

03 12.06.19

Ct. No. 02

akd

F.M.A.T. 521 of 2019

With

CAN 4885 of 2019

Sabita Srivastava

Vs.

Jaiparakash Agarwal & Ors.

Mr. Jiban Ratan Chatterjee,

Mr. Soumik Ganguly,

Ms. Kumkum Mukherjee.

... for the appellant.

The present appeal arises from an order dated 30th May, 2019 passed by the learned Civil Judge (Senior Division), Siliguri in Title Suit No. 26 of 2019, by which the prayer for ex parte ad interim order of injunction is refused and the plaintiff/appellant was directed to file requisites.

It is beyond cavil that ordinarily the Court should not pass any order of injunction, be it ad interim or otherwise, without affording an opportunity of hearing to the defendants. However an exception is carved out under Order XXXIX Rule 3 of the Code of Civil Procedure, which empowers the Court to pass an ex parte ad interim order of injunction provided it would cause irreparable loss and injury and/or may invite an irreversible situation. It is obligatory on the part of the Court to record reasons before passing ex parte ad interim order of injunction, as any infraction and/or non-adherence would entail such order liable to be quashed and set aside.

The plaintiff/appellant filed a suit for declaration that the purported deed of conveyance dated 30th March, 2017 is bad and illegal and liable to be cancelled and delivered up. It is alleged that taking advantage of the Power of Attorney executed simultaneously with an agreement for sale, the purchaser, the defendant nos. 1 and 2, executed and registered the purported deed of conveyance in

favour of the other defendants, when the time was the essence of the said agreement. In other words, it is contended that the agreement for sale provides that it shall be completed within five months from the date of its execution and, therefore, such time being the essence of the contract the agreement ipso facto seized, exhausted and/or lapsed on the failure of the principal defendants in completing the transaction within such period.

It does not appear from the averments made in the plaint that the plaintiff/appellant ever attempted to cancel or rescind the said agreement and/or the power of Attorney, but the entire shelter is taken under the time being the essence of the agreement. It further transpires from the pleadings that the said property was mortgaged or put as collateral security in securing the loan from the financial institution and the action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act.) has already been initiated after declaring the subject property as non-performing assets and the appellant has already approached the Debt Recovery Tribunal with an application under Section 17 of the said Act. It further transpires that another proceeding under the said Act had been initiated against the defendant nos. 3 and 4 and an identical application under Section 17 of the said Act had been made before the Debt Recovery Tribunal and an application was made for an interim protection.

Since the interim protection was refused, the matter was carried to the Appellate Tribunal and it appears that an order of status quo with regard to the possession was passed and according to the learned Advocate for the appellant the same is operative till date.

It is no longer res-integra that the consideration at the time of passing an ex parte ad interim order of

injunction is different than the consideration for passing an interim order after inviting the defendants to disclose their defence. Even if the plaintiff has been able to make out a prima facie case, the Court should not be swayed by such fact only and recorded its findings that delay in passing an order would cause severe injury to the appellant inviting the Court to take shelter under the exception carved out under Order XXXIX Rule 3 of the Code.

Though we do not approve the reasons and/or findings recorded by the Trial Court in refusing to pass ex parte ad interim order of injunction, yet on the findings recorded hereinbefore we do not find that it is a fit case where the ex parte ad interim order of injunction should be passed.

Since considerable time has elapsed, as the plaintiff/appellant exhausted their remedy by filing an appeal before this Court, we extend the time for filing the requisites. The appellant is directed to put in the requisites, as directed by the Trial Court in the impugned order, within a week from date.

For abundant precaution it is hereby made clear that the observations recorded hereinabove are mere tentative and restricted to the prayer for ex parte ad interim order of injunction and, therefore, shall not have any persuasive value at the time of considering the prayer for interim order in presence of the defendants/respondents.

The appeal and application are thus dismissed.

(Hiranmay Bhattacharyya, J.)

(Harish Tandon, J.)

