construction.

15. The third aspect relevant to is the irreparable loss, harm and injury. In respect to the said principle, this Court finds it very pertinent to take note of the submission made by Mr. K. N. Choudhury, the learned senior counsel appearing on behalf of the respondents wherein he duly submitted by drawing the attention of this Court to paragraph No.23 of the written objection filed by the defendants before the learned Trial Court wherein it has been categorically mentioned that the defendants undertook on oath to demolish the RCC building being constructed if at the end of the trial, the same is found to have encroached either to any part of the 8 feet common road or into any part of the plaintiff's land. Mr. K. N. Choudhury, the learned senior counsel appearing on behalf of the respondents submitted on instructions that the defendant Nos.1 & 2 also continues to give the same undertaking before this Court. Under such circumstances, this Court would therefore construe the same as an undertaking being given before this Court.

16. The learned counsel for the petitioner submitted that after making enquiry it has come to light that the defendant Nos.1 & 2 are not constructing a residential building, and as such, there is every likelihood that third party rights would be created. The learned counsel for the petitioner therefore submitted that if any alienation of the building so constructed by the defendants is not restrained, it would be difficult on the part of the plaintiff/petitioner at the end of the trial to execute the decree in view of the creation of third party rights.

17. Mr. K. N. Choudhury, the learned senior counsel for the respondents submitted on instructions that as on date, there has been no alienation or creation of third party rights. The learned senior counsel further submitted that any third party rights if created would be subject to the final result of the suit. This Court takes the said submission made by the learned senior counsel for the respondents as an undertaking also before this Court.

18. This Court further takes note of that the construction had already begun and is in the advance stage, stalling the construction could not be in the interest of justice in as much as the loss which would be suffered by the defendant Nos.1 & 2 would far exceed taking into account that construction materials which are already lying would become unusable. In addition to that, if at the end of the trial, the plaintiff's suit is dismissed, the defendant Nos.1 & 2 cannot be compensated by any decree of the Court. Under such circumstances, this Court is of the opinion that there is no irreparable loss, harm and injury for the purpose of stopping the construction which is already in the advance stage.

19. This Court however makes it clear that this Court has not granted the injunction by taking into due consideration the undertaking so given which has been recorded herein above and the same shall be duly considered by the learned Trial Court while disposing of the suit.

20. Before concluding, this Court further finds it relevant to deal with the submission made by Mr. B. D. Deka, the learned counsel for the petitioner that the construction so carried out as per inspection report is in violation to the building permission.

21. This Court taking into account that there has been no relief sought for in the plaint against the Goalpara Municipal Board who had granted the construction permission is not inclined to accept the said submission. Be that as it may, the petitioner herein would be at liberty to take the said matter before the said Authority and the pendency of the suit shall not be a bar.

22. Taking into account the above, this Court therefore is not inclined to interfere with the order passed by the learned First Appellate Court dated 27.03.2024 passed in Misc. Appeal No.03/2023.

23. In view of the above, the instant petition stands disposed of.

24. The interim order passed in I.A.(C) No.1109/2024 stands vacated and the said

application stands closed in view of the present order.

JUDGE

Comparing Assistant