

10 **01.10.
2021**
Ct. No. 09

Ab

**FMAT 553 of 2021
With
CAN 1 of 2021**

**Indrani Dutta Gupta
Vs.
Madan Mohan Hazra and another.**

**Mr. Rishad Madora,
Mr. Ramendu Agarwal.
... for the appellant.**

The plaintiff/appellant filed a suit for decree of possession in respect of a first floor with an alternative prayer of payment of Rs. 79,00,000/-, which the defendants/respondents failed and neglected to pay in terms of an agreement.

It is alleged in the said suit that the plaintiff/appellant was allotted a plot of land by the Governor of West Bengal in the year 1985. Since it was not possible for the plaintiff/appellant to make construction thereupon, a development agreement was entered into with the defendant no. 1/respondent no. 1 for construction of a building thereat with clear stipulation that the first floor shall be within the owner's allocation and the rest portion shall be dealt with by the defendant no. 1 without any interference and/or intervention of the plaintiff/appellant. A Power of Attorney was also executed in order to facilitate the said agreement and it is not in dispute that the defendant no. 1 raised construction and the possession of the first floor was given to the plaintiff/appellant. Subsequently, the plaintiff/appellant by another agreement permitting the defendant no. 1 to let out the said first floor and the rental income would be accrued to the account of the plaintiff/appellant.

The dispute cropped up on account of disbursement of the rent and as the plaintiff/appellant was a permanent resident of abroad, it was decided to sell off the said first floor to the defendant no. 2 through defendant no. 1 at a consideration of rupees one crore. It is further stated in the plaint that a part payment to the tune of Rs. 21,00,000/- was paid but the aforesaid defendants failed and neglected to pay the rest, which constrained the plaintiff/appellant to cancel the said agreement as well as the Power of Attorney. Since the possession could not be delivered to the plaintiff/appellant and is being illegally and wrongfully occupied by the defendants, a suit with such prayer was instituted.

An application for temporary injunction was instituted restraining the defendants from creating any third party interest as they were put into physical possession in terms of the said agreement and the Power of Attorney so that the property may not be dissipated and/or the value may not be diminished by any further action. The said application for injunction was moved for ex parte ad interim order of injunction and the order annexed to the Memorandum of Appeal would reveal that the Court restrained the defendants from creating any third party interest in respect of the suit property till 7th October 2021. The plaintiff/appellant is not aggrieved by such portion of the order, as she has been blessed with the ex parte ad interim order of injunction. However, the dispute pertains to keeping an application for Receiver filed under Order XL Rule 1 of the Code of Civil Procedure by the trial court.

According to the learned Advocate for the plaintiff/appellant, the plaintiff/appellant asked for appointment of the Receiver or alternatively

Investigating Commissioner or an Inspecting Commissioner so that the real state of affairs or the exact nature of the suit property can be ascertained. He tries to impress upon us that in the dispute of such nature, the appointment of Receiver or Investigating Commissioner or Inspecting Commissioner is inevitable not only to minimize the litigation but also to render complete justice to the parties.

We are not impressed by the said submission for the simple reason that the appointment of Receiver at the ad interim stage without serving notice upon the defendants has a far reaching consequences as the person, who is in possession, shall be dislodged therefrom and the property would be deemed to be in custodia legis. Furthermore, the invocation of Order XL Rule 1 of the Code of Civil Procedure at an ex parte stage should be discouraged except in an exceptional and extraordinary circumstances where the delay would defeat the very purpose.

From the impugned order, we do not find any reflection of such nature, as the trial court has simply kept the said application on record. Though the appellate court enjoins all the powers of the original court under Section 107 of the Code of Civil Procedure yet the appellate court should be slow and circumspect in interfering with the order or exercising the original jurisdiction in absence of any findings recorded in the order.

The trial court has not applied its mind nor has taken any decision thereto except that the said application was simply kept on record, we, thus, do not find any ground interfering with the later portion of the said order.

However, we grant liberty to the plaintiff/appellant to move the said application for appointment of Receiver

before the trial court and if such prayer is made, the learned Judge in the trial court is requested to take up the said application and pass an appropriate order in accordance with law.

With these observations, the appeal is disposed of.

In view of disposal of the instant appeal, the connected application being CAN 1 of 2021 has become infructuous and the same is also disposed of.

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

(Harish Tandon, J.)

(Bibek Chaudhuri, J.)