

28.11.2022
106
Ct. no. 652
sb

C.O. 3564 of 2015

**Sri Kishore Kumar Gupta & Anr.
Vs.
Sri Pranab Kumar Debnath & Ors.**

Mr. Asit Baran Raut
Mr. Falguni Bandyopadhyay
Mr. Amit Das
Ms. Riya Ballav ...for the petitioners

Mr. Jayanta Samanta
Ms. Promita Malakar ...for the O.P.no. 1

Being aggrieved by the order no. 2 dated 17.8.2015 passed by learned District Judge-in-charge at Alipore in Misc. appeal no. 274 of 2015, present application under Article 227 of the Constitution of India has been preferred.

By the impugned order, learned District Judge-in-charge at Alipore affirmed the order no. 3 dated 18.6.2015 passed by the 1st Civil Judge (Junior Division) at Alipore in Misc. case no. 20 of 2015 arising out of Title Execution case no. 7 of 2015.

The petitioner contended that the opposite party no. 1 herein, who claimed himself as developer instituted a Title Suit no. 1591 of 2010 before the court of Civil Judge (Junior Division), 1st Court, at Alipore against the defendant/opposite party no. 2 herein for a decree of eviction of licensee from B schedule property after

revocation of licence granted in favour of the opposite party no. 2 /original owner and also for permanent injunction restraining the opposite party no. 2 from handing over possession of the B schedule property to any third party. The plaint case is that the plaintiff/opposite party no. 1/developer constructed three storied building on the A schedule property and according to the agreement dated 4.11.2000 the defendant/opposite party no. 2 and his brother/opposite party no. 3 are entitled to get only ground floor of the suit premises. The defendant approached the plaintiff to purchase the roof of the suit premises at a price of Rs. 3,50,000/- but he ultimately did not sign the agreement for sale of the roof of suit premises. Subsequently, the defendant approached the plaintiff to allow him to stay as a licensee in the second floor of the suit premises being B schedule of the plaint for the purpose of construction of roof for their living and the plaintiff granted leave and licence without any licence fee. After taking possession of the roof, the defendant started construction in the roof and subsequently taking advantage of the escalation of the price of the flat, the defendant was trying to hand over the B schedule in favour of third party and therefore the plaintiff by a notice of eviction revoked the licence granted in favour of the defendant of that suit.

The petitioner herein states that the opposite party no. 2/defendant did not file written statement denying

the material allegations made in the plaint and therefore, the suit was posted for ex parte hearing against defendant, in spite of fact that the B schedule property is in actually possession of the present petitioner on the basis of an agreement dated 15.12.2007. The petitioner herein, after coming to know about the collusive nature of the suit in between the plaintiff and the defendant filed an application under Order 1 rule 10(2) of the Code of Civil Procedure. The learned trial Judge was pleased to reject the said application filed on behalf of the petitioner. Being aggrieved, the petitioner preferred a revisional application being C.O. 2802 of 2010 before this court and this court was pleased to reject the said application for addition of parties in the said suit holding inter alia that the applicants are not without any remedy and they can well protect their right following the provision under order 21 Rule 101 of the Code of Civil Procedure. This court was further pleased to observe that the applicants even before passing of the decree in such a suit can also protect their right by filing independent suit seeking appropriate relief. In terms of the aforesaid order of this court passed in C.O. 2802 of 2010, the petitioner filed Title Suit no. 3502 of 2010 but said suit was dismissed. The petitioner herein then filed an application under Order 21 Rule 89-101 read with Section 151 of the Code before the Executing Court on 17.6.2015 praying for declaration and permanent

injunction restraining the opposite party no. 1 from executing decree in Title execution case no. 7 of 2015, arising out of decree dated 8.4.2013 passed by the learned Civil Judge (Junior Division), 1st court, Alipore in the aforesaid Title Suit no. 1591 of 2010. The petitioner also filed an application under Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure for granting an order of temporary injunction restraining the opposite party no. 1 from executing the decree dated 08.04.2013. The petitioner also filed an application under Section 151 of the Code of Civil Procedure in the Misc. case no. 20 of 2015 under Order 21, rule 97 of the Code of Civil Procedure paying for stay of all further proceedings of the execution case being Title Execution case no. 7 of 2015 but learned Civil Judge(Junior Division), Alipore had rejected both the applications holding that the petitioner herein failed to make out any prima facie case for granting an order of temporary injunction.

Being dissatisfied with the said orders, the petitioner herein preferred Misc. appeal before the District Judge, Alipore and the court below by its impugned order dated 17.8.2015, also refused to grant injunction on the ground of delay.

Learned advocate for the petitioner submits that the lower appellate court failed to appreciate that the petitioner filed the present application under Order 21

rule 89-101 of the Code after expiry of one month of initiation of title execution case and as such he was erred in rejecting the said application.

In this context, he has also referred Section 49 of the Registration Act and Section 35 of the stamp act contending that even if a deed of agreement is not properly stamped, it could be cured at a subsequent stage and as such solely on that ground, the prayer for injunction cannot be refused. In this context he also relied upon judgments reported in (2016)2 ICC (Cal) 235 and (1982) 3 SCC 484 and another unreported judgment in the case of GTZ (India Private Limited) vs. Power Electronic Engineers & ors. He also states that the learned trial Judge, by holding that the agreement was executed on insufficiently stamped paper should not have rejected the prayer for injunction. Learned trial court could have demanded from the petitioner for sufficient amount of security to safeguard the interest of the said revenue but there has been no justification of rejecting the prayer for injunction when the plaintiff has paid a substantial amount towards consideration price.

Learned advocate for the opposite party submits that from the agreement of sale, it is clear that such agreement does not bear the signature of the vendors, it bears the signature of the purchaser and such unsigned/unstamped document cannot be called as agreement for sale which was allegedly prepared in 2007.

However, if petitioner wanted to enforce such agreement, his remedy were elsewhere but not in the present suit for eviction of licensee which has already been decreed against the defendants of that suit. On the basis of such alleged agreement, the petitioner cannot have any right to claim any portion of the suit property nor has he any right to claim possession over the suit property and as such the trial court rightly refused to grant injunction restraining the decree holders from executing the decree.

In reply, learned counsel for the petitioner submits that it is true that the agreement for sale does not bear the signature of all the vendors but the petitioner has filed money receipt which goes to show that the said vendor had received substantial amount of consideration price from the petitioners herein.

Considered the submissions made by both the parties.

Needless to say that order 21 rule 101 clearly provides that all questions including questions relating to the right, title and interest in the property arising between the parties to a proceeding on an application under Rule 97 or rule 99 or their representatives and relevant to the adjudication of the application shall be determined by the court dealing with the applications and not by a separate suit and the executing court will have the jurisdiction to decide such question. Accordingly, the petitioner filed an application under

Order 21 Rule 101 of the Code. Now in order to get an order of injunction, the petitioner has to show his prima facie right to possess the suit property. In the present case, admittedly the agreement which was allegedly prepared on 15.12.2007 is not properly signed or stamped. However, it is claimed that the petitioner has paid certain amount of money to the opposite party no 1/plaintiff. This court while disposing C.O. no. 2802 of 2010 has held “in such a suit, there is hardly any scope for consideration of the legality and/or enforceability of the agreement for sale entered between the applicants and the defendant and his brother. As such, this court holds that the scope and/or ambit of the trial of the present suit cannot be expanded by allowing the present applicants to be added in the said suit as in case of addition of such applicants in the said suit a foreign issue regarding legality and enforceability of the said agreement which is totally unconnected with the issues involved in the present suit will be required to be considered.” In view of the above background of the case, petitioner in order to get injunction based on an issue unconnected with the suit. Ordinarily party seeking injunction in such cases must have proprietary interest in subject matter of dispute. An interim relief is granted to a person on the footing that such person is prima facie entitled to the right on which he based the claim for the main relief as well as interim relief. As such ultimate

finding of the courts below does not call for any interference.

Accordingly, C.O. 3564 of 2015 is dismissed.

Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)