

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Appellate Side)

MAT 1192 of 2021
With
CAN 1 of 2021

(Through Video Conference)

Reserved on: 04.01.2022
Pronounced on: 10.01.2022

Rustom Khan

...Appellant

-Vs-

The State of West Bengal and others

...Respondents

Present:-

Mr. Rabindra Nath Mahato,
Mr. Arita Shankar Ray, Advocates
... for the appellant

Mr. Amal Kumer Sen,
Ms. Benajir Ahmed, Advocates
... for the State

Mr. Sukanta Das, Advocate
... for the private respondent

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE
THE HON'BLE JUSTICE KESANG DOMA BHUTIA,
JUDGE

Prakash Shrivastava, CJ:

1. By this appeal the writ petitioner has challenged the interlocutory order dated 25.10.2021 passed by the learned Single Judge in WPA 14422 of 2021 whereby learned Single Judge has expressed that prayer for ad interim order of injunction cannot be decided without exchange of affidavits.

2. The submission of learned Counsel for the appellant is that he is already having a decree of permanent injunction in the civil suit and that the execution proceedings are pending thereof in the meanwhile the appellant should be allowed to access the land in dispute because the crop is at the harvesting stage. He has submitted that instead of taking action to protect the appellant, the police has initiated proceedings against him by issuing show cause notice dated 29.09.2021.

3. Learned Counsel for the respondents has opposed the appeal and has submitted that the interlocutory order under challenge is not in the nature of judgment, therefore, the appeal is not maintainable and that the appellant cannot resort to the writ remedy after already availing execution remedy.

4. Having heard the learned Counsel for the parties and perusal of the record, it is noticed that both the private parties are setting up their respective claim for the land in question. The petitioner is relying upon the *ex parte* decree in Title Suit No. 49 of 2004 whereas at the instance of the respondent No. 4 the Title Suit No. 175 of 2020 is pending. In view of the facts disclosed in the writ petition and keeping in view the background of the litigation between both the parties, learned Single Judge has rightly observed that matter cannot be decided without exchange of affidavits. So far as notice dated 29.09.2021 is concerned that is only for maintaining peace in terms of Section 107 of the Cr.P.C.

5. That apart, in terms of the judgment of the Hon'ble Supreme Court in the matter of **Shah Babulal Khimji vs. Jayaben D. Kania and another**, AIR 1981 SC 1786 an order deciding a controversy

affecting valuable right of one of the parties can be treated as judgment within the meaning of the letters patent.

6. In the above background we are of the opinion that order of learned Single Judge does not require any interference. Since in the impugned order the prayer for interim order of injunction has not been rejected, therefore, we are of the opinion that the appellant has remedy to make a prayer for interim order or final decision before the learned Single Judge. To expedite the matter private respondent is directed to file the affidavit-in-opposition before the learned Single Judge within two weeks hence, if not already filed. We make it clear that we have not expressed any opinion on the merits of the case or about the maintainability of the writ petition. Since we find no reason to interfere in the order of the learned Single Judge, therefore, the appeal is dismissed.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(KESANG DOMA BHUTIA)
JUDGE

Kolkata
10.01.2022

PA(SS)