

05 02.02.2021

Ct. No. 02

akd

F.M.A.T. 64 of 2020
CAN 1 of 2020 (old no. CAN 716 of 2020)

Sri Raghunath Sikder & Anr.
Vs.
Sri Tapas Saha.

Mr. M. P. Gupta,
Mr. Dilip Kumar Sailo.
... for the appellants.

Mr. Arindam Sen,
Mr. Sandeep Prasad Shaw,
Ms. Rinku Sen.
... for the respondent.

The present appeal arises from an order no. 30 dated 22nd November, 2019 passed by the learned Civil Judge (Senior Division), 1st Court, Barasat in Title Suit No. 210 of 2013, by which an application under Order XXXIX Rule 4 of the Code of Civil Procedure filed by the defendants/appellants was dismissed and an application for injunction was allowed on contest without costs.

Indubitably, the plaintiff/respondent filed a suit for specific performance of an agreement for sale of an immovable property at a consideration money of Rs.21 lakhs. Out of the said consideration money a sum of Rs.6.5 lakhs was paid by way of earnest money and it is alleged by the plaintiff that despite he being ready and willing to perform his obligation under the written agreement dated 16th February, 2013 there was a failure on the part of the defendants/appellants to honour the terms of the said agreement and, therefore, the plaintiff was constrained to file a suit for specific performance of an agreement for sale.

It is further alleged in the plaint that several requests were made in completing the transaction, but the negligence on the part of the

defendants/appellants is eminent and evident. On the conspectus of the aforesaid facts an application for temporary injunction was taken out for an order restraining the defendants from creating any third party interest, alienating, transferring and/or dealing with the property in any manner whatsoever and also from changing the nature and character thereof.

The said application for temporary injunction was moved before the Court for an ex parte order of injunction, which was, in fact, granted by the Trial Court directing both the parties to maintain status quo with regard to the nature, character and possession of the suit property. Simultaneously the Court directed the plaintiff/respondent to comply with the provisions under Order XXXIX Rule 3 of the Code of Civil Procedure which was admittedly complied with.

The defendants/appellants entered appearance and instead of contesting the application for temporary injunction took out an application under Order XXXIX Rule 4 of the Code for vacation, variation and setting aside the ex parte ad interim order of injunction. The Trial Court rejected the said application on the premise that there is a prima facie existence of an agreement for sale reduced in the written agreement, which manifest the acceptance of earnest money and, therefore, the ex parte ad interim order of injunction already granted should be made absolute.

Mr. M. P. Gupta, learned Advocate appearing for the defendants/appellants, vociferously argues that there has been a complete failure of justice on the part of the learned Trial Judge in rejecting the application under order XXXIX Rule 4 of the Code without considering the supporting documents to the

pleadings. He arduously submits that the time was essence of the contract, which would be evident from the terms and conditions embodied in the purported agreement for sale. The moment it expires, no right is created to the intending purchaser to approach the Court for specific performance of the said agreement. Mr. Gupta vehemently submits that the existence of a purported agreement for sale has been denied by the defendants and once the said agreement is shrouded with suspicion the perpetrator of the commission of an act which per se is illegal should not be permitted to reap the benefit therefrom. Though feebly, it is submitted by the Mr. Gupta that the said agreement does not contain sufficient stamp duty nor it was registered and, therefore, the Court ought not to have passed an order of temporary injunction.

On the other hand, the learned Advocate appearing for the plaintiff/respondent submits that the defendants entered into an agreement for sale after putting signature on each paper thereof and also accepted the earnest money of Rs. 6.5 lakhs, which is sought to be denied by them. It is further submitted that there was no misleading or false statement made in the application for temporary injunction or in the plaint, therefore, requirements under Order XXXIX Rule 4 of the Code have not been satisfied.

Indubitably, the entire argument is hovering around the point whether the Trial Court was justified in rejecting an application under Order XXXIX Rule 4 of the Code as well as allowing an application for temporary injunction simultaneously. Before we proceed to decide the matter on merit on the facts, which emanates from the respective

pleadings of the parties, it would be profitable and relevant to quote the provisions contained under Order XXXIX Rule 4 of the Code.

“Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

provided that if in 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 so to do in the interests 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 party.”

It is manifest from the aforesaid provision that the defendants have the rights to file an application under the aforesaid provisions provided the application for temporary injunction as well as the plaint based upon which the ad interim order of injunction was passed contain false and misleading statements or there has been gross suppression of material facts occasioning failure of justice.

We are not unmindful to the proposition of law that there is a distinction between the “suppression of facts” and the “suppression of material facts”. The facts, which do not constitute the integral part of the cause of action, if not disclosed, cannot be termed as “suppression of material facts”, whereas the facts, which germane to the cause and intricately related therewith, are suppressed, may disentitle the

recalcitrant litigant to approach the Court and obtain an order of injunction. What is sought to be projected before us is that though the plaintiff had averred that they caused the letters signifying their intention to act upon the said agreement and readiness and willingness to perform their obligation therein, there is a complete lack of proof of service of such letter upon the defendants.

We are not impressed with the aforesaid submissions for the simple reason that whether the aforesaid letter was duly served upon the defendants or not is a matter of evidence to be decided at the time of trial.

It is no gainsaying that the plaintiff has to prove his case and cannot take the benefit of defendant's weakness. Once the Court finds that this is a triable issue, the protection of the property is the virtue for the simple reason that if any party is left to deal with the property and dissipated the same either in its value or otherwise, it may invite, in some cases, irreversible situation. Though the injunction application is decided on three golden parameters; namely the existence of prima facie case, balance of convenience and inconvenience and irreparable loss and injury, yet the Court has to strike the balance between three in order to ascertain whether eminent threat to the status of the right claimed in the lis is in existence and the protection is required.

The consideration at the time of passing an ad interim order of injunction is different than the consideration at the stage of disposal of an application for temporary injunction in presence of both the parties and after the exchange of affidavits.

There are three remedies available to the defendant, who suffered an ad interim order of

injunction; firstly he can answer to the show cause issued upon him by filing opposition to an application for temporary injunction and invite the Court to decide the same on merit; secondly he can file an application under Order XXXIX Rule 4 of the Code seeking modification, variation and/or setting aside the order on the grounds enumerated therein; and thirdly he can prefer an appeal under Order XLIII Rule 1 (r) of the Code of Civil Procedure.

However, once he exhausts third remedy the defendant has to confine itself within the peripheral of the application for temporary injunction and the plaint as well as the documents filed therein and has to demonstrate before the Court that despite the existence of those facts there was no occasion to pass an ex parte ad interim order of injunction. So far as the second remedy is concerned, the consideration of the Court should be whether the plaintiff had obtained ex parte ad interim order of injunction by making false misleading statements and/or by suppressing material facts. The consideration of such application is different than the consideration for disposal of an application for temporary injunction. Even if the Court finds that there is no false, misleading and/or suppression of material facts and rejected the application under Order XXXIX Rule 4 of the Code, it does not act as deterrent on the part of the Court to decide the application for injunction and dismissing the same holding that the plaintiffs have miserably failed to establish the prima facie case or the balance of convenience and inconvenience does not lie in their favour or there is no eminent injury to be suffered. The distinction is real and apparent and to be applied by the Judge in relation to the applications come before him for disposal.

In the instant case, it is submitted that the application for injunction was not fixed for hearing on the said date, which would also be apparent from the second paragraph of the impugned order that an application under Order XXXIX Rule 4 of the Code was fixed for hearing. The aforesaid impression further gets impetus from the act of the plaintiff recorded in the first paragraph of the impugned order that he sought an extension of injunction earlier granted. There was no opportunity given to the defendants/appellants to argue the case on the merit of an application for temporary injunction as the date on which the impugned order is passed was not fixed for hearing of the said application.

Furthermore we do not find either from the averments made in the application under Order XXIX Rule 4 of the Code or from the submissions advanced before us that the defendants have been able to make out any case relating to the grounds envisaged under Order XXXIX Rule 4 of the Code and there was no infirmity or illegality in rejecting the said application.

However, the order is modified to the extent that the application for temporary injunction, which was disposed of by the impugned order, is hereby set aside and is revived to be disposed of afresh.

The Trial Court is directed to fix a date for disposal of an application for temporary injunction in presence of both the parties and effort should be shown to fix a date not beyond a fortnight from date of the communication of this order.

Since the affidavits are already exchanged by the parties to the application for temporary injunction, the Trial Court shall make an endeavour to dispose of the same within two weeks from the date to be fixed in the light of the directions passed herein on

merit.

For abundant precaution it is once again made clear that the observations made hereinabove is restricted to the application under Order XXXIX Rule 4 of the Code and shall not have any persuasive impact in the mind of the learned Judge in deciding the application for temporary injunction on its merit.

The appeal is disposed of. All connected applications, if there be any, are accordingly disposed of.

(Harish Tandon, J.)

(Kausik Chanda, J.)