

03 28.03.2022

Ct-08

ar

SA 14 of 2022
with
I.A No. CAN 1 of 2022

Surendar Moni Dubey & Ors.
Vs.
Asansol Municipal Corporation & Anr.

Mr. Gopal Chandra Ghosh
Mr. Arnab Roy
Mr. Satyam Mukherjee
... For the Appellants

This second appeal has come up for admission. The appellants are aggrieved by the judgment and decree passed by the learned Civil Judge, Senior Division, 2nd Court at Asansol, Paschim Bardhaman in Title Appeal No. 22 of 2018 affirming the judgment and decree dated 13th June, 2018 passed by learned Civil Judge, Junior Division, Additional Court at Asansol, Burdwan in Title Suit No. 37 of 2014.

The plaintiffs claim to be the owner of the property. It is alleged that in the earlier suit the appellants were declared to be the owner of the property. It is also alleged that in the year 1979 the plaintiffs filed a suit being Title Suit no. 321 of 1979 for declaration of title and permanent injunction impleading the State of West Bengal, the Collector of Burdwan and JLRO, Asansol, Chelidanga as defendatns. The said suit was decreed in favour of the plaintiffs and the defendants were permanently restrained from interfering in any manner with the peaceful possession of the predecessors of the plaintiffs over the suit land. Against the said suit, the defendants had preferred an appeal, which was dismissed for default. The defendants again

filed a Misc. Case no. 306 of 1986 and the same was also dismissed for default. So, the original judgment and decree passed in Title Suit No. 321 of 1979 declaring the right, title and interest and possession of the predecessors of the appellants in respect of the suit property survived.

Being known the above facts with regard to plaintiffs' possession over the suit property, the respondents/defendants tried to grab a portion of the suit properties for raising construction thereon on the plea that the suit properties are vested land and forcibly tried to dispossess the plaintiffs and agents therefrom on 15th February, 2007. The plaintiffs further alleged that during the pendency of the suit an order of injunction was passed in favour of the plaintiffs restraining the defendants from changing the nature and character of the suit property. However, admittedly the plaintiffs did not initiate any proceeding under Order 39 Rule 2A of the Code of Civil Procedure for alleged violation of the order of injunction. The plaintiffs amended the plaint by incorporating a prayer for mandatory injunction directing the defendants to dismantle and/or remove the illegal construction raised. The trial court held that in absence of any prayer for recovery of possession suit might not be maintainable. The first appellate court, however, held that for getting proper remedy the plaintiffs would have to apply under order 21 Rule 32 of the Code of Civil Procedure for execution of the order of injunction.

The prayer for mandatory injunction cannot give a complete relief to the plaintiffs and the plaintiffs were out of possession on the basis of

their own averment. It is alleged by the plaintiffs that during the pendency of the suit unauthorised and illegal construction was taken place in the suit property. It is not clear whether such construction was taken place during the pendency of the suit or prior thereto. In any event, the trespasser can only be evicted by due process of law. The mandatory injunction was prayed for by the appellants/plaintiffs is treated to be a recovery of possession, which was open to the plaintiffs while amending the plaint by making a prayer for recovery of possession or dispossession on the basis of their admission and the report of the commissioner was relied upon by the appellants before the trial court.

Learned counsel appearing for the appellants submits that if the respondents are not lawful owners of the property, as would be evidence from the judgment of both the courts below, then the status of the respondents could be a trespasser and the act of trespass is a continuing wrong for which the appellants may be permitted to take appropriate steps in accordance with law.

On such consideration, we do not find any substantial question of law is involved in the present appeal for which the second appeal may be admitted. However, dismissal of the second appeal may not prevent the appellants/plaintiffs to take appropriate steps in accordance with law.

On such consideration, we do not find any merit in the second appeal.

The second appeal is, therefore, summarily dismissed under Order XLI Rule 11 of the Code of Civil Procedure.

In view of dismissal of the appeal nothing remains to be decided in the injunction application being CAN 1 of 2022 and the same is accordingly dismissed.

(Ajoy Kumar Mukherjee,J.)

(Soumen Sen, J.)