

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

Present:-

The Hon'ble Justice Subhasis Dasgupta.

CO. No. 711 of 2020

**Sunil Sen @ Sunil Kumar Sen
Vs.
Chhanda Dutta (deceased)
represented by Samir Kumar Dutta & Ors.**

For the Petitioner	: Mr. Sakti Nath Mukherjee, Sr. Adv. Mr. Saptangshu Basu, Sr. Adv. Mrs. Chandramala Mukherjee, Adv. Mr. Suhabrata Das, Adv.
For the Opposite Parties	: Mr. Jayanta Kumar Mitra, Sr. Adv. Mr. Debajyoti Barman, Adv. Ms. Sanjukta Basu Mallick, Adv.
Heard On	: 09.11.2021, 24.11.2021, 01.12.2021.
Judgment	: 28.01.2022.

Subhasis Dasgupta, J:-

The jurisdiction of this Court under Article 227 of the Constitution of India has been invoked impugning order no. 114 dated 18th January, 2020, passed by learned Civil Judge (Senior Division), 1st Court, Baruipur in Miscellaneous Appeal No. 12 of 2016. 1st Lower Appellate Court directed both the parties to maintain *status quo* in respect of nature, character and possession of suit property till disposal of the suit, thereby reversing the

order no. 46 dated 26th April, 2016, passed by learned Civil Judge (Junior Division), 2nd Court at Baruipur, South-24-Parganas in Title Suit No. 240 of 2013.

The order of 1st Lower Appellate Court granting *status quo* upon reversing the order of Trial Court is thus under challenge under the supervisory jurisdiction of this Court.

Before addressing the issues raised in this case, a little reference to foundational facts maybe of highest relevance. Opposite party no. 1 (Chhanda Dutta, since deceased) filed a suit being Title Suit No. 240 of 2013 in the court of learned Civil Judge (Junior Division), 2nd Court, Baruipur, with a prayer for decree declaring opposite party/plaintiff and proforma defendants to be owners of suit land with a further declaration that the two deeds dated 02.09.2009 and 19.05.2010, standing in the name of petitioner (Sunil Sen @ Sunil Kumar Sen/defendant no. 30), as covered in B Schedule to the plaint, are invalid, inoperative and not binding upon the plaintiff and proforma defendants and also for permanent injunction restraining the defendants including the petitioner from ousting opposite party/plaintiff with others from the suit property upon making construction in the suit land, and restraining further them from changing the mode of user of the suit land. The suit land pertains to C.S. and R.S. plot number 26 measuring 26 decimal of land appertaining to C.S. Khatian Number 1293, Mouza- Barhans Fartabad, P.S.- Sonarpur, District- South 24 Parganas.

In gist, plaintiff and proforma defendants/opposite parties claimed their title and possession in respect of suit property, mentioned in the schedule to plaint.

Descendants of Nandi's having superior interest holding interest in C.S. Khatian No. 1293, executed a deed of transfer in favour of defendant no. 30, on 2nd September, 2009, while descendants of Banerjee's having forcible possession (Jordang) in respect of R.S. Plot Number 26 pertaining to Khatian Number 1292 of same mouza similarly executed a deed of transfer dated 19.05.2010, in favour of defendant no. 30, thereby conveying alleged right, title, interest and possession in respect of the suit property to petitioner, who is a developer/promoter having undertaken a work of raising multistoried construction in the suit land.

The basis of title and alleged possession of petitioner is the two deeds, referred above and the R.S. record of right, which according to petitioner has been rightly recorded by the lawful authority concerned.

The petitioner, however, disputed the C.S. record of right giving rise to the claim of the plaintiff and proforma respondents over the self same land by way of inheritance alleging the same to be erroneous, fictitious and non-existent at the moment.

Petitioner being defendant no. 30 also filed a Title Suit No. 164 of 2011 in respect of self same plot of land for declaration and permanent injunction restraining the defendants (including plaintiff/opposite party) from disturbing the plaintiff's peaceful possession, and in connection with

such suit on 28th July, 2011, an order of *status quo* was passed, which was, however, made absolute on 7th August, 2013.

Mr. S.N. Mukherjee, learned senior advocate representing petitioner/defendant no. 30 had challenged the legality of order of the 1st Lower Appellate Court submitting that 1st Lower Appellate Court had erroneously exercised the discretion vested to it, while reversing the order of the Trial Court thereby refusing the prayer for injunction on an application being filed by the petitioner under Order 39 Rule 4 of Code of Civil Procedure. upon simply giving a superficial view without subscribing any independent findings necessary therefor.

The approach adopted by 1st Lower Appellate Court, while questioning the findings of the Trial Court, was absolutely illegal, and as such the same should not be sustained, Mr. Mukherjee contended.

While seriously disputing with the findings of the 1st Lower Appellate Court, Mr. Mukherjee strenuously argued that the suit property mentioned in the plaint had become non-existent, fictitious and more so, the C.S. Khatian No. 1293 got already stood extinguished by the solenama decree for eviction and execution thereof, which Nandi's already initiated during previous round of litigation for eviction of their tenants being Sarkars, appearing in 23rd column of C.S.R.O.R.

According to Mr. Mukherjee the old interest of Sarkars was merged with the superior interest of Nandi, and the order in favour of Nandi's passed in solenama decree permitting to evict Sarkars, being tenants

under Nandi's should not be disregarded by opposite party/plaintiff and proforma respondents in any manner whatsoever.

Mr. Mukherjee further argued taking resort to Section 44(4) of Estates Acquisition Act, 1953, that the forward presumption of possession, attached with R.S. record of right being a statutory presumption could not be called in any question after its final publication.

Incidentally Mr. Mukherjee, put much emphasis on a revealing fact that the Nandi's having obtained a decree for recovery of possession against Sarkars, and having actually obtained delivery of possession in execution of a solenama decree in 1933, the claim of title and possession of opposite parties would not be tenable in law.

Two suits previously instituted by the alleged successor of Nandi's in 1958 and 1959 for recovery of possession against descendants of Sarkar's being tenant under Nandi's ultimately carried in Second Appeal and ended finally in dismissal of SLP by the Apex Court. The two suits were thus, dismissed in Second Appeal on a finding that plaintiff of such suits was not the successor of Nandi's, as claimed in such suits.

Mr. Mukherjee drew attention of the Court, while relying upon order dated 22nd September, 2017, of Division Bench of this Court in FMA 56 of 2017 in support of his stand that the construction of the multistoried structure raised on the suit property, having reached a substantial part in the meantime should not be stopped with the aid of *status quo* to maintain, as the petitioner being builder/promoter, had already spent

huge money. The petitioner being made one of the defendants in such appeal, originated from the suit for partition and injunction, was allowed to undertake construction in the suit land with some caveat, as specifically mentioned in the order, and such important revealing and significant facts could not be taken into account by the 1st Lower Appellate Court, while reversing the order of the Trial Court. And as such, failure of the 1st Lower Appellate Court to render necessary findings, while reversing the order of the Trial Court would also be a jurisdictional error liable to correction under Article 227 of the Constitution of India.

Mr. Mukherjee was of the view that the Division Bench of this Court in FMA had duly considered the decision reported in **(2008) 11 SCC 1** rendered in the case of **Mandali Ranganna & Ors. Vs. T. Ramachandra & Ors.** and permitted petitioner to undertake further construction and even allowed creating third party interest with same stipulation embodied therein, which is of course shall be abide by the final outcome of the suit.

It was thus sought to be impressed by Mr. Mukherjee taking resort to such decision referred above that opposite parties/plaintiffs/proforma defendants had kept quite for a long time and allowed another to deal with the property exclusively.

Since, the petitioner had already undertaken substantial construction in the suit land making all his acts of possession in his all probable endeavour, the 1st Lower Appellate Court would not have been oblivious of the order passed by Division Bench in the referred FMA.

Further reliance was placed by Mr. Mukherjee on a decision reported in **2011 (6) SCC 73** delivered in the case of ***Purshottam Vishandas Raheja & Anr. Vs. Srichand Vishandas Raheja (Dead) through LRS. & Ors.*** to submit that the tests to be applied to assess the correctness of the order impugned would be whether the order is arbitrary, capricious, perverse justifying interference at an interlocutory stage by the superior court.

The Trial Court, according to Mr. Mukherjee, having exercised the jurisdiction rightly, contrary to the arbitrary exercise of authority, as alleged, the same could not be branded to be perverse or capricious, and further the same being reached upon the settled principles of law, necessary for granting or refusing interlocutory injunction, the order of Trial Court should go unaltered.

Capitalizing a further decision reported in ***AIR 1984 Calcutta 122***, rendered in the case of ***Benode Behari Ghosal Vs. Shew Kamal Singh & Ors.***, Mr. Mukherjee, after having made reference to Section 3A (2) of West Bengal Land Reforms Act, 1955, submitted that the right of intermediary to claim possession/retention of land, who was not in Khas possession, could not be enforced even against the trespasser after the vesting of his estate.

Since the suit is not maintainable by reason of the provisions of Section 34 of Special Relief Act, for not having claimed recovery of

possession, there can not be any injunction granted in a suit for mere declaration of right, Mr. Mukherjee also argued.

The claim of possession, as asserted by the plaintiff being the descendants of Nandi's, out of Khas possession of land should not be allowed to be inflated in a manner beyond its obvious limits so as to provide strength to the case made out in the plaint for its acceptability, Mr. Mukherjee submitted while challenging the illegality of the impugned order.

As regards the statutory presumption attached to R.S.R.O.R., which is finally published, Mr. Mukherjee placed his reliance on a decision of this Court reported in **AIR 1965 Calcutta 328**, delivered in the case of **Jatinder Nath Malik Vs. Sushilendra Nath Palit**, propounding that a entry in the record of rights is presumed to be correct, until it is proved to be incorrect by evidence. The same principle thus, Mr. Mukherjee sought to be applied over the facts and circumstances of this case.

Upon referring such grounds, Mr. Mukherjee learned senior advocate, seriously contended that the order of *status quo* passed by the 1st Lower Appellate Court being product of non-consideration of material and significant facts, as already passed by Division Bench of this Court in FMA, should not be allowed to stand and same should be set aside.

Per contra, Mr. Jayanta Kumar Mitra, learned senior advocate representing opposite party/plaintiff supporting the order of the 1st Lower Appellate Court, submitted that the impugned order neither suffered from

any arbitrariness, nor perversity requiring any interference by this Court at interlocutory stage in connection with the prayer for temporary injunction.

According to Mr. Mitra, the plaintiff claimed her title to the suit property by inheritance from her predecessor-in-interest (Rakhal Das Nandi), whose name was duly recorded in the C.S. record of right appertaining to Khatian No. 1293, plot number 26, measuring an area of 26 decimal of land, in Mouza- Barhans Fartabad, District- South 24 Parganas.

The name of Sarkar's, however, stood recorded as *Dakholidar* in 23rd Column of said C.S. record of right. Petitioner/defendant no. 30, a builder/promoter in this case had disputed the existence of C.S. record of right before the Trial Court on the ground that the plaintiff could not produce the record of right, but only furnished the information slip of C.S. record of right.

Admittedly, C.S. record of right could not be produced due its non-availability at that time. During the process of hearing before this Court, the xerox copy of C.S. record of right was produced. But according to Mr. Mitra, the reference of C.S. record of right was found mentioned in several decisions rendered by different courts including the High Court pertaining to the relevant C.S. record of right.

On the contrary Mr. Mitra, had strongly challenged the R.S. record of right providing right, title and interest to the predecessor of defendant

no. 30, from whom defendant no. 30/petitioner, said to have purchased the suit property by two deeds dated 2nd September, 2009, and 19th May, 2010.

Mr. Mitra disputing with the solenama decree dated 11th November, 1932 of learned Sub- Judge Court, said to have evicted Sarkars in execution of a solenama decree, submitted that the said document had neither seen light of the Trial Court, nor the Appellate Court, when the decision was rendered by the 1st Lower Appellate Court granting an order of *status quo* in connection with a prayer for injunction. Therefore, it was a new fact disclosed for the first time before this Court by way of supplementary affidavit.

More so, according to Mr. Mitra, the said solenama decree had nothing to do with suit property, because upon comparison of location of the suit property together with its description, the conspicuous difference between the two properties could be very easily deduced.

Though there had been series of previous litigation pertaining to the suit property, which ultimately carried in the Second Appeal followed by SLP in the Apex Court, but the claim of Harimohon Nandi @ Hari Charan Nandi being the predecessor-in-interest of defendant no. 30/petitioner could not be established.

As regards purchase of suit property by petitioner from the descendants of Gourmohan Banerjee, whose name was recorded as Jordang in R.S. record of right, the same was considered by the 1st Lower

Appellate Court, and subsequently in a Second Appeal, wherein the Banerjee and his legal heirs were declared to be a mere trespassers, and even their claim of adverse possession was not believed in the decision of the Second Appeal, rendered by this Court.

In the decision of the 1st Lower Appellate Court, during previous round of litigation, Hari Charan @ Harimohan Nandi was not shown to have any right, title and interest in the property, thereby disputing with the devolution of interest upon Hari Charan @ Harimohan, from whose legal heirs, the petitioner/defendant no. 30, said to have purchased the property by sale deed now under challenge in the Trial Court, Mr. Mitra strenuously argued.

Mr. Mitra, putting much stress upon the R.S. record of right submitted that it was not genuine, and there was reasons for the 1st Lower Appellate Court to come to such finding, which stood affirmed in Second Appeal to describe the same to be erroneous, having no basis. The previous round of litigation previously initiated to evict Sarkars, were ultimately dismissed and such dismissal was accepted by the Apex Court, while dismissing the SLP on 30th January, 2006, against the judgment of this Court passed in Second Appeal Nos. 866 of 1976 and 867 of 1976.

Since foundation of claim of petitioner/defendant no. 30 in respect of the suit property was on the strength of purchase of two deeds dated 2nd September, 2009 and 19th May, 2010, and that too from the descendants of Hari Charan @ Harimohan, and descendants of

Gourmohan Banerjee (having forcible possession/ Jordang in the suit property), neither the heirs of Harimohan, nor the heirs of Banerjee could be safely believed to have had their right, title and interest in respect of the suit property so as to convey the same to petitioner by two such sale deeds, Mr. Mitra argued and submitted further that the entry in R.S.R.O.R. was erroneous, having no basis, and it was observed in the decision of the 1st Lower Appellate Court, and subsequently affirmed in the decision of Second Appeal of this Court followed by Apex Court. The entry in R.S.R.O.R. would not be safe to be relied upon. The entry was subsequently reversed by ASO following receipt of objection petition under Section 44(1) West Bengal Estates Acquisition Act, 1953, Mr. Mitra challenged to rebut the presumption of R.S.R.O.R. without furnishing any supporting documents.

While confronting the submission of Mr. Mukherjee, as regards validity and legality of the R.S.R.O.R., Mr. Mitra strongly contended that the claim of the petitioner would not be tenable in the present circumstances of this case, as the petitioner having derived his right, title and interest from persons, who themselves had no title in the suit property, and more so Banerjees' were ultimately declared to be trespasser having without acquired any adverse possession in respect of the suit land.

In such circumstances, Mr. Mitra, submitted that in a Court of equity, wrongful acts are not passport to favour a person having no valid right, title and interest in the suit land.

Mr. Mitra while countering the submission of Mr. Mukherjee, as regards the predecessor of plaintiff not being in Khas possession for the purpose of claiming retention under the provisions of law and consequent vesting of such suit property to State, strenuously argued that it was a mixed question of law and fact, and such point was neither raised before the Trial Court, nor in the Appellate Court, and it was a new challenge thrown simply to support unlawful construction.

Mr. Mitra, then proceeded to make a distinction over the applicability of an order dated 22nd September, 2017, passed by Division Bench of this Court in **FMA 56 of 2017** delivered in the case of **Subir Das & Ors. Vs. Sailen Nandy & Ors.**, grossly being relied upon by Mr. Mukherjee in this case, submitting that such decision would not be operative over the present facts and circumstances of this case, now under reference, as the petitioner/plaintiffs/opposite parties were not the parties to the said suit, though the petitioner of the instant proceeding was one of the defendants in a suit giving rise to FMA 56 of 2017, following rejection of a prayer for injunction.

The opposite party/plaintiff and proforma defendants being all along in possession of the suit property, Mr. Mitra contended that they had no necessity to pray for recovery of possession, besides the prayer for

declaration and injunction, in reply to the submission advanced by Mr. Mukherjee. And as such Section 34 of Specific Relief Act would not be a bar in the instant case.

As regards the alleged silence and conduct of opposite party/plaintiff, said to have been exposed giving rise to the continuation of construction being carried on the suit land, Mr. Mitra submitted that the petitioner deliberately started making construction upon collecting building materials on 15th December, 2013, and ultimately plaintiff filed Title Suit No. 240 of 2013, giving rise to the instant litigation on 20th December, 2013.

An ad interim order of *status quo* was obtained against the petitioner on 21st December, 2013 in TS No. 240 of 2013, which continued up to 26th April, 2016. Upon referring such particulars, Mr. Mitra endeavored to establish that there was neither any silence, nor any reluctance on the part of the petitioner for stopping the unwanted, illegal construction in the suit land. The ad interim order of *status quo* passed on 21st September, 2013 was ultimately vacated by the Trial Court on 26th April, 2016 on an application being filed by petitioner/defendant no.30 under Order 39 Rule 4 C.P.C.

While reinforcing support to the order of the 1st Lower Appellate Court granting order of *status quo*, Mr. Mitra drew attention of the Court that in a suit filed by petitioner being T.S. No. 164 of 2011 in respect of the self-same plot of land, impleading plaintiff as defendants therein, with

a prayer for declaration and permanent injunction restraining the defendants from disturbing the plaintiff's peaceful possession, an order of *status quo* was passed on 28th July, 2011, and such order of *status quo* was made absolute on 7th August, 2013. And in the fitness of the things and upon considering the balance of convenience and inconvenience, prima facie case and the loss of injury, the 1st Lower Appellate Court granted an order of *status quo* reversing the order of the Trial Court simply to preserve and protect the property merely upon floating on the right, title and interest of the parties, without going deep into the details, pending adjudication of the matter in controversy between the parties to suit.

Mr. Mitra, however, candidly admitted during his submission that in pending FMA 56 of 2017, the opposite party/plaintiff had already filed an application for addition of party under Order 1 Rule 10 C.P.C., which is still pending for hearing.

It was also challenged by Mr. Mitra that being emboldened by the decision of FMA No. 56 of 2017, permitting petitioner to undertake construction with a further right to create third party interest in the suit land with some caveat, as specifically mentioned therein, the petitioner had already created some interest violating doctrine of *lis pendens*, as found in Section 52 of the Transfer of Property Act.

As regards the applicability of the decisions referred by Mr. Mukherjee, it was submitted by Mr. Mitra that such decisions would not be applicable in the given context of this case, as the facts involved in

such decision are completely different. The decisions, thus being relied upon by petitioner, according to Mr. Mitra, would be distinguishable on facts.

Mr. Mitra, however, contended that though Mr. Mukherjee sought to rely upon a decision of Apex Court reported in **(2008) 11 SCC 1** rendered in the case of ***Mandali Ranganna & Ors (supra)*** permitting defendant to undertake construction for substantial part of the construction having been completed by that time, would not be applicable in the given context of this case, as the security amount directed to be deposited before the learned Trial Judge had not been directed to be deposited in the decision of FMA 56 of 2017, so as to protect the right, title and interest of the plaintiff pending adjudication of the suit.

Upon referring a decision reported in ***AIR 1960 SC 335***, delivered in the case of ***Mst. Rukhmabai Vs. Lala Laxminarayan & Ors.***, Mr. Mitra proceeded to counter the submission of Mr. Mukherjee that the suit was hopelessly barred by Section 34 of the Specific Relief Act, for want of prayer for recovery of possession, the mischief of Section 34 of Specific Relief Act would not be attracted in this case, since the plaintiff and proforma defendants were all along in possession of suit land.

According to Mr. Mitra, it is a well settled rule of practice not to dismiss suit automatically, but to allow the plaintiff to make necessary amendment, if he seeks to do so. It is thus reiterated by Mr. Mitra that since plaintiff was all along in possession of the suit land, there arose no

necessity to claim for any recovery of possession, besides declaration and permanent injunction.

Having considered the submission of both sides, it appears that the very basis of claim of plaintiff is C.S. record of right, which has been challenged by the petitioner upon taking grounds, as mentioned hereinabove. As against such claim of plaintiff/defendant no. 30/ petitioner has similarly advanced a claim banking upon R.S.R.O.R. In short, the claim of plaintiff is based on inheritance from the predecessor of C.S. recorded owner, while the foundation of the claim of petitioner/defendant no. 30 is on the strength of purchase by two deeds.

The situation, as is presented in course of submissions advanced by two learned senior advocates, appearing for respective rival sides, it appears that there is a strong conflict between C.S. record of right and RS record of right in the instant litigation.

Admittedly, the information slip of C.S. record of right was produced before the Trial Court, but the xerox copy of C.S. record of right was produced before this Court. Certain new facts were disclosed before this Court, which ought to have been disclosed for the first time before the Trial Court, being the Court of first instance, and at least to the 1st Lower Appellate Court, while rendering decision to a petition for temporary injunction.

The solenama decree, dated 11th November, 1932 of learned 18th Sub- Judge Court, intending to evict Sarkars, and subsequent execution

of solenama decree to recover possession of the suit property from Sarkars' even could not be brought to light before Trial Court, far to speak off the 1st Lower Appellate Court.

It was for the first time disclosed before this Court in the form of supplementary affidavit. Though law point can be challenged at any point of time, but the point raised by Mr. Mukherjee pertaining to State Acquisition Act, and Land Reforms Act was not at all raised before the Trial Court, or 1st Lower Appellate Court.

The order of the Division Bench passed by this Court in FMA 56 of 2017, permitting petitioner to go for construction even creating third party interest pending adjudication, which was of course with some caveat, as specifically spelt out in such order, and of course subject to the final decision of suit, even could not be considered by the 1st Lower Appellate Court.

The dispute between the Nandi's with respect to their recording of name in C.S.R.O.R. against Sarkars to the extent of their recording as Dakholdar, appearing in the 23rd Column of C.S.R.O.R. commenced long before i.e. the year 1958. Nandi's intending to evict Sarkar's, their tenants previously instituted two suits being Title Suit No. 58 of 1958, and 25 of 1959. Against the decision of the Trial Court, there were two appeals preferred being Title Appeal No. 1149 and 1186 of 1962. The Appellate decision observed that neither Harimohan nor Hari Charan Nandi was the same and identical person. The devolution of interest to the extent of

recording the name of Harimohan Nandi in the R.S. record of right was found to be without any basis, and accordingly held to be erroneous.

Though the name of Gourmohan Banerjee was recorded in R.S.R.O.R. as Jabar Dokhol (Jordang) with respect to the relevant suit plot involved in this case, but ultimately as per Appellate decision, he was considered as a mere trespasser and his claim of adverse possession was not even accepted.

There was a Second Appeal carried against the decision of the 1st Lower Appellate Court being Second Appeal Nos. 866 of 1976 and 867 of 1976. The decision of the 1st Lower Appellate Court, however, remained untouched, and both the Second Appeals were dismissed affirming the decision of the 1st Lower Appellate Court.

Argument was strongly raised in such context by Mr. Mitra that C.S.R.O.R. in the given context of this case, should be prevailed over the R.S.R.O.R. being already held to be erroneous in previous round of litigation between the predecessors of the petitioner and the opposite parties.

At the same time, the claim of petitioner regarding a decree for recovery of possession against the Sarkars on the strength of a solenama decree and its subsequent execution thereof giving rise to the delivery of possession, obtained in execution of the decree in 1933, could not be looked with doubt and that was the reason behind the reflection of

recording the name of Harimohan Nandi in the R.S. record of right, Mr. Mukherjee advocated.

From the copy of the plaint of Title Suit No. 240 of 2013, it appears that plaintiff/opposite party claimed to have 1/4th share from one Narendra Nath Sarkar, son of Ram Nath Sarkar, the erstwhile owner of the suit property. Narendra Nath Sarkar upon execution of a will transferred his share in the property bequeathing a will to his wife Abja Dey Sarkar, who subsequently died leaving two sons, and plaintiff/opposite party/Chhanda Dutta (since deceased). Therefore, the share of plaintiff in the suit land appears to be limited to the extent of 1/3rd of original four (4) annas share, held by Narendra Nath Sarkar, who if, at all received the property by inheritance, as per recording of C.S.R.O.R.

Admittedly, defendant no. 30/petitioner filed Title Suit no. 164 of 2011, in respect of the self-same plot of land involved in the present litigation with a prayer for declaration and injunction impleading the opposite party/plaintiff with others as defendants. There was an order of *status quo* against the defendants on 28th July, 2011, and such order of *status quo* was made absolute on 7th August, 2013.

Though Mr. Mitra endeavoured to challenge the erroneous entry of R.S. record of right upon referring the discussions contained in the appellate judgment, as well as in the observation of the Second Appeal affirming the judgment of the Lower Appellate Court, but no document

was ever produced before the Trial Court, and subsequently to 1st Lower Appellate Court to establish the stand of objection raised against the erroneous recording of name, as alleged by the plaintiff with respect to R.S.R.O.R. and L.R. record of right.

One Subir Das and others filed a Title Suit being T.S. No. 46 of 2016, with a prayer for declaration and injunction, which was refused up to the 1st Lower Appellate Court. In such litigation, petitioner was made one of the defendants. An appeal was then carried in the High Court being FMA 56 of 2017, and stay application being CAN No.11984 of 2016 was moved.

By an order dated 22nd September, 2017, Division Bench of this Court in connection with FMA No. 56 of 2017, proceeded to protect the plaintiff's interest in the suit property pending final outcome of the suit, observing therein that in the event the plaintiffs ultimately succeed in proving their title, the defendant no. 3 (the petitioner herein) should restore the property to the plaintiffs' in its original condition, as it existed on the day of institution of the suit.

The direction according to Mr. Mukherjee passed in First Miscellaneous Appeal would address the point of irreversible loss and injury being cost of the suit land, and further petitioner/defendant no. 3 therein was, however, permitted to carry on his construction.

There was further observation in such order that the petitioner, however, shall not be entitled to claim any equity in his favour, if the

plaintiffs' ultimately succeed in the suit. The stay application was thus disposed of against the refusal of the prayer for injunction, and directed further that any construction made by petitioner /defendant no. 3 during the pendency of this suit shall be subject to final outcome of suit, and in the event petitioner seeks to alienate, or create third party's right in any form whatsoever during the interim period, pending disposal of this suit, he shall intimate in writing to the person in whose favour such right is being created, or sought to be created, about pendency of this suit and such written communication must also specify the direction contained in the judgment.

Much was argued by Mr. Mitra that during the pendency of instant litigation, as well as the enforcement of ad interim order of *status quo*, the petitioner purposefully, deliberately created third party interest violating the doctrine of *lis pendens* under Section 52 of Transfer of Property Act.

With regard to the contention raised as regards violation of *lis pendens*, what I perceive is that a transfer is not void just because the transfer is made during the pendency of litigation, and effect of Section 52 is that a transfer will be subject to the outcome of the suit. All that Section 52 of the Transfer of Property Act provides is that the transfer, which is made during the pendency of the proceeding, is subjected to the final result of the litigation.

When admittedly an application under Order 1 Rule 10 C.P.C. has already been filed by the plaintiff/opposite parties in FMA 56 of 2017, to

establish her interest in the suit land, and further when there is a separate title suit being number T.S. 164 of 2011 in respect of the self-same plot of land involved between the parties, wherein an order of *status quo* has already been granted and made absolute on 7th August, 2013, this Court is of the view that returning any decision at this juncture on to the law points, as raised by Mr. Mukherjee with respect to extinction of C.S. plot number 1293 and merger of same with R.S. plot number 1292, non-retention of the land for not having held the same in the Khas possession under the provisions of Land Reforms Act would unnecessarily make the trial critical and exacerbated.

If any decision is given, with respect to alleged construction, as raised by Mr. Mitra, there is fair chance of pre-judging the suit even. In view of the discussion hereinabove, and in the fitness of things, this Court, however, desist from returning any decision on such law points. Such points are, however, left to be decided by the Trial Court at the appropriate point of time, and when there will be sufficient scope for the Trial Court to decide the same upon making consideration of the evidence to be adduced by either of the parties to this case.

The supervisory jurisdiction under Article 226 is exercised for keeping sub-ordinate courts within bounds of their jurisdiction. The same is, however, not available for correcting mere errors of fact or law. It is, however, available only when error is manifest and apparent on face of

record, and grave injustice or gross failure of justice has been occasioned thereby.

Alternatively, it may be put in this way that the jurisdiction under Article 227 of the Constitution of India may be restrictive in the sense that it is to be invoked only to correct errors of jurisdiction, but when a Court asks itself a wrong question or approaches the question in an improper manner, even if it comes to the finding of the fact, the said fact cannot be said to be one rendered with jurisdiction, and it is still be amenable to correction at the hands of the High Court under Article 227 of the Constitution of India. The failure to render the necessary findings to support its order would also be jurisdictional error liable to correction {(2006) 3 SCC 312 rendered in the case of **Kishore Kumar Khaitan & Anr. Vs. Praveen Kumar Singh** para- 13 relied upon}.

From the materials produced including the affidavit exchanged between the parties, and the short notes filed by each of the parties to this case, it appears that the order of Division Bench passed in FMA 56 of 2017 vide stay application being CAN No. 11984 of 2016 dated 22.09.2017, could not be adequately taken into account by the 1st Lower Appellate Court, when the impugned order granting *status quo* upon reversing the order of the Trial Court was passed on 18th January, 2020, though written notes of argument were allegedly furnished by either of the parties to this case before the 1st Lower Appellate Court. Non-

consideration in such circumstances of material facts obviously prompted the Lower Court to reverse the order of the Trial Court.

The obligation to discharge judicial function of the 1st Lower Appellate Court in terms of the authority vested to it stands at higher pedestal compared to Trial Court. Failure to render necessary findings by 1st Lower Appellate Court to support its order in spite of sufficient materials being produced before it, would also be a jurisdictional error, liable to correction under Article 227 of the Constitution of India.

It goes without saying that the instant litigation (T.S. 240 of 2013) was originated on 20th September, 2013, and on 18th January, 2020, the 1st Lower Appellate Court set aside the order of the Trial Court, directing both parties to maintain *status quo* till decision of the suit. The Trial Court originally granted injunction, which however, continued till April, 2016, and ultimately vacated on 26th April, 2016 on an application being filed by petitioner under Order 39 Rule 4 C.P.C.

Having considered the long passage of time since 2013, it would not serve any practical purpose to relegate the instant application to 1st Lower Appellate Court for decision afresh, because that would add further age to the age of present litigation.

For the discussions made hereinabove, trial is absolutely necessary to unfold the real matter in controversy between the parties in a case, where there is previous strong conflict between C.S.R.O.R. and R.S.R.O.R., pertaining to the suit properties involved in this case.

Since, no local inspection report is found in the record to show the extent of construction already reached in the meantime in the suit land, there lies no justification requiring petitioner to furnish security in the interest of undertaking further construction together with creation of third party interest in terms of the order of FMA No. 56 of 2017, because that would be a subject matter of consideration in FMA No. 56 of 2017, and further if any such order is passed, there may be conflicting decisions to come, which is not at all desirable in the dispensation of justice.

Though, challenge was raised with regard to the unlawful construction being carried on, violating the order of *status quo*, but surprisingly no application for violation of injunction order was filed before the Trial Court to check or prevent the violation, if there be any, caused in the suit land.

For the discussions made hereinabove, the order of the 1st Lower Appellate Court granting *status quo* during the pendency of the suit, upon reversing the order of the Trial Court is thus, not sustainable, and accordingly set aside.

The revisional application succeeds.

Before parting with record, this Court feels obliged to give a direction for expeditious disposal of the suit, otherwise the substantial justice cannot be reached to the parties without holding a trial.

Accordingly, the Trial Court is directed to dispose of the suit expeditiously as possible providing sufficient opportunity of hearing to

either of the parties to this case, but without granting unnecessary adjournment unless it is extremely unavoidable.

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.)