

22.11.2021
Ct. No.15
Sl. Nos.15 & 16
akd

F.M.A.T. 275 of 2021 *[via video conference]*
CAN 1 of 2021
CAN 2 of 2021

[Sk. Saifuddin -Vs- Sk. Yamin & Ors.]

W I T H

F.M.A.T. 464 of 2021 *[via video conference]*
CAN 1 of 2021

[Sk. Saifuddin -Vs- Sk. Yamin & Ors.]

Mr. Sourav Sen

... .. for the appellant
[in both the appeals]

Mr. Debanjan Banerjee

... .. for the respondents
[in both the appeals]

FMAT 275 of 2021 is directed against order dated 28th June, 2019 whereby the ad-interim order of injunction directing maintenance of status quo by the defendant no.1-appellant and plaintiff-respondent in respect of nature, character and possession of 'B' schedule property was made absolute till the disposal of the suit.

Pursuant to leave granted by this court, FMAT 464 of 2021 was filed whereby order dated 7th March, 2020 refusing to set aside the aforesaid order of injunction has been challenged.

Learned advocate appearing for the appellant submits adequate opportunity of hearing was not granted to his client and the court below had not gone into the merits of the case while making the ad-interim order absolute. Hence, the order impugned is liable to be set aside. He further submits the

respondent-plaintiff had not averred in the plaint that he had made any construction and subsequently changed his stance claiming that construction 'H2' made on the suit plot had been undertaken by him. It is also contended that the construction is almost complete and it is prayed that the construction be permitted to be made habitable without prejudice to the rights and contentions of the respondent no.1-plaintiff and/or creating any equity in favour of the appellant-defendant.

On the other hand, learned advocate appearing for the respondent no.1 argues that the orders impugned do not call for interference. Appellant-defendant no.1 failed and neglected to appear before the court below inspite of adequate notice and considering the fact that the suit is for partition the order of status quo as regards nature, character and possession of the suit property was made absolute. Subsequently, application for vacating the said order was also turned down as no new facts are placed on record. He emphatically argues further construction on the suit property would be prejudicial to his interest and adversely affect the litigation.

We have considered the materials on record in the light of the aforesaid submissions. Perusal of the order dated 28th June, 2019 shows that the advocate of the appellant-defendant no.1 was not present during the hearing and the contentions of the appellant-defendant no.1 were not effectively canvassed before the court below when the ad-interim order of injunction had been made absolute. Ordinarily we would not have interfered with such order as due notice had been served upon the appellant-

defendant no.1. However, we note from the materials on record that construction of the house 'H2' is almost at the stage of completion. However, due to the order of injunction the property is uninhabitable.

In this backdrop, appellant-defendant no.1 prayed for variation or modification of the order of injunction to the limited extent of making the house property habitable without creating any equity in his favour.

This, however, is disputed by the plaintiff-defendant no.1 who contends that the construction was undertaken by him.

However, no such pleading is appearing from the plaint filed by the respondent no.1-appellant.

Although we note that the suit is one of partition, it must almost be borne in mind that the balance of convenience and inconvenience of the parties require that pending hearing of the suit, the suit property is not rendered uninhabitable due to an interim interdict passed by the court below.

These aspects of the matter has not been addressed by the court below.

In this backdrop, we consider it prudent to set aside the order dated 28th June, 2019 and remand the matter for fresh consideration after giving an opportunity to the appellant-defendant no.1 to file a written objection to the injunction application within seven days from date. Upon such application being filed, the injunction application shall be considered and disposed of within two months from date without granting unnecessary adjournments.

In the light of the aforesaid directions, order dated 7th March, 2020 is also set aside.

Both the appeals are accordingly, disposed of.

In view of disposal of the appeals, the connected applications are also disposed of.

There shall be no order as to costs.

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

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)