

07.01.2021.
Item No. 20

F.M.A.T. 350 of 2020
With
C.A.N. 1 of 2020 (Old No. C.A.N. 3894 of 2020)
C.A.N. 3 of 2020 (Old No. C.A.N. 3897 of 2020)

Sri Shyamal Majumder
Vs.
Sri Subhas Majumder @ Goutam and others.

Mr. Prantick Ghosh,
Mr. Siddhartha Sarkar,
MR. Sourav Guha.

... for the appellant.

Mr. Abhimanyu Banerjee.
... for the respondent nos. 1 & 4.

The instant appeal arises from an *ex parte* ad interim order of injunction.

The plaintiff/appellant filed a suit for partition and separation of shares of the joint property and took out an application for injunction alleging that the defendant no. 1 and 4/respondent no. 1 and 4 in collusion with their men, agents and assigns are trying to deprive the plaintiff/appellant from his legitimate share in the suit property. It is further alleged that the aforesaid defendants are trying to encroach the portion in occupation of the plaintiff/appellant and reasonable apprehension has been created in the mind of the plaintiff/appellant that they will alienate the property to deprive the plaintiff/appellant therefrom.

On the basis of the aforesaid allegations, an application was moved for an *ex parte* ad interim order of injunction, which was refused by the trial court. Subsequently, an appeal was filed before the learned District Judge, though it does not lie thereto,

and an interim protection was granted, which was enjoyed by the plaintiff/appellant for a considerable period of time. Immediately after having pointed out that the learned District Judge is denuded of the jurisdiction to entertain such appeal, the same was dismissed and the present appeal is filed assailing the parent order passed by the trial court upon condonation of delay. The delay was condoned by this Court on condition, which has been fulfilled and/or complied with by the plaintiff/appellant.

The learned Advocate for the defendant no. 1 and 4/respondent no. 1 and 4 submits that there is no attempt to grab the portion, share or property of the plaintiff/appellant and the entire allegation is unfounded and incorrect. It is further submitted that the defendant no. 4 is residing at her matrimonial house having no semblance of physical possession in the ancestral house nor has been allowed to enter thereto by the plaintiff/appellant and, therefore, the allegation of making construction is a concocted story in order to drag and delay the disposal of the injunction application. He also submits that the defendant no. 1 is residing in a portion of the joint property by constructing a house and the plaintiff/appellant has also constructed a house thereat and residing therein.

Ordinarily, the appellate court while considering the matter flowing from the refusal to pass an *ex parte* ad interim order should not be swayed by the version of the defendants and restricted its perusal to the averments made in the plaint and documents annexed thereto. However, such rule is not rigid; as in exceptional circumstances, the court may consider the stand of the defendants even in an appeal against an order refusing to pass an *ex parte* ad interim order of injunction.

Be that as it may, without entering into such disputed arena, more particularly, when a substantial time has elapsed in the meantime, it would sub-serve the justice if the application for temporary injunction is disposed of itself.

Since the entire allegation hovers around the defendant no. 1 and 4, who are represented before us, there is no impediment on the part of the trial court in proceeding to dispose of the application for temporary injunction in absence of other defendants.

The defendant no. 1 and 4 are, therefore, directed to file affidavit-in-opposition to the application for temporary injunction filed before the trial court within two weeks from date; reply thereto, if any, shall be filed within a week thereafter. The trial court is directed to dispose of the application for temporary injunction within two weeks from the date of expiration of period for exchange of affidavits, as indicated above, in accordance with law.

It is made clear that the consideration at the time of passing an *ex parte* ad interim order is different than at the time of disposal of the application for temporary injunction.

With these observations, the instant appeal is disposed of.

In view of disposal of the appeal itself, the connected applications are become infructuous and the same are also disposed of.

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

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(Harish Tandon, J.)

(Kausik Chanda, J.)