

21.09.2022
SL No.9 wt 10
Court No.8
(gc)

**FMAT 265 of 2022
CAN 1 of 2022**

**Biresh Chandra Daw & Anr.
Vs.
Archana Rani Daw & Ors.**

With

**FMAT 344 of 2022
CAN 1 of 2022**

**Archana Rani Daw & Ors.
Vs.
Biresh Chandra Daw & Ors.**

Mr. Aniruddha Chatterjee,
Mr. Chayan Gupta,
Mr. Anujit Mookherji,
...for the Appellants in FMAT 265 of 2022.
Mr. Rupak Ghosh,
Mr. Jayanta Sengupta,
Mr. Arnab Dutt,
...for the Respondents in FMAT 265 of 2022
...for the Appellants in FMAT 344 of 2022.
Mr. Debnath Ghosh,
Mr. Sayantan Chatterjee,
Mrs. Debarati Das,
...for the Respondent Nos.9,10 & 11.

By consent of the parties both the appeals and the connected applications are taken up together and disposed of by this common order.

The appellant in FMAT 265 of 2022 are the respondents in a suit filed by the appellant in FMAT 344 of 2022.

The appeal being FMAT 265 of 2022 is directed against the order dated 22nd June, 2022 passed by the learned Judge, XIIth Bench, City Civil Court at Calcutta in T.S. No.1265 of 2022 in connection with an application

filed under Order 39 Rule 1 & 2 read with Section 151 of the Code of Civil Procedure filed by the plaintiffs/respondents praying for an order of injunction restraining the defendant No.1 from acting as sole trustee and collecting any rent issues and profit of the Shib Krishna Debuttar Estate and from holding seva puja of the deities and from managing and administering the Shib Krishna Debuttar Estate and restraining the defendant Nos.1 to 5 from interfering with the plaintiff No.1 as member of family of the settlers to act, administer, manage and supervise all activities of the Debuttar Estate.

FMAT 344 of 2022 is the appeal preferred by the plaintiffs against the judgment and order dated 10th August, 2022 being aggrieved by the order passed by the learned Judge in refusing to pass an order appointing Receiver over the said Debuttar Estate.

The appellant preferred an appeal on 7th July, 2022 but the matter could not be heard as the regular Bench had released the matter and only after assignment this matter has appeared before this Bench for consideration.

The basis of the claim of the plaintiffs is that the plaintiff no.1 is eligible to act as sole trustee and Shebait as the present senior most lineal descendant/member of the settlor's family to hold the office of Shib Krishna Debuttar Estate and administer the said Estate in terms of all the provisions of the deed of dedication/Arpannama dated 28th April, 1896.

In the suit, the plaintiffs have prayed for a declaration that senior most lineal descendant/member irrespective of gender of the family of settlers of the said estate is entitled to hold the office of the sole trustee of the Shebait and administer their estate in terms of the aforesaid deed of dedication. In the suit the plaintiffs are alleged mismanagement and siphoning of assets by the respondents.

The application was moved ex parte on 22nd June, 2022. It appears that the plaintiffs earlier filed a suit under Section 34 of the Indian Trust Act inviting the Court for a decision on the two several deeds of settlement being ATA 8 of 2021. However, the said suit was dismissed as withdrawn on the prayer of the plaintiffs with liberty to file a civil suit in accordance with law. The said order was passed on 10th February, 2022. It is not in dispute that for all the earlier years, the arrangement that is now sought to be disrupted by the impugned order continued. It was towards the end of last year only dispute started. It does not appear from the impugned order that the learned Trial Judge had really seen the order dated 10th February, 2022 or conscious of the earlier litigation that has given rise to the present litigation in which the impugned order was passed. We do not find any reflection of the said order in the impugned order dated 22nd June, 2022. The learned Trial Judge, in our view, could not have passed an ex parte order having regard to the order dated 10th February, 2022 where the

petitioners and all the respondents were represented by their advocate. We are of the view that even if a *prima facie* case would have been made out in favour of the plaintiffs but the balance of convenience and the prejudice that such an order is likely to cause was not well-appreciated by the learned Trial Judge in deciding the said matter *ex parte*. We assume that he was not aware of the order dated 10th February, 2022 and proceeded on the basis that there has been no earlier litigation between the parties concerning the said issue.

There is no discussion in the impugned judgment that the plaintiffs was successful in establishing a *prima facie* case on the basis of the facts narrated and unless an ad-interim order is passed it would cause serious prejudice. It is true that the interim order was for a period of four weeks but having regard to the nature of the order it is having a far reaching effect.

The impugned order only narrates the submission made on behalf of the parties and does not take a *prima facie* view that on the basis of the two deeds the plaintiff no.1 is entitled to hold the office of the sole trustee and shebait of the said Estate.

Mr. Aniruddha Chatterjee learned Counsel appearing on behalf of the appellants has submitted that without a *prima facie* view being taken in favour of the plaintiffs as to their rights to function as the sole trustee the learned trial judge could not have proceed with the matter and it is not one of such exceptional cases where

the trial court could have exercised its discretionary power to pass such a drastic order at an ad-interim stage.

Mr. Rupak Ghosh learned Counsel representing the plaintiffs however, submits that all necessary facts were taken into consideration by the learned Court before passing of an ex parte ad interim order. The learned Counsel further submits that the defendants did not apply under Order 39 Rule 4 of the Code of Civil Procedure and the matter could have been disposed of in the mean time if the defendants were willing to have the matter disposed of at an early date.

As observed earlier the impugned order was only a mechanical reproduction of Order 39 Rule 1 without they are being any discussion even briefly with regard to the fulfillment of the conditions for an ex parte ad interim order.

We find the order to be unreasoned. Moreover, we feel that the said order could not have been mechanically extended once the appellants appeared before the learned Trial Court. However, at the same time it could not be ignored that if the plaintiffs are beneficiaries they have a right to raise their voice for any act of mismanagement. It is irrespective of their claim that the plaintiff no.1 is to represent the Estate as the senior most trustee.

Considering the fact that the status quo ante continued for several years without any disruption and having regard to the fact that for few months from now the Estate may require to hold various Seva pujas

commencing from Durga Puja, we modify the interim order to the extent that defendant No.1 shall be entitled to collect rents till the matter is taken up by the learned trial court. The defendant no.1 shall account for all the expenses that are likely to be incurred towards the seva pujas and also render true and faithful account of all the incomes and expenses of the said Estate upon furnishing prior copies thereof to the plaintiffs in advance. The defendants no.1 shall file accounts in the form of an affidavit in the pending proceeding. The plaintiffs shall be allowed to participate in the seva puja without prejudice to their rights and contentions in the pending proceeding.

The appellants in FMAT 265 of 2022 are restrained from alienating, encumbering and/or creating any third party interest in respect of the properties of the Estate till the disposal of the injunction application without the express leave of the trial court. The appellants shall include a list of tenants and the income and expenses of the Estate before the learned Trial Court in the form of an affidavit as directed on 26th September, 2022 upon prior service.

On such considerations, we modify the interim order to the aforesaid extent till the matter is being considered by the learned Trial Court on the date fixed. The learned Trial Judge is directed to consider the prayer for appointment of receiver or a Special Officer on consideration of the accounts to be disclosed by the appellants. If the Trial Court is convinced upon disclosers

being made that there has been any mismanagement, it would be free for the trial Court to pass appropriate order ensuring that the Durga Puja and other festivals are in no way affected and also to ensure that rights of the parties are preserved. It may not be necessary for the trial Court to dispose of the injunction application on merits on the date fixed for paucity of time or the prayer for receiver on the adjourned date but any interim order to be passed should be a reasoned order upon consideration of the materials on record.

We make it clear that in deciding the applications the learned Trial Judge shall not be influenced by the observations made by us in disposing the appeals.

We have been informed that the said Bench, i.e. XIIth Bench, City Civil Court at Calcutta is lying vacant. The Chief Judge, City Civil Court at Calcutta is requested to assign these applications to a particular Bench so that the matter can be taken up on the date fixed.

We make it clear that none of the parties shall make any prayer for adjournment on the date fixed.

Accordingly, both the appeals and the connected applications are disposed of.

However, there shall be no order as to costs.

A copy of this order shall be forwarded to the Chief Judge, City Civil Court at Calcutta by the Registrar Administration (L&OM).

Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Uday Kumar, J.)

(Soumen Sen, J.)