

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

Present:-

The Hon'ble Justice Subhasis Dasgupta.

**CO. No. 288 of 2022
Santanu Basu & Anr.
Vs.
Smt. Aparna Basu & Ors.**

For the Petitioners	: Mr. Sounak Bhattacharya, Mr. Sounak Mondal
For the Opposite Parties	: Mr. Chittaranjan Chakraborty. Mr. Dip Jyoti Chakraborty, Mr. Sumit Banerjee
Heard On	: 10.08.2022.
Judgment	: 17.08.2022.

Subhasis Dasgupta, J:-

The subject matter of challenge in this case is against the rejection of a prayer for construction, pending decision of a suit for partition.

Mr. Sounak Bhattacharya, learned advocate appearing for the petitioners, while proposing for construction submitted that existing possession of the petitioners in respect of a straw thatched mud built house had not been disputed by the opposite parties/plaintiffs vide their written objection.

Mr. Bhattacharya further contended that the dilapidated condition of such house under possession of petitioners had been disclosed in the petition for construction supported by an affidavit, which also remained undisputed by the opposite parties.

According to petitioners, the court below even in the absence of any categorical objection against the proposed construction to be made by the petitioners, had rejected the prayer for construction observing, inter alia, that no *bona fide* reasons had been disclosed to allow the prayer of petitioners enabling them to make change in the nature and character of suit property under a compelling circumstances.

Incidentally, Mr. Bhattacharya submitted that the construction so proposed to be conducted taking financial support from Government Scheme would not extend beyond the proportionate and legitimate share of land of petitioners in respect of the suit land, compared to their existing possession over their mud built house, and thus further clarified that the construction would be carried out on lessor area of land, proportionate to their share of land in subject property.

Reliance was placed by Mr. Bhattacharya on a decision reported in **2009(2)CLJ (Cal) 153** in the case of **Sanghati Pal vs. Prakash Adhuryya & Ors.** to enforce his stand that existing mud built house under possession of the petitioners would reveal the area of the land, the petitioners possess distinctly, over which proposed construction should have been allowed by the court below, and with this construction, there

will be no change in the nature and character of the suit. More so the existing order of *status quo* touching the suit property would not be invaded in any manner whatsoever.

In the referred decision a purchaser of property having purchased specific and demarcated portion of the property, in a pending partition suit was granted liberty to raise construction within the purchased portion of the property without claiming any equity, and further conditioned by subject to result of partition suit.

Mr. Bhattacharya submitted the ratio of such decision would be squarely applied over the facts and circumstances of the case, as the existing mud built house would reveal the distinct area of land, the petitioners possess at the moment, and over which the proposed construction would be raised without claiming any equity therefor.

Mr. Chittaranjan Chakraborty, learned advocate appearing for the opposite parties disputing with the submission raised by the petitioners replied that the alleged dilapidated and worn out condition of the mud built house could not be revealed in the learned Inspection Commissioner's report. The plea taken by the petitioners to reveal the existing condition of the mud built house, even went unnoticed by the learned Commissioner, while holding inspection Commissioner.

It was strenuously argued by the opposite parties that in the absence of any specific materials being placed before the court below, as to whether the mud built house under possession of the petitioners

needed any imminent and urgent construction, or not, for the same having turned out to be inevitable at the moment, there could not be any permission granted for raising permanent construction.

Supporting the order of the court below, Mr. Chakraborty, submitted unless the urgent need of undertaking construction was disclosed, upon supplying sufficient materials before the court below, the prayer for proposed construction, so as to substitute the old mud built house was nothing but imaginary one, and as such the impugned order would remain unaltered.

Challenging the applicability of the decision referred above, relied upon by the petitioners; Mr. Chakraborty submitted that in the case at hand, no demarcated portion had been purchased by the petitioners to go for construction pending decision of partition suit.

It was contended by Mr. Chakraborty that when there was an order of injunction granting *staus quo* to be maintained by the parties, in the event of proposed construction being allowed to be raised, there would be certainly change in the nature and character of suit, and more so, the order of *status quo* would be interfered with.

Reliance was placed by Mr. Chakarborty on a decision reported in ***AIR 1999 Supreme Court 2322*** delivered in the case of ***Sree Jain Swetambar Terapanthi Vid (s) v. Phundan Singh and Ors.*** to submit that the findings reached by the court below, while making rejection of a prayer for construction, being a product of discretion, lawfully exercised

by the court below, the same should not be upset holding it to be erroneous finding.

In such decision, the scope of appellate court, while upsetting the injunction order on ground that Trial Court had gone wrong in recording *prima facie* satisfaction, was addressed and decided. The subject under challenge is not against the findings reached in connection with injunction matter.

Reliance was also placed by Mr. Chakraborty on a further decision reported **AIR 2008 Supreme Court 2291** delivered in the case of **Mandali Ranganna and Ors. vs. T. Ramachandra and Ors.** to submit that the conduct of the parties would be of relevant consideration, while granting equitable relief.

In the referred decision, the conduct of the parties, sought to be viewed, was decided to be kept in consideration, apart from taking consideration of the basic elements in relation to the prayer for injunction, while granting injunction, which is an equitable relief, unlike the facts and circumstances involved in this case.

Profit was further sought to be obtained making reliance on a decision by Mr. Chakraborty, reported in **2000 CalLT 254** delivered in the case of **Harendr Nath Ghosh vs. Subodh Kumar Ghosh** that petitioners without having taken consent of the opposite parties, who are co-sharer could not be permitted to raise any construction over any

portion of the subject property under reference, simply to hinder any effective partition or to diminish the value of the joint property.

Upon advancing such submission Mr. Chakarborty persuaded this Court to believe that proposed construction was not the urgent need of petitioners, and such urgent need should not be ascertained merely from an affidavit supporting the prayer for proposed construction, in the absence of any report revealing the endangering and dilapidated condition of existing mud built house of defendants under their possession in suit land.

The undenying possession is that there is an order grating injunction directing *status quo* to be maintained in a partition suit. Both the parties to this case are ordinarily expected to have their proportionate share in the suit property requiring partition by metes and bounds.

Mr. Bhattacharya countered the decisions, cited by Mr. Chakraborty, submitting that the facts leading to the decision were patently distinguishable from the facts involved in this case at hand. Mr. Bhattacharya further submitted that the ratio of the decisions referred by the opposite parties would neither have direct relevance in the present facts and circumstances in the case, nor would be remotely connected with the issues raised in this case.

Having considered the submission of both sides, it appears that the existing possession of petitioners with respect to straw thatched mud built house could not be disputed or denied by the opposite parties. There was

a reference of mud built straw thatched house, as evident from the learned Inspection Commissioner's report. The dilapidated and worn out condition of the mud built house was disclosed in the petitioner proposing for construction, which was supported by an affidavit.

The court below, by the order impugned, declined to give permission to petitioners to raise construction for not having assigned any *bona fide* reasons for the purpose, but observed in the order impugned categorically that the existing possession of petitioners over the mud built house remained undisputed by the opposite parties.

It is thus clear that petitioners have their possession in respect of their existing mud built house over some undefined area of land, which was submitted to be proportionate to the share of the petitioners to be allocated. When there was nothing to deny the existing possession of the petitioners with respect to their mud built house, and the condition of which being disclosed in the petition proposing construction, the affidavit submitted by the petitioners, in ratification of the averment disclosed in the petition for construction, in the absence of any other things to the contrary being established, should not be disregarded, irrespective of the learned Inspection Commissioner's report, if there be any.

This is not the case set up by the opposite parties, vide by their written objection, that proposed construction will be on some advantageous portion, and for that, it would ultimately diminish the value of subject property, and more so, the proposed construction will have

direct impact of causing hindrance to effectively distribute the properties to co-sharers, as per their respective share by metes and bounds.

As it was assured by Mr. Bhattacharya that the proposed construction would be undertaken on lessor area of land, as per their existing possession, but in any case would not exceed the area of the land proportionate to their share in the subject property, this court finds no wrong to apply the ratio of the decision rendered by the Division Bench of this Court, as referred by Mr. Bhattacharya in the case of ***Sanghati Pal (supra)***, over the facts and circumstances of this case, otherwise the mud built house under possession of petitioners may be ruined near future pending decision of instant partition suit, with the passage of time, and there is also chance of petitioners being rendered homeless, which is of course against equitable the principle of law.

Since the existing possession of the petitioners with respect to their old mud built house was not disputed by the opposite parties, by the proposed construction, there would be hardly any chance of invading the order granting *status quo* to be maintained by the parties to this case, granted in connection with injunction application.

The impugned order dated 15th December, 2021, passed by the learned Civil Judge (Senior Division), Diamond Harbour in Title Suit No. 252 of 2019, dealing with the rejection of a prayer for construction is set aside.

Petitioners are permitted to raise construction within the area of land, over which existing mud built house is there, without claiming any equity and of course subject to the result of the suit for partition.

With this direction and observation the revisional application stands disposed of.

Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of all formalities, on priority basis.

(Subhasis Dasgupta, J.)