

03 **14.01.22**

Ct. No. 04

Akd

F.M.A. 20 of 2022

With

CAN 1 of 2021

Masud Ali @ Lal

Vs.

Wahdia Rahman & Anr.

Mr. Rajdeep Bhattacharya.

... for the appellant.

The instant appeal arises from an order dated 7th October, 2021 passed by the learned Civil Judge (Senior Division), 5th Court, Alipore in Title Suit No. 1043 of 2021; whereby and whereunder the prayer for ex parte ad interim order of injunction was refused.

The plaintiff filed a suit for partition, declaration and permanent injunction. According to the plaintiff the property was initially leased out by the Central Bank of India in favour of three persons, namely Sabara Khatoon, Chand Khan and Jamshed Khan. Since the property came within the purview of Calcutta Thika Tenancy Act, 1981, such property was treated as such and in view of the vesting provisions contained therein the land, which was owned by the Bank, stood vested with the State of West Bengal.

Be that as it may, the plaint clearly discern that the property is comprised in thika tenancy and since the ownership of the structure is not in dispute, the aforesaid persons became thika tenants under the State of West Bengal. Subsequently transfer was effected by executing a deed of conveyance after coming into force of the said Act. An ex parte ad interim order of injunction was sought to protect the possession from the other co-tenants including the stranger, who allegedly acquired right by virtue of the

alleged deed of conveyance executed by the co-thika tenant, namely Jamshed Khan.

The Trial Court refused to pass ad interim order of injunction solely on the ground that the ownership of the property is not clear at present. It is somewhat settled that the existence of prima facie title and the existence of prima facie case are two distinct features. The Court is not supposed to proceed to trace out the prima facie title for the purpose of considering an application for injunction, but the Court has to confine its scrutiny within three golden parameters, namely existence of prima facie case, balance of convenience and inconvenience and irreparable loss and injury at the time of considering an application for temporary injunction.

However, an exception has been carved out by introduction of Order XXXIX Rule 3 (a) of the Code of Civil Procedure, which puts a reasonable restriction in passing an ex parte ad interim order of injunction against the defendants unless the Court is satisfied that the delay would defeat the very purpose of injunction upon returning the reasonable findings thereupon. It is a normal rule that notice is to be issued to the defendant before the Court proceeds to pass an order of injunction and exception has been made provided the expression used therein is strictly followed.

The Trial Court did not find such emergent situation warranting invocation of an exception provided in the aforesaid provision. The claim is founded on the right in the property and the possession as a co-thika tenant. The possession of the co-sharer in an undivided property is not on the basis of his share therein but also on behalf of the other co-sharers unless other co-sharers claim ouster. The injunction appears to have been sought

against the co-thika tenant and in absence of any clear and explicit case having pleaded, the ex parte ad interim order of injunction should not be passed simplicitor on the ground that the law respects possession and nobody shall be allowed to take the law in his own hand.

We thus do not find any infirmity in the impugned order.

The appeal is thus dismissed. Connected application is also dismissed.

There will be no order as to costs.

(Harish Tandon, J.)

(Rabindranath Samanta, J.)