

**FMAT 141 of 2021
with
IA No. CAN 1 of 2021
with
IA No. CAN 2 of 2021**

Anarul Mollah

- Versus -

Amjad Ali Mollah & Ors.

(Through Video Conference)

**Mr. Anirban Mitra
Mr. Amit Halder
Ms. Saberi Saha**

....For the appellant

Re : IA No. CAN 1 of 2021

We have perused the report filed by the Stamp Reporter.

In view of the fact that the appeal is within the period of limitation, there is no requirement to file the application for condonation of delay.

The application for condonation of delay is thus disposed of by recording that the appeal is filed within time.

**Re : FMAT 141 of 2021
With
IA No. CAN 2 of 2021**

The appeal is arising out of an order passed by the learned Civil Judge (Senior Division), Basirhat in connection with an application for injunction in Order 39 Rules 1 & 2 of the Code of Civil Procedure in a suit for partition filed by the appellant. Learned trial judge refused to pass interim order on the ground that in the event any

order of injunction is passed at this stage, it may cause inconvenience and irreparable loss and injury to the defendant.

Learned counsel appearing on behalf of the appellant has submitted that the plaintiffs and the defendant no. 1 are the co-sharers in respect of total 9 decimals, originally owned by Madar Molla, the father of the plaintiff no. 5 and defendant no. 1 and the predecessor of the plaintiff nos. 1 to 4.

It is trite law that in a partition suit even the co-sharers have right over every inch of the property and it is the duty of the Court to pass an order of injunction, may be in the form of *status quo* as to the nature, character and possession of the parties till the disposal of the partition suit, as failure to pass any such order may cause irretrievable injury to the plaintiffs.

It appears that in refusing to pass the interim order, the learned trial judge has relied upon the learned advocate commissioner's report and existence of buildings and houses including the constructions substantially made in a portion of the suit property, which alleged to have been done by the respondent no. 1. The written objections filed by the respondents in the trial court shows that they have pleaded mutual partition and amicable settlement, as a justification for their possession and construction. The learned trial judge observed that having regard to the wrong possession of the defendant over the

suit property and there has been substantial construction and if any order of injunction is passed, it would cause undue hardship. Moreover, there is a burial ground also which may cause inconvenience to the public.

We have considered the pleadings as well as the commissioner's report and the written objections filed by the defendants. The sketch map shows existence of a burial ground and various buildings and houses standing in the suit property and shows people including the co-sharers of the property are residing therein making houses. It further appears that the defendant no. 1 has made substantial construction in a portion of the suit property claiming ownership by way of mutual partition. However, the defendant no. 1 had claimed the ownership of the portion of the suit properly based on mutual partition is justified or valid is a matter to be decided by the trial judge at the time of hearing of the suit.

A co-ordinate Bench presided over by our former Chief Justice Jyotirmay Bhattacharya in FMA 1371 of 2014 (CAN 2463 of 2015) (Daspur-I Agriculture Marketing Co-operative Society Ltd. Vs. Tapan Bhattacharyya @ Adhikary & Ors.) on 6th April, 2015 addressed similar facts and circumstances and has succinctly laid down the law in the following words:-

“When substantial construction was allowed to be raised by the plaintiff in our view, the plaintiffs cannot now seek injunction for restraining the said defendant no. 1 from completing the said construction. The conclusion we draw by following the principles as laid down

by Hon'ble Supreme Court in the case of Mondali Ranganna & Ors. –vs- T. Ramachandra & Ors., reported in 2008 (11) S.C.C., Page 1 wherein the Hon'ble Supreme Court had held that grant of injunction is an equitable relief and as such, if a person had kept quiet for a long time and allowed another to deal with the property exclusively, ordinarily he would not be entitled to an order of injunction. The Hon'ble Supreme Court, thus, in an identical situation held that interest of justice will be subserved, if while allowing the party to carryout construction of the building, a condition is imposed to the extent that such construction will be made subject to the ultimate decision of the suit and the hearing of the suit is expedited. Identical view was expressed by a learned Single Judge of this Court almost is an identical situation, in the case of Soumendra Kumar Chatterjee & Anr. –vs- Sri Sridhar Jew & Ors., reported in AIR 1971 Calcutta, page 264.

That apart we find that though the appellant has purchased 32 decimals of land but he is raising construction only on 4 decimals of land. Considering the area of this land on which such construction is being raised, we cannot hold that the relief claimed in the suit may ultimately be frustrated if the appellant is allowed to complete the incomplete construction without permitting him to extend the area of such construction.

Thus, in the facts of the present case, we respectfully disagree with the findings of the learned Single Trial Judge that this is a fit case where injunction should be granted in restraining the defendant no.1/appellant from completing the construction already made therein.

We, thus, modify the impugned order by permitting the defendant no.1/appellant to complete the incomplete construction which has already been made by the said defendant over a portion of the suit property without further extending the area of such construction and without claiming any special equity for such construction in the suit property.”

The commissioner's report does not clearly say that any fresh construction has taken place. In the instant case, as the construction has already been made as recorded by the learned trial court in Order No. 12 and in the absence of any evidence of further construction being

carried out by the defendant no. 1 or any of the other co-sharers in the suit property, we are of the view that the learned trial judge did not commit any error in refusing to pass an interim order.

We, however, make it clear that there shall be no further construction and parties shall maintain *status quo* with regard to nature and character of the suit property and/or possession of the parties in the property, without undertaking any further construction, without the express leave of the trial Court till the disposal of the suit.

This order shall immediately be communicated to the parties.

We further make it clear that construction already completed are not to be disturbed by this order.

The appeal and the stay application stand disposed of.

There shall, however, be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties on the usual undertakings.

(Subhasis Dasgupta, J.)

(Soumen Sen, J.)