

30.03.2022
SL No.27
Court No.8
(gc)

**FMA 238 of 2022
With
CAN 1 of 2022**

**Sundar Mondal
Vs.
Srimanta Giri & Ors.**

(Via Video Conference)

Mr. Joytosh Majumdar,
Mr. Arjun Roy Mukherjee,
Ms. Saheli Mukherjee,
Ms. Debapriya Mitra,
...for the Appellant.
Mr. Haradhan Banerjee,
Mr. Amitava Paine,
Ms. Manideepa (Paul) Roy,
...for the Respondent No.1 & 8.

By consent of the parties, the appeal and the application are taken for consideration and disposed of by this common order.

In a suit for partition, the plaintiff filed an application for temporary injunction against the respondents. The plaintiff alleged that the defendant No.1 since December 28, 2021 has been trying to raise construction over a valuable portion of the undivided suit plot and in the event such construction is allowed to be completed, the plaintiff would suffer from irreparable loss and prejudice. It was further claimed that the plaintiff is as much a co-owner as that of the defendants and as the co-owner, he has a right over the portion which has been illegally occupied by the defendants to the exclusion of the plaintiff. The defendants in their objection had

stated that the plaintiffs have no right, title and interest in respect of the suit property and the partition suit is likely to fail for want of ownership and title to the property. The Trial Court, however, on examination of the documents disclosed by the plaintiff do not disbelieve the claim of the plaintiff as a co-owner in the property. The learned Trial Court observed that the plaintiff was able to make out a prima facie case for an injunction. However, the Trial Court had taken into consideration that the defendant Nos.1 and 8 were granted permission to change the character of the land in the year 2018 and were also granted permission by the local Panchayat in the area in the year 2020 on the basis of which the defendants raised construction in a demarcated portion of the suit property and in the event the said defendants are restrained now from completing the said construction, the defendants may suffer prejudice after having invested the money for such construction. The learned Trial Court was of the view that the defendants may be prejudiced in the event such construction is now stopped but the defendants may be permitted to complete the balance construction without creating any equity in their favour with further condition that he would demolish the said construction at their own expenses, ultimately if it is found to be joint or the defendants are not co-sharers in respect of the property in question. Accordingly, the learned Trial Judge permitted the defendant No.1 to complete the existing

construction in terms of the site plan without making any deviation with a rider that the defendants shall not claim any equity in respect of such construction and would demolish such construction raised beyond permit at their own expenses and would also restore the said property to its original form.

Mr. Joytosh Majumdar, learned Counsel appearing on behalf of the appellant has submitted that in the suit for partition the Court should not allow a party to raise construction as the right of enjoyment to the question over which the defendants are claiming exclusive right is as much a part of the joint property to which the plaintiff has equal share and right of enjoyment. Mr. Majumdar has relied upon a Division Bench judgment of our Court in ***Sk. Abdul Shovan @Lalu Anr. Vs. Sk. Abdul Sattar & Ors.*** reported at ***2017 SCC Online Cal 16196***.

One of the disputes required to be decided by the Trial Court was the claim of the plaintiff as co-sharer. The plaintiff admittedly claimed 8 11/12 Satak in the suit property whereas the defendants claimed about 31 satak in the suit property. In the LRROR, the name of the defendant No.1 is recorded in respect of 21 Satak in the suit dag and the name of the defendant No.8 is recorded in respect of 10 Satak.

It appears that the defendants were in possession of the property in question for a long time and after obtaining necessary permission has raised certain construction. Mr. Majumdar submits that

representations on the basis of which such construction was raised are false and such sanction plans are required to recall due to misrepresentation.

The inclusion of the name of the defendants in the Record of Rights to the aforesaid extent are not under challenge before the concerned authority. There is no material on record suggesting such challenge. The Division Bench of our Court in ***Sanghati Pal Vs. Prakash Adhuryya & Ors.*** reported at ***2009 (2) CLJ (Cal) 153*** held that in such a situation liberty should be given to the party who is in possession of the demarcated portion to raise construction in such demarcated portion they claimed to be in possession without creating any equity in his favour and subject to the result of the suit for partition. The Division Bench, in fact, followed the ratio laid down by the Hon'ble Supreme Court in ***Mandali Ranganna & Ors. Vs. T. Ramachandra & Ors.*** reported at ***AIR 2008 SC 2291***.

Mr. Majumdar in the supplementary affidavit has referred to few documents to show that in issuance the permission on 22nd September, 2021 in favour of the respondents for the construction of a Petrol Pump, the same authority is disregarded. However, we are not concerned with the said objection in this proceeding. The said authorities are not parties to the suit nor any proceeding was initiated for granting such permission against such authorities.

On the basis of the materials available before the Trial Court, we are of the view that the Trial Court was justified in passing the impugned order by balancing the equities.

Under such circumstances, the appeal being FMA 238 of 2022 and the application being CAN 1 of 2022 stand dismissed.

However, there shall be no order as to costs.

All parties shall act on the server copies of this order duly downloaded from the official website of this Court.

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)