

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

C.O. 1583 of 2021

Sudharshan Kumar Birla

Vs.

Raiganj Properties Pvt. Ltd. & Ors.

For the Petitioners : Mr. Saktinath Mukherjee..... senior
advocate
Mr. Aniruddha Chatterjee,
Mr. Jishnu Chowdhury,
Mr. Sourav Bhagat,
Mr. Biswajit Kumar,
Ms. Shruti Swaika
..... advocates

For the Opposite Party :Mr. Surajit Kumar Mitra... Senior
advocate
Mr. Bratin Kumar Dey,
Ms. Anjana Banerjee,
Mr. Pradeep pandey
.....advocates

Heard on : 27.09.2021

Judgment on : 07.10.2021

Hiranmay Bhattacharyya, J.:-

The instant application is at the instance of the defendant no. 1 and is directed against an order no. 4 dated July 28, 2021 passed by the learned District Judge-in-charge, 24 Parganas (south) at Alipore in Misc. Appeal No. 124 of 2021.

By the order impugned the application for stay filed by the petitioner herein before the First Appellate Court praying for stay

of operation of the order dated July 5, 2021 passed by the learned Trial Judge was rejected.

The facts giving rise to the instant Civil Order is as follows:-

The suit property is a strip of land measuring 110 feet in length and 16 feet in width butted and bounded by premises no. 3/2, 3/1, 3B and 5, Raja Santosh Roy Road as well as the Raja Santosh Roy Road itself. The suit property has been specifically described in Schedule A to the plaint. The plaintiff/ opposite party no. 1 herein claims to be the owner of municipal premises no. 3B, Raja Santosh Road which has been specifically described in Schedule B to the plaint by virtue of the registered deed of conveyance dated 11.04.2005.

The plaintiff claims to be using the Schedule A property as a common passage for ingress and egress of the B schedule property since the purchase of the B scheduled property. While the plaintiff attempted to repair the existing boundary wall and gate of the B schedule property by the side of the common passage, the defendant and their men and agents and associates have damaged a portion of the boundary wall which was being repaired and threatened the men contractors and masons engaged by the plaintiff with dire consequences. The defendants were trying to forcefully and illegally acquire the said common passage with an intention to establish their illegal exclusive rights over the said common passage. On such allegations the opposite party no. 1 herein filed a suit for declaration that the A schedule property is a common passage and also that the plaintiff has every right to use and enjoy the A schedule property without any resistance and disturbance from the defendants and

for permanent injunction restraining the defendants and the men and agents from forcibly obstructing the plaintiff and his men and agents in the matter of free ingress and egress through the said common passage.

The opposite party no. 1 herein filed an application under Order 39 Rule 1 and 2 of the Code of Civil Procedure praying for an order of temporary injunction restraining the defendants and their men and agents from creating hindrance and obstruction from free ingress and egress and disturbance to the plaintiff and his men and family members in the matter of enjoying the A schedule property in any manner whatsoever including free ingress and egress.

The Learned Civil Judge, Junior Division, 2nd Court at Alipore by an order dated July 5, 2021 in Title Suit No. 7371 of 2021 passed an ad interim order of injunction restraining the defendants and their men and agents from creating hindrance, obstruction to free ingress and egress to the suit property of the plaintiff and his family members with respect to the suit property till August 3, 2021.

The petitioner herein preferred a Miscellaneous Appeal being no. 124 of 2021 before the learned District Judge at Alipore challenging the order dated July 5, 2021 passed by the learned Trial Judge. In connection with the said appeal the petitioner filed an application praying for stay of operation of the order dated July 5, 2021 passed by the learned Trial Judge.

It was specifically contended in the said application for stay that Birla Eastern Ltd. is the owner of premises no. 3/1, Raja

Santosh Road and access to such premises is through the passage. It was specifically contended that since 1960 the owners of the premises no. 3B, Raja Santosh Road have never used the said passage and the plaintiff also do not have any right of user over the said passage. It was also contended that on or about April 28, 2021, the plaintiff broke open a part of the boundary wall abutting the passage and installed a gate to have access to the same for which Birla Eastern Ltd. by advocate's letters dated May 1, 2021 and May 13, 2021 asked the plaintiff to desist from the illegal act of trespass.

The said application for stay was rejected by the learned Trial Judge by the order impugned. Being aggrieved against such order, the defendant no. 1/ petitioner herein has preferred the instant civil order.

Mr. Mukherjee, the learned senior advocate for the petitioner contended that Gwalior Company Ltd. acquired right, title and interest in respect of the premises no. 3/1 Raja Santosh Road, Kolkata 27 by virtue of a deed of conveyance dated March 29, 1956. By various schemes of amalgamations/arrangement amongst the group companies of Gwalior Company Ltd, premises no. 3/1 Raja Santosh Road came to belong to Birla Eastern Ltd. He contended that by virtue of the deed of conveyance dated March 29, 1956 Birla Eastern Ltd. acquired free right and liberty in common with the owners and occupiers for the time being of premises no. 3/2 Raja Santosh Road and no. 5 Raja Santosh Road and all other persons entitled to like rights and liberties with or without horse cattle or other animals cart carriages motor cars and other vehicles of whatsoever description for all purposes

connected with the use and enjoyment of the said premises to pass and repass along and over the passage leading from Raja Santosh Road and shown in the map as common passage. By referring to a portion of the said deed of conveyance Mr. Mukherjee contended that the owners, occupiers and all other persons who have right of access to premises no. 3/2 and 5 Raja Santosh Roy Road have the right to use the said passage as a common passage but the said passage is for the exclusive use of the aforesaid persons and the plaintiffs have no right of user of the said passage. Mr. Mukherjee contended that the petitioner acquired right over the said passage by virtue of the deed of conveyance dated March 29, 1956. On the other hand, the deed of conveyance dated April 11, 2005, which is much later in point of time than the deed of conveyance of the petitioner did not grant any right in favour of the plaintiff over the said passage and as such the plaintiff cannot be permitted to encroach upon the said passage.

By referring to the site plan appended to the deed of conveyance of the plaintiff, Mr. Mukherjee contended that the said site plan indicates only two entrance on the southern side of the B scheduled property from Raja Santosh Roy Road. He further, contended that the said site plan does not indicate any gate or entrance on the eastern side of the B scheduled property. Thus, according to him the said passage was never used by the plaintiffs nor do they have any right thereupon.

Mr. Mukherjee relied upon a judgment passed by a Division Bench of this Court on March 3, 2008 in CRC No. 1369 of 2007 (*M/s. Hindusthan Auto Distributor vs. Kamlesh Khandelwal and*

ors.) and contended that the plaintiff cannot encroach upon the portion of the property which does not belong to him as per the deed of conveyance.

Thus, Mr. Mukherjee concluded by submitting that the order of injunction passed by the learned Trial Judge is required to be stayed as the learned judge of the First Appellate Court failed to exercise the jurisdiction vested in him by law by not passing an order of stay.

Mr. Mitra, the learned Senior Counsel for the plaintiff/opposite party no. 1 seriously disputed the contentions raised by Mr. Mukherjee. He contended that the passage has been indicated as a common passage in the plan appended to the deed of conveyance dated March 29, 1956 by virtue of which the petitioner is claiming right in respect of the said premises. He, further, submitted that the said deed of conveyance also recognised the right of other persons to pass and repass along and over the passage leading from Raja Santosh Roy Road. According to him expression "all other persons entitled to like right and liberties" cannot be given a restrictive meaning to imply that only the persons having right of access to premises no. 3/2 and 5, Raja Santosh Roy Road have the right to use the said passage. He, further, contended that a gate on the eastern side of the B scheduled property by the side of the common passage was in existence since long and since the defendants were creating obstruction in the repair work of the existing boundary wall and gate of the B schedule property by the side of the common passage, the opposite party no. 1 herein was compelled to file the instant suit. He, further, contended that the order of injunction

did not have the effect of restraining the user of the common passage by the defendants but the defendants were only restrained from obstructing the plaintiff from using the said passage. Mr. Mitra submitted that the petitioner is alleging illegal trespass by the plaintiff upon the passage over which they claim to have exclusive right. The petitioners did not approach the Court for relief alleging violation of their right. Mr. Mitra contended that, such conduct is to be taken note of while vacating the ad interim injunction. In support of such contention, Mr. Mitra relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Gujarat Bottling Co. and ors vs. Coca Cola and ors* reported at (1995) 5 SCC 545. He, further, submitted that it is well settled that a Court should not hold a mini trial at the stage of grant of temporary injunction. In support of such contention Mr. Mitra relied upon a judgment of the Hon'ble Supreme Court of India in the case of *Zenit Metaplast Private Limited vs. State of Maharashtra and ors.* reported at (2009) 10 SCC 388.

I have heard the learned advocates for the parties and have considered the materials on record.

The suit property is a strip of land leading from the Raja Santosh Roy Road and proceeds towards north up to premises no. 3/1, Raja Santosh Roy Road. Premises no. 5, Raja Santosh Roy Road is situated on the eastern side of the said passage and premises no. 3B is on its western side. The dispute is whether the said passage is for the exclusive use of the owners, occupiers etc. of the premises no. 3/1, Raja Santosh Roy Road and premises no. 5, Raja Santosh Roy Road or the same is a passage

for the beneficial enjoyment of premises no. 3B, Raja Santosh Roy Road, 5, Raja Santosh Roy Road and 3/1, Raja Santosh Roy Road.

The plaintiff claims to have a right over the said passage for the purpose of beneficial enjoyment of the property. On the other hand the defendant claims that such passage is only for the exclusive use of the owners and occupiers of the premises no. 3/1, Raja Santosh Roy Road and 5, Raja Santosh Roy Road and the plaintiff do not have any right over the passage.

It is the specific case of the plaintiff that the A schedule passage is a common passage used by the habitats of the premises no. 3B, Raja Santosh Roy Road along with premises no. 3/1, Raja Santosh Roy Road and premises no. 5, Raja Santosh Roy Road. The said common passage had been in existence since the year 1937 and at that point of time the Central Bank of India had been the owner of the original premises no. 3, Raja Santosh Roy Road. From the deed of conveyance dated April 11, 2005 it is evident that the vendor of the plaintiff herein acquired title in respect of the property of which B schedule is a part from Central Bank of India by a deed of conveyance dated October 1, 1937.

On the other hand, the petitioner claimed that only the owners and occupiers of premises no. 3/2, Raja Santosh Roy Road and premises no. 5, Raja Santosh Roy Road have exclusive right over the said passage.

Upon a bare reading of the deed of conveyance dated March 29, 1956, it, *prima facie* appears to this Court that the petitioner herein, claiming to be the owner of premises no. 3/2, Raja

Santosh Roy Road, has a right to pass and repass along and over the passage leading from Raja Santosh Roy Road for the enjoyment of the premises. The said passage has also been described as a common passage in the deed of conveyance of the petitioner. At this stage the petitioner has not been able to satisfy this Court that the right of the petitioner over the said passage is to the exclusion of the plaintiff/ opposite party no. 1 herein.

Mr. Mukherjee, the learned Senior advocate tried to impress upon this Court that the plaintiff do not have and also cannot have the right of user over the said passage as the site plan appended to the deed of conveyance of the plaintiff does not mention any entrance to the B schedule property by the side of the said passage. The mere fact that the site plan do not mention any entrance on the B schedule property by the side of the passage cannot take away the right of user of a party over such passage if such passage can be said to be a appurtenant to the B schedule property and also that such passage was used in common by the habitats of the premises no. 3B, Raja Santosh Roy Road along with premises no. 3/1, Raja Santosh Roy Road and premises no. 5, Raja Santosh Roy Road at least from the year 1937 as claimed by the plaintiff. Such fact is, however, required to be proved at the time of trial of the instant suit. It is well settled as held by Hon'ble Supreme Court of India in *Zenit Metaplast* (supra) that it may not be appropriate for any Court to hold a mini trial at the stage of grant of temporary injunction. It is also well settled that the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for

which he could not be adequately compensated by way of damages.

The plaintiffs claimed that the said passage was used as a common passage at least from 1937 whereas the petitioner herein in their application for stay has contended that since 1960 the owners of premises no. 3B, Raja Santosh Roy Road, Kolkata-27 have never used the said passage. Such factual dispute can only be resolved by trial on evidence. At this stage the Court is to consider whether the learned judge of the First Appellate Court was justified in rejecting the prayer for stay of the ad interim order of injunction passed by the learned Trial Judge.

The petitioner in the application for stay alleged that on or about April 28, 2021 the plaintiff broke open the part of the boundary wall abutting the passage and installed a gate to have access to the same. Birla Eastern Ltd. protested against such illegal act of attempted trespass by issuing letters dated May 1, 2021 and May 13, 2021 through its learned advocate. It appears from the letter dated May 13, 2021 that it was alleged on behalf of Birla Eastern Ltd. that the plaintiff has damaged the 6" thick wall which was raised in front of the gate a long time back. The said gate was towards the common passage and the wall has been demolished to enable wrongful use of the gate. Thus, it *prima facie* appears to this Court from the allegations contained in letter dated May 13, 2021 that the gate towards the common passage was in existence since long time back. It was also stated therein that since the building has already two gates on the Raja Santosh Roy Road the plaintiffs do not require nor entitled to any access to the common passage to have access to the main road.

Thus, the stand of the petitioner herein is that since the B schedule property has two gates on the main road i.e. Raja Santosh Roy Road, they are not entitled to any access through the common passage. A building may have gates on different sides. Merely because the B schedule property has two entrance on the main road it cannot be said at this stage that the plaintiff do not have any right of access through the common passage. This Court is of the prima facie view that the right of user over the said passage is necessary for the beneficial enjoyment of the B scheduled property as admittedly the said passage is adjoining the B Schedule property.

At this stage it does not appear to this Court that the plaintiff do not have any right of user over the said passage. As such the unreported judgment in the case of *Hindusthan Auto Distributor(supra)* relied upon by Mr. Mukherjee is of no assistance to the petitioner.

The petitioner has alleged that the plaintiff broke open a part of the boundary wall and installed a gate to have access to the property through the said passage. The petitioner kept quiet and did not take any steps against the alleged illegal act of trespass. It is only after the plaintiff filed a suit and obtained an order of injunction restraining the defendant from creating any obstruction to free ingress and egress to the suit property the petitioner approached the First Appellate Court with a prayer for stay.

The object of granting injunction is to maintain the *status quo* that was prevailing on the date of filing of the instant suit. The petitioner admitted the fact of user of the passage by the

plaintiff since April 28, 2021. Thus, it is evident that as on the date of institution of the suit which is much after April 28, 2021 that the plaintiff was using the said common passage. The petitioner was not restrained from using the said passage by the order of injunction. Only they were prevented from creating any obstruction to free ingress and egress of the plaintiff to the suit property. Thus the balance of convenience and inconvenience is in favour of the plaintiff/opposite party no. 1 herein. Since, the plaintiff is using the passage, in the event the order of injunction is stayed, the plaintiff will suffer irreparable loss and injury.

From the conduct of the petitioner it appears that even after having knowledge that the plaintiff broke open the wall on April 28, 2021 and was using the suit passage, they only protested against such alleged illegal act by issuing two letters and kept quite thereafter till the order of injunction passed by the learned Trial Judge was communicated to them. Thereafter, they woke up from their slumber and approached the First Appellate Court with a prayer for stay of the order of injunction. It is well settled that party applying for vacating the *ad interim* injunction has to show before the Court that he himself was not at fault and was also not responsible for the present situation as held by the Hon'ble Supreme Court of India in *Gujarat Bottling Co. Ltd* (supra). Thus, taking into consideration the aforesaid conduct of the defendant, this Court is of the considered opinion that the learned judge of the First Appellate Court was justified in rejecting the prayer for stay pending hearing of the miscellaneous appeal.

For the reasons as aforesaid this Court is of the view that the impugned order does not suffer from any infirmity warranting interference under Article 227 of the Constitution of India. The Civil Order no. 1583 of 2021 accordingly stands dismissed without, however, any order as to costs.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)