

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FMA 437 of 2022

Sourav Sarkar
versus
Hirak Ranjan Sarkar & Anr.

For the Appellant : *Mr. Tanmoy Mukherjee,*
Ms. Debjani Sengupta.

For the Respondent No.1 : *Mr. Partha Pratim Roy,*
Mr. Jayanta Samanta,
Ms. Paromita Malakar (Dutta),
Ms. Sarwar Jahan,
Ms. Swarnali Halder.

Hearing is concluded on : *22nd November, 2022.*

Judgment On : **2nd December, 2022.**

Partha Sarathi Chatterjee, J.

1. The instant appeal has been preferred assailing the order no. 26 dated 13.12.2021 passed by the learned Civil Judge, Senior Division, Chanchal, Malda in O.C. no. 187 of 2020 whereby prayer for an interim

order made by taking out an application under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure (hereinafter referred to as CPC) was turned down.

2. Factual conspectus leading to filing of this appeal is that the plaintiff no.1/appellant and the plaintiff no.2/respondent no.2 herein filed a suit for specific performance of contract against the defendant/respondent no.1 herein. Along with the plaint, the plaintiffs filed an application under Order 39 Rules 1 and 2 read with Section 151 of CPC.

3. In the said application, it was recited that the defendant (hereinafter referred to as the respondent no.1) happens to be original owner of the suit property who had executed one agreement for sale to sell out the suit property at a consideration money of Rs.94 lakhs to the appellant and one Kollol Kanti Sarkar (hereinafter referred to as Kollol) on 6.2.2012 and at the time of execution of the agreement, respondent no.1 accepted Rs. 10 lakhs as advance. In the aforesaid agreement, it was agreed by and between the parties that within 6.6.2012, the plaintiff no.1 and Kollol would pay rest consideration money to the respondent no.1, who upon receipt of such amount would execute the deed of sale in their favour. In the meantime on 14.3.2012, brother of the respondent no.1 filed one suit against him seeking partition and separate possession of the suit property and the said suit was registered as partition suit no. 120 of 2012 and before 6.6.2012, when the plaintiff no.1 and Kollol approached the respondent no. 1 to perform his part of contract, the said respondent no.1 disclosed that due to pendency of the suit, it would not be possible for him to perform his part of contract. In the

application it was further stated that on 17.1.2017, the said partition suit was decided in favour of the respondent no.1 but the judgment and decree passed in the partition suit was impugned in one appeal before this Court, which was registered as F.A.T no. 176 of 2017. Due to pendency of the litigation, the respondent no.1 could not perform his part of contract. Kollol did not want to wait for any further period and then on 22.8.2016, respondent no.1 and Kollol executed one agreement, wherein it was agreed by them that respondent no.1 would execute deed of sale in respect of suit property in favour of plaintiff no.1 and Manoj Agarwal, respondent no. 2 herein in place and instead of Kollol and it was also contended that thereafter, the respondent no.1 took Rs. 25 lakhs and hence, it was claimed that as per two agreements, the respondent no.1 was to execute and register the deed of sale on receipt of rest consideration money being Rs. 59 lakhs since in the meantime, the appeal pending before this Court was disposed of. In the said application, it was also claimed that in the suit property there was a garage which was being used by appellant since 6.2.2012 and since, the respondent no.1 did not come out to perform his part of contract, the appellant and respondent no.2 herein by giving two legal notices dated 24.8.2020 and 12.10.2020 asked the respondent no.1 to execute and register the deed on 15.10.2020 at the office of the Registrar concerned but the respondent no.1 did not turn up to execute and register the deed which forced the appellant and respondent no.2 herein to file the suit. In the application, it was claimed that if the respondent no.1 creates any third party interest in respect of the suit property, plaintiffs would suffer

irreversible injury and hence, an appropriate interim order was required to be passed.

4. Record reveals that defendant/ respondent no. 1 herein resisted the application by filing written objection wherein denying all the averments made in the said application, it was specifically contended that suit is bad for mis-joinder and non-joinder of parties and that Kollol is a necessary party to the suit. Lastly, it was claimed that plaintiffs were not entitled to get any order of injunction and hence, prayer was made for dismissal of the said application.

5. Record further reveals that initially an ad-interim order was passed on 4.12.20 directing the parties to maintain status quo and the said interim order was extended from time to time but since 21.9.21, the appellant took no steps, no order regarding extension of interim order was recorded and ultimately, by passing the order no.26 dated 13.12.2021, the application for injunction was rejected.

6. The appellant has impugned the order dated 13.12.2021 in this appeal, *inter alia*, on the grounds that the learned Court below erred in refusing to grant interim order as sought for without appreciating the pleadings and materials placed before it and erred in holding that no order of injunction should have been passed without taking evidence, both oral and documentary, failing to appreciate that there was no scope to adduce evidence in connection with the application for injunction. It was also not considered that the plaintiffs fulfilled all criteria to get interim order in their favour. The learned Court below also failed to appreciate that if during

pendency of the suit, third party interest is created in respect of suit property, the same shall lead to multiplicity of proceeding.

7. In course of hearing, Mr. Mukherjee learned advocate appearing for the appellant submitted that in the written objection, except making some evasive denial, no specific case has been made out by the respondent no.1. Drawing our attention to the reply to the legal notice of the plaintiffs dated 24.8.20, he submitted that the respondent no.1 has virtually admitted that the respondent no.1 had executed both the two agreements and was a party to both the two agreements and hence, both the agreements are binding upon him and he added that the learned Court having held that for the purpose of disposal of the suit, evidence is required to be taken, accepted that the plaintiffs had made out a *prima facie* case yet no interim order was passed. He asserted that it is a fit case where interim order of injunction, as was sought for, was required to be passed and to buttress his arguments, he placed reliance upon the judgments delivered in the cases of *M/s. N.N. Global Mercantile Private Limited –vs- M/s. Indo Unique Flame Limited & Others*, reported in 2021(4) SCC 379, *Biswajit Chakraborty –vs- Mira Sen Ray*, reported in 2002(3) CHN 151 (Cal) and *GTZ (India Private Limited) –vs- Power Electronic Engineers & Ors.*, reported in 2009 (4) CHN (415).

8. *Per Contra*, Mr. Roy, learned advocate appearing for the respondent no.1 argued that the suit is bound to fail due to technical defects. He asserted that one Manoj Agarwal was made a party to the suit although there was no privity of contract in between the respondent no.1 and Mr. Agarwal and he submitted that contract entered into by and between

respondent no.1 and Kollol cannot be stated to be a concluded contract. He added that the second agreement is not enforceable in law and that both the agreements are unregistered and not properly stamped and hence, the Court of law cannot rely upon the same.

9. He argued that the initial agreement was entered into by and between three persons but later on by second agreement, the same has been modified by two persons and such second agreement cannot be enforced and that Kollol cannot be made party to the suit since, relief, if claimed by Kollol, would be barred by limitation. In support of such contention reliance has been placed upon the judgments delivered in the cases of *Ambalal Sarabhai Enterprise Limited –vs- KS Infraspac LLP Limited and Another*, reported in AIR 2020 SC 307 and *Kasturi –vs- Iyyamperumal & Ors.*, reported in (2005) 6 SCC 733.

10. For proper and effective adjudication of the appeal, it would be useful to quote the observation made by the learned Court below while disposing of the application for injunction which is as follows :

“Perused the case record, pleadings, petition dated 3.12.2020 U/O 39 r.1 and 2 r/w 151 C.P.C praying for temporary injunction against the defendant filed by the plaintiffs and the written objection filed by the defendant and the papers and documents filed by the parties, I find that this is a suit for specific performance of contract and plaintiffs have prayed for an order of temporary injunction restraining the defendant from transferring the schedule landed property mentioned in the plaint to any third party.

Considering the prima facie case, balance of convenience and inconvenience of the parties, the materials on record and the papers and documents, submission of both sides, I think no order of injunction should be passed without taking evidence both oral and documentary in connection with this suit for the ends of justice.

Hence, it is,

Ordered

that the prayer U/O 39 r.1 and 2 r/w 151 CPC made by the plaintiff against the defendant is hereby considered and rejected on contest...”

11. Upon perusal of the said order passed by the learned Court below, we have no hesitation to hold that the same is a non-speaking one. The need for delivering a reasoned order is a requirement of law which has to be complied with in all orders. The Hon'ble Supreme Court in several judgments has denounced the practice of issuance of non-speaking orders. Any order dehors reason suffers from the vice of non-application of mind. A Court of law while passing any order is duty bound to assign reason. Issuance of a non-speaking order is nothing but deprivation of justice particularly in respect of the party, who has suffered defeat since he has every right to know the reason of his defeat.

12. Needless to mention that the grant of interlocutory injunction during pendency of a *lis* is a matter of judicial discretion and when such discretion is exercised upon proper appreciation of facts and upon

application of true principles of law applicable on the issue, it would be a sound exercise of judicial discretion.

13. In exercise of such discretion, tests to be applied are i) whether the plaintiff has a *prima facie* case, ii) whether balance of convenience and inconvenience is tilted in favour of the plaintiff and iii) whether plaintiff would suffer irreparable injury, which cannot be compensated in terms of money, if his prayer for temporary injunction is disallowed.

14. '*Prima facie case*' is not to be confused with '*prima facie title*'. To decide the question as to whether plaintiff has *prima facie* case in his favour, Court shall first see whether plaintiff has raised any substantial question which needs investigation and decision on merits, i.e., whether he has raised some question to go into the trial. Court may consider probability of his success in the trial and the comparative strength of the cases of the respective parties before it. The Court may also ascertain as to whether the suit shall fail on technical ground but it is not necessary for the plaintiff to prove his case to the hilt and if a fair question is raised for determination, it should be taken that a *prima facie* case has been established.

15. Plaintiff must establish that his inconvenience, in the event the relief of temporary injunction is denied to him will, in all events, exceed that of the defendant in case he is restrained.

16. The term '*irreparable injury*' means substantial injury which cannot be adequately remedied or compensated by way of damages and the Court shall consider whether protection is necessary from the species of

injuries known as '*irreparable*' before his legal right can be established. Court shall consider whether the mischief or inconvenience likely to arise from withholding injunction will be greater than which is likely to arise if granted. At this stage of deciding the application for temporary injunction, the Court is not required to go into the merits of the case in detail.

17. Now, coming to the case at hand the plaintiffs came up with a plea that respondent no.1 had entered into an agreement for sale to sell out the suit property in favour of one Sourav Sarkar and Kollol and since, there was delay in execution and registration of deed of sale due to pendency of a *lis*, Kollol did not want to wait and another agreement was entered into by and between respondent no.1 and Kollol to the effect that the respondent no.1 would transfer the suit property in favour of Sourav and Manoj Agarwal.

18. Except some evasive denial, the respondent no.1 did not specifically raise any issue regarding privity of contract, enforceability of the subsequent agreement or joinder of Mr. Agarwal in the suit as plaintiff no.2 or as regards acceptability of unregistered agreement in his written objection.

19. Here, it *prima facie* appears that the respondent no.1 had entered into two agreements to sell out the suit property and now, to enforce the specific performance of contract, the appellant has filed this suit. Admittedly, in both the agreements, the respondent no.1 had put his signatures. So, whether plaintiffs shall be entitled to enforce the specific performance of contract or not is a serious question which needs investigation and decision on merits. Whether suit will fail due to defect of

party is also a question required to be decided in trial. So, before taking such decision and before the legal right of the plaintiffs are established in trial, if the respondent no.1 is allowed to create third party interest, the same shall lead to multiplicity of proceeding and even such transfer and/or alienation, if made during pendency of the proceeding, can stand in the way of enforcement of specific performance if in case the Court ultimately comes out with a finding that specific performance is required to be enforced. If third party interest is allowed to be created in the suit property, then mischief, hardship and inconvenience of the plaintiff would be greater than the injuries which the respondent no.1 may suffer if he is restrained from transferring or alienating the suit property during pendency of the suit. The learned court below has committed mistake in not considering this aspect. The judgments upon which reliance has been placed by the Mr. Roy are distinguishable on facts.

20. So, we are of the considered view that it would be proper to pass an interlocutory order of injunction to restrain the respondent no.1 from creating any third party interest in the suit property during pendency of the suit. Consequently, the appeal be and the same is allowed. The order impugned herein is hereby set aside. The defendant/respondent no.1 herein is hereby restrained from creating any third party interest in the suit property in any way and/or manner whatsoever till the disposal of the suit.

21. The appeal being FMA 437 of 2022 is, accordingly, disposed of.

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

23. Urgent Xerox certified copy, if applied for, shall be given expeditiously upon completion of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)