

28.09.2022

Court : 04
Item : 04
Matter : FMA
Status : DO
Transcriber: NANDY

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
(Commercial Division).

FMA 1250 of 2022
with
CAN 1 of 2022

R.G. Nirman Pvt. Ltd.
Vs.
Alak Kumar Nandy

Mr. Mainak Bose, Senior Advocate
Mr. Avishek Guha, Advocate
Mr. Rahul Kumar Singh, Advocate
Ms. Debarati Das, Advocate
Ms. Akansha Chopra, Advocate

.....for the Appellant

Mr. Shaktinath Mukherjee, Senior Advocate
Mr. Sounak Bhattacharya, Advocate
Mr. Sumitava Chakraborty, Advocate
Mr. Sounak Mondal, Advocate

.....for the Respondent

Today when the matter is taken up for final disposal, it has been pointed out by the learned Advocate appearing for the appellant that there are some ministerial and typographical errors in the order dated 15.09.2022.

Firstly, the first two names of the learned Advocates appeared for the appellant were recorded as Mainak Ganguly and Avishek Gupta instead of **Mainak Bose** and **Avishek Guha** respectively.

Secondly, the date of the Development Agreement appearing in the first page as 03.03.2013 and in the second page as 03.03.2013 and 03.03.2015 respectively should be replaced with **03.05.2013**.

Thirdly, in the third page of the said order, where the respondent was restrained from dealing with and/or disposing of the third to fifth floor of the building should be third **and** fifth floor of the building. The aforesaid contention has not been disputed by the learned Advocate for the respondent. Rather it is submitted that the fourth floor is in possession of their client.

In view of the above, let the necessary correction be carried out by the office as pointed out hereinabove.

The instant appeal arises from an order dated August 31, 2022 passed by the learned Judge, Commercial Court, Rajarhat in Misc. (Arb) Case No. 65 of 2022 (CC) whereby and whereunder the prayer for an *ex parte ad interim* order of injunction was refused.

At the time of admitting the instant appeal this Court noticed that despite having held that the appellant has been able to make out a *prima facie* case and the balance and inconvenience lies in his favour and if the injunction is not granted it may cause injury to the appellant, the Court declined to pass an *ex parte ad interim* order of injunction on the premise that the agreement dated 18.03.2020 contained a forum clause excluding the jurisdiction and/or conferment of the jurisdiction and, therefore, it would not be proper to pass an order without hearing the other side.

It is not in dispute that the Development Agreement was executed between the parties on 03.05.2013 followed by supplemental agreements from time to time. The supplemental agreement dated 18.03.2020 was executed for the purpose of recording the factum of

completion and construction in terms of the Development Agreement and the specified portion to be given to the respondents and certain portions relating to car parking space to remain in common for the project and to be utilized for the service utilities already installed therein. It was further contended that in terms of the Development Agreement dated 03.05.2013, the security deposit was supposed to be refunded yet the same has not been done and on the other hand, the respondent is contemplating to make construction in the inner courtyard situated between the two existing towers which is in gross violation of the terms and conditions of the agreement.

We passed an *ex parte ad interim* order of injunction on 15.09.2022 after noticing the aforesaid fact and the findings recorded by the Court below on fulfilment of three golden principles applicable for passing a temporary injunction. We observed that the moment those conditions are found to have been satisfied, there was no justification on the part of the trial Court in declining to pass an *ex parte ad interim* order of injunction simplicitor on the basis of forum clause.

Today when the matter is listed, Mr. Shakinath Mukherjee, learned Senior Counsel, appearing for the respondent contested the instant appeal and according to him the facts discerned from the record would not justify any interim order to be passed. Mr. Mukherjee further submits that various documents are required to be looked into which his client intend to place before the Court which may reveal the events narrated in the said application to be diametrical opposite thereto.

We are not unmindful of the fact that the instant appeal arises from an order refusing to pass an *ex parte ad interim* order of injunction. Ordinarily the Appellate Court confine itself to the averments made in the main application and an application for passing an interim order and if the Court is satisfied that it does not involve any case warranting an *ex parte ad interim* order of injunction to be passed, in such event, the Court may interfere. However, the exceptions are there and, therefore, such principles cannot be applied as universal principle of law. In the instant case, even the Court below have found the existence of all the parameters required to passing in interim order, yet declined to pass it because of the forum clause, which we feel should be decided giving an opportunity to the other side.

We, however, feel since the respondent has entered appearance, he must get an opportunity to contest the application filed under Section 9 of the Arbitration and Conciliation Act, 1996 which is pending before the Court below. It is to be remembered that the consideration at the time of passing an *ex parte ad interim* order of injunction is different than at the time of passing an order of temporary injunction upon exchange of affidavits and the disclosure of the facts by both the parties. Therefore, we trust and hope that the Court below would consider the aforesaid principle at the time of disposing of the proceedings upon disclosure of the facts by the respective parties and shall not be swayed by any observations made by this Court in the instant appeal.

We find that it is a fit case where an *ex parte ad interim* order of injunction ought to be passed.

We, therefore, restrain the respondent from making any construction in the inner courtyard situated between two existing buildings for a period of ten weeks from date or until further order, whichever is earlier. We further restrain the respondent from dealing with, transferring and alienating and/or disposing of the third and fifth floor of the building in any manner whatsoever for the like period as indicated above with the caveat that the user thereof is kept outside the purview of the said injunction order.

The respondent is directed to file affidavit-in-opposition to an application under Section 9 of the Arbitration and Conciliation Act, 1996, before the Court below within one week after reopening of the Court following long vacation for the year 2022. Reply thereto, if there be any, shall be filed within a week thereafter.

The Court below shall fix the date immediately upon expiration of the period of exchange of affidavits, if necessary, by preponing the date, in presence of the respective Counsel and the parties. Endeavour shall be shown to dispose of the said proceeding within three weeks therefrom by recording proper reasons in accordance with law.

Nothing observed hereinabove nor pleaded before us, shall be construed to have any prejudicial effect upon the rival parties and the Court below shall proceed to dispose of the said proceeding independently and any observation touching upon the merit, shall be deemed to have no persuasive effect on it.

With these observations, the appeal being **FMA 1250 of 2022** and the connected application being **CAN 1 of 2022** are **disposed of**.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)