

09.03.2021  
SL No.7  
Court No.12  
(gc)

**FMAT 956 of 2019  
With  
CAN 1 of 2019  
(Old No: CAN 10908 of 2019)**

**Smt. Durga Mudi & Anr.  
Vs.  
Shyamal Mudi & Anr.**

**(Via Video Conference)**

Mr. Shyamal Chakraborty,  
Mr. Mahammod Mahmud,  
...for the Appellants.

The appeal and the application are taken up together at the admission stage and disposed of by this common order.

The appeal is arising out of an order dated 22<sup>nd</sup> July, 2019 passed in a suit for partition in which the Trial Court has decided an application filed by the plaintiff/respondent No.1 under Order 39 Rule 1 and 2 of the Code of Civil Procedure for temporary injunction.

Mr. Shyamal Chakraborty, learned Counsel appearing on behalf of the appellants submits that the Trial Court was in error in passing an order of injunction in respect of Schedule 'A' property, following the decree passed by the learned Civil Judge (Junior Division), 6<sup>th</sup> Court, Howrah in Title Suit No.17 of 2011 and Title Suit No.2419 of 2014. The decree was passed on 15<sup>th</sup> February, 2018. We find from the pleadings of the parties that in a supplementary objection filed on behalf of the appellants there is a reference to the eviction suit pending before the learned Civil Judge

(Junior Division), 6<sup>th</sup> Court, Howrah concerning 'A' Schedule property. However, in view of the fact that the said supplementary affidavit was affirmed on 24<sup>th</sup> August, 2017, the question of running of a decree passed on 15<sup>th</sup> February, 2018 on the basis of which the appellants are now seeking to contend that the plaintiff has lost his right, could not have been before the learned Civil Judge. Although it is submitted by way of Firisti documents filed in March, 2019 that a certified copy of the said decree was filed, but there was nothing on record to show that there is a pleading in respect of what is now being contended before us. However, there cannot be any doubt that if the decree dated 15<sup>th</sup> February, 2018 is taken into consideration, there is a clear finding that deed in the name of the defendant No.1 meaning thereby Smt. Durga Mudi, marked as Exhibit-1 belongs to the mother. The observation of the learned Trial Judge in this regard is relevant:-

*“Nowhere from the statements made therein it is revealed that the A scheduled suit property was purchased in the name of the defendant no.1 by Jaladhar Mudi. The provision of Section 4(3)(b) of the Benami Transactions (Prohibition) Act, 1988 is very clear that person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.*

*The deed in the name of the defendant No.1 marked as Exhibit 1 does not reveal any benami transaction.*

*The plaintiff has not been able to prove that the A scheduled suit property was purchased in the name of the defendant no.1 by Jaladhar Mudi and the defendant No.1 is a trustee.*

*Therefore on careful consideration of the oral and documentary evidence this Court finds that the plaintiff has failed to discharge his burden to prove his assertion that the real owner of the A scheduled suit property was Jaladhar Mudi, his father, and the defendant No.1 is an ostensible owner. Therefore his claim that he is a co-owner in respect of the A scheduled suit property is disproved.”*

We feel that the plaintiff has been able to make out a strong case in so far as the appellants are concerned to exclude ‘A’ Schedule property from the partition suit in respect whereof the learned Civil Judge (Senior Division), 2<sup>nd</sup> Court, Howrah has granted status quo. We are not sure as to what materials were exactly made available to the learned Trial Judge at the time of disposal of the injunction application dated 22<sup>nd</sup> July, 2019.

Accordingly, we direct the learned Civil Judge (Senior Division), 2<sup>nd</sup> Court, Howrah to rehear the injunction application after taking into consideration the decree passed in Title Suit No.17 of 2011 and Title Suit No.2419 of 2014 without being influenced by our observation.

The appellants shall be entitled to bring all necessary documents in support of their claim over ‘A’ Schedule Property by way of an affidavit filed within 10 days from date upon prior service to the respondents and the respondents

shall be at liberty to file any rejoinder to the said affidavit within 10 days thereafter.

We request the learned Civil Judge (Senior Division), 2<sup>nd</sup> Court, Howrah to decide the said issue as to the 'A' Schedule Property only, within four weeks from the date of completion of pleadings. The rehearing of the injunction application on this limited issue shall not preclude the learned Trial Judge to proceed otherwise with the suit.

In so far as the status quo in relation to the other properties is concerned, we see no reason to interfere with such finding. The order of status quo in relation to the 'A' Schedule Property shall continue for a period of eight weeks or until the matter is disposed of by the learned Trial Judge in terms of our order, whichever is earlier.

The learned Counsel for the appellant would communicate this order to the Trial Court as also upon the respondents in course of this week.

With the aforesaid observation, the appeal being FMAT 956 of 2019 and the application for stay being CAN 1 of 2019 (Old No: CAN 10908 of 2019) stand disposed of.

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

**(Subhasis Dasgupta, J.)**

**(Soumen Sen, J.)**