

22-04-2021

Ct. 17

FMAT 208 of 2021
With
CAN 1 of 2021

Selima Khatun Bibi
Versus
Sk. Morjen Ali & Ors.

(Through Video Conference)

Mr. Kumar Jyoti Tewari, Adv.
...for the appellant

Mr. Tanmoy Chowdhury, Adv.
Ms. Ritoprita Ghosh, Adv.
...for the respondent no.1

The affidavit of service filed in Court today be kept with the record.

By consent of the parties, the appeal and the application are taken up together for hearing and disposed of by this common order.

The appellant is the defendant in a suit for partition. The application filed by the appellant under Order 39 Rule 4 of the Code of Civil Procedure for modification of the ad-interim order passed against the appellant was rejected by the learned trial court. This has given rise to the present appeal.

Sk. Morjen Ali filed a suit for partition against Selima Khatun Bibi and others on 17th August, 2020. On the same date an ad-interim order of injunction was passed directing both the parties to maintain status quo in respect of nature, character and possession of the suit property. The defendant no.1/appellant has filed an application under Order 39 Rule 4 of the Code of Civil Procedure on the ground that if the said order of status quo is maintained, it would cause undue hardship to the appellant.

The case of the defendant no.1 in short is that, the suit property was originally belonged to Sk. Lal Mahammad in 16 annas. He sold out the specifically demarcated portion of 3 satak out of the suit plot to the predecessor of the plaintiff namely, Sk. Apsar Ali, who possessed the said demarcated portion and now he has instituted this false suit against the defendants mentioning that the suit property is possessed in ejmal. On 15th June, 2019, the local Amin measured the suit property in presence of all the parties and also drawn the map as per the title of the parties and thereafter defendant no.1, being the appellant herein, after consultation with the plaintiff and after taking permission from the local Panchayat, started the construction of the new building over the land possessed by her and her predecessors and after the said construction was completed upto the linton level, the plaintiff filed this suit and got the injunction order without notice.

The contention of the appellant before the learned trial court was that the defendant no.1 along with her children are staying in the cowshed and accordingly the order of injunction may be modified. The contention of the plaintiff before the trial court was that the defendant no.1 has separate house for her residence and the defendant no.1 is trying to make new construction on the vacant portion of the suit property about which the plaintiff raised objection when she started to construct. But the defendant no.1 ignored such objection.

The defendant appears to have placed reliance upon the judgments of our Court to show that in a given facts and circumstances, in a suit for partition, the parties may be allowed to raise construction which, however, shall not create any equity in the event it is ultimately found and held that the construction was raised in

the portion of a properly not allotted to the party raising such construction.

The learned Judge felt that the judgments referred to by the defendants in justification of continuance of the construction is not applicable in the present case and accordingly, the learned Judge rejected the application filed by the appellant for modification.

It appears from the records and the submission made on behalf of the parties, that the plaintiff is not possessing a demarcated portion and has raised a construction thereon on the plea that the said land exclusively belongs to him. If such explanation is accepted then the plaintiff should not have raised such construction. The argument that in a partition suit, a co-sharer would not be allowed to raise a construction, is self-defeating as on the selfsame ground the plaintiff cannot justify the construction that he had already made as the property is not partitioned. It appears that on 15th June, 2019, the measurement of the suit property had taken place and prima facie shows that the share is in occupation of the appellant. It is too early to comment as to whether on the partition of the land in which the defendant is residing is to be considered as an exclusive property of the defendant as the partition suit is pending. In fact, every co-sharer is entitled to every inch of the property being the subject matter of the partition unless the property is divided by meets and bounds.

On consideration that the plaintiff had enjoyed the property by raising a construction, it would be unfair at this stage if the defendant no.1, being the appellant herein, is not bestowed with the same benefit. Accordingly, we permit the defendant no.1 to raise construction on the basis of a sanction plan and not otherwise and any such construction

shall not give any equity in favour of the defendant in the pending suit.

We have been informed by the parties that the shares were admitted.

In view thereof, we direct the parties to approach the learned trial court for passing a preliminary decree on admitted share and to appoint a Commissioner for partition to divide the property by meets and bounds according to their shares, unless they agreed to do so mutually upon declaration of their share.

The appeal succeeds.

The impugned order is set aside.

With the above observation, the appeal and the application are disposed of.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Saugata Bhattacharyya, J.)

(Soumen Sen, J.)