

26.09.2022
KC(8)

F.M.A. 1218 of 2022
Neeraj Bajoria and Ors.
-versus-
Pawan Kumar Todi and Ors.
With
CAN 1 of 2022

Mr. Abhrajit Mitra, Sr. Adv.,
Mr. Jishnu Chowdhury,
Mr. Varun Kothari,
Mr. Amit Agarwalla,
Mr. B.N. Joshi,
Ms. Debashri Mukherjee.....For the appellants.

Mr. Jayanta Kumar Mitra, Sr. Adv.,
Mr. Rwitobrata Mitra,
Ms. Radhika Singh.....For the respondent
no. 1.

Mr. Dhruba Ghosh,
Ms. Nandini Mitra,
Mr. Sayantak Das.....For the respondent
no. 11.

Mr. Suman Dutt,
Mr. Rajarshi Dutta,
Mr. Dipendra Nath Chander,
Ms. Monica Jaiswal.....For the respondent
no. 13.

Mr. Surajit Nath Mitra, Sr. Adv.,
Mr. Rudraman Bhattacharya,
Mr. Dhiraj Sethia,
Mr. Abhishek Roy.....For the respondent
no. 44.

At the outset, we record the objection of Mr. Jayanta Kumar Mitra, learned senior advocate appearing for the respondent no. 1 that this appeal is not maintainable for the reason that the learned court below has not even considered the application for injunction filed by the appellants/plaintiffs. Hence, there is no impugned order.

To consider this objection the order sheets of the learned court below have to be looked into.

The one dated 17th June, 2022 records filing of a suit for declaration and perpetual injunction by the appellants/plaintiffs along with usual recordings regarding payment of court fees, requisites and so on and direction for issuance of summons etc. On 23rd June, 2022, the court recorded that the plaintiffs filed an application under Order XXXIX rules 1 and 2 of the Code of Civil Procedure and also that the court was not “inclined to pass any ad-interim injunction order without giving the caveators an opportunity of being heard”. 2nd July, 2022 was fixed for appearance of the respondents/defendants after issuance of notice. On 2nd July, 2022 the court did not refer to the application for injunction but recorded diverse other applications filed by the parties, after noting that the court was disposing of one of the applications directing the defendant no. 44 to furnish better particulars of the deceased defendant no. 46 to the applicant. A similar order seems to have been passed on that day on the application filed by some parties.

Thereafter, the matter appeared before the learned judge on 25th July, 2022 when it was recorded that the plaintiffs had filed a petition praying for time to file written objection against the application under Order I Rule 10(2) of the Code of Civil Procedure. That

the other parties also filed applications asking for further and better particulars and so on which were also recorded .

The impugned order was made on 25th August, 2022. We find, in that order the learned court below recorded all the applications that were before it and finally said :

“Fixing 21.09.2022 for hearing of application U/O 1 R 10(2) read with Section 151 of CPC filed by the plaintiffs, U/O 1 Rule 10(2) read with Section 151 of CPC filed by defendant Nos. 17, 20, 22, 23, 24, 25 and 26, U./O 1 R 10(2) read with Section 151 of CPC filed by defendant Nos. 27, 36 and 37 and hearing of application UI/O 7 R 11 of CPC filed by defendant no. 13, w/s and w/o.”

It appears from an examination of these orders that whilst applications were being filed in the court for procedural orders as stated above, the appellants/plaintiffs did not press the court to consider their application for interim relief before considering the other applications.

However, Mr. Abhrajit Mitra, learned senior advocate appearing for the appellants submits that such prayer was made on each and every occasion but not considered by the court.

The court recorded on 23rd June, 2022 that it would consider the Order XXXIX Rule 1 and 2 application in the presence of the “caveators”.

We are not going into the details of the matter, but the fact remains that as of now there is nothing on

record to show that after service of notice upon the respondents the court has even considered the Order XXXIX rules 1 and 2 application.

Mr. Abhrajit Mitra, submits that by virtue of the last will and testament of N.L. Todi, who had 25% stake in the family assets, he bequeathed his entire share to the appellants. They have filed an application for grant of probate of the said will before a competent court. In the absence of an interim order there is likelihood of the respondents siphoning away the fund obtained by sale of these properties, to the deprivation or detriment of the appellants.

Mr. Jayanta Kumar Mitra submits that this 25% share of N.L. Todi had been transferred prior to his death to his clients.

As far as the preliminary objection of Mr. Jayanta Kumar Mitra is concerned, we would take guidance from Section 11 Explanation V of the Code of Civil Procedure which says that when reliefs are claimed but not granted, it is deemed to have been refused. Although we are quite certain that the Order XXXIX rules 1 and 2 application was not even considered by the learned court below, since it was in the file of the court, we have to take it as if the interim order was refused.

In our opinion the court should consider this application at the 'Motion Stage' and on appreciation of

prima facie case, balance of convenience and the irretrievable injury factor, pass an interim order or refuse to do so with reasons. We direct the learned court below to consider and decide such application at the motion stage at the earliest possible opportunity.

With regard to inflow of proceeds out of sale of subject properties, from and after this date the respondent no. 44 shall maintain accounts and will furnish to the appellant's advocate on record and all other parties who may request for it by-weekly statements of accounts, one immediately after Laxmi Puja and one immediately before Dipabali and thereafter at such interval as to the funds they received and the amount that was disbursed and its recipients after retaining the developer's share, subject to orders that may be passed by the court below.

The appeal (F.M.A. 1218 of 2022) and the connected application (CAN 1 of 2022) are disposed of.

(I.P. MUKERJI, J.)

(BISWAROOP CHOWDHURY, J.)

