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**FMAT 565 of 2020
With
CAN 1 of 2020**

**Amit Kumar Samanta
vs
Kajal Ghorui &Ors**

**Mr. Gopal Chandra Ghosh,
Mr. Sobham Majumdar, ... For the Appellant.**

**Mr. Srijib Chakraborty,
Ms. Susmita Kumari Singh,
... For the Respondent.**

The present appeal arises from judgment and order dated 5th March, 2020 passed by Civil Judge (Senior Division), Arambagh, Hooghly in Title Suit No. 14 of 2020 whereby and whereunder an application under Order 39 Rule 4 of the Code of Civil Procedure was rejected.

The suit was filed for partition and separation of share by the plaintiff/respondent alleging that the property appended to the schedule of the plaint is an undivided property of the co-sharers. Apropos such statement, an application for temporary injunction was filed restraining the defendants therein from making any construction at the undivided property and an ad interim order of injunction in the form of status quo was passed.

The defendant No. 9/appellant entered appearance and filed an application under Section 39 Rule 4 of the Code of Civil Procedure on the premise that there has been a suppression of material facts and the ex parte order of injunction, so passed, could not have been passed if the facts disclosed therein were made evident before the Court.

The application under Order 39 Rule 4 of the Code of Civil Procedure filed by the defendant No. 9/appellant came to be dismissed on the premise that there is no valid permission for conversion nor sanction for construction available in the record and that other defendants than the appellant have not appeared before the Court so in their absence the ex parte order of injunction should not be vacated.

We are amazed and surprised upon perusing the reasons for dismissal of an application under Order 39 Rule 4 of the Code of Civil Procedure. The aforesaid provision does not contemplate such ground as assigned by the learned Judge and for better recapitulation the provision containing in Order 39 Rule 4 is quoted as under:

" 4. Order for injunction may be discharged, varied or set aside.- Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice.

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party."

It is axiomatic to record that the said provision never contemplated that all the defendants should approach the Court and apply for variation, discharge

and setting aside the ad interim order of injunction. The first proviso appended thereto envisages a situation wherein an ad interim order of injunction has been obtained making a false and misleading statement relating to material particulars or when the Court finds that it would cause an undue hardship to the party.

It is a paramount duty cast under the said provision that the Court must record the reasons strictly within the peripheral thereof and the extraneous factor should not sway the Court to reject the application. If one of the defendants has successfully demonstrated before the Court that the ex parte ad interim order of injunction has been obtained by making a false or misleading statement relating to material particulars and it would cause undue hardship to him, the same would be the relevant factor for considering an application under Order 39 Rule 4 of the Code of Civil Procedure and not the one as has been assigned in the impugned order. Nowhere the said provision envisages that the entire set of defendants should come forward and made an application and not any of them. We further find relevant records concerning the conversion of the land from sali to bastu and the permission to make construction at the property claimed by the defendant No. 9/appellant were filed before the Court and, therefore, the finding that no documents have been filed appears to be erroneous and contrary to the record.

It is a specific case of the appellant that those documents which are annexed to the stay application were filed along with the firsti which is also annexed to the injunction application and if the contention of the appellant is taking to be correct, we cannot support the findings of the Trial Court that no such documents were available in the record.

Since the impugned order has been passed by the Trial Court with closed mind, it cannot be sustained.

The impugned order is, thus, set aside.

The Trial Court is directed to rehear the application under Order 39 Rule 4 of the Code in the light of the observations made hereinabove and all efforts should be made to dispose of the same within three months from the date of communication of this order.

The appeal and the connected application are disposed of.

(Harish Tandon, J)

(Kausik Chanda , J)