

28.11.2022  
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Ct. no. 652  
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**C.O. 4300 of 2019  
With  
CAN 1 of 2022  
With  
CAN 3 of 2022**

**Mangal Pari  
Vs.  
Smt. Gita Jana & ors.**

Mr. Partha Pratim Roy  
Mr. Dyutiman Banerjee  
Mr. Salil Maity                      ...for the petitioner

Affidavit of service filed by the petitioner, is taken on record.

In spite of service, opposite party is not represented.

Being aggrieved and dissatisfied with the order dated 28.11.2019 passed by the learned District Judge, Purba Medinipore in Misc. case no 35 of 2018, the present application under Article 227 of the Constitution of India has been preferred. By the impugned order, learned court below has reversed the order no. 103 dated 12.4.2018 passed by the learned Civil Judge (Junior Division), Additional Court, Tamluk in Title suit no. 15 of 2010.

The petitioner contended that the petitioner herein as plaintiff has filed aforesaid suit for declaration of title and for permanent injunction before the learned Civil

Judge (Junior Division), Additional Court, Tamluk against the opposite parties herein and it was registered as Title suit no. 69 of 2008 which was subsequently re-numbered as Title suit no. 15 of 2010. According to the plaint case, ka-1 property being plot no. 997 is absolutely owned by the plaintiff by way of purchase and his further case is that the defendant no. 1 who is owner of a contiguous plot i.e. plot no. 1007, made an attempt to encroach a portion of the said plot no. 997 particulars of which is given “ka” schedule to the plaint. Accordingly, the plaintiff approached before the learned trial court with a prayer for declaration of his title in respect of entire plot no. 997 and for permanent injunction restraining defendants from interfering with the peaceful possession of the plaintiff in respect of the said plot of land and for other reliefs.

It is submitted that the plaintiff has practically made no specific aspersion against the defendant nos. 6 to 9 though the said set of defendants have been made parties in the said suit. The opposite party/defendant nos. 6 to 9 filed injunction application before the trial court claiming that they are the joint owners of  $2\frac{2}{3}$  decimals of land in plot no. 997 and they are occupying a portion of said plot no. 997 by constructing a “kancha hutment” which in course of time have become worn out and thus the same is required to be renovated and reconstructed with the help of Government scheme since

the said defendants belong to below poverty line (BPL) category. It is alleged in the said injunction application, when they started to make reconstruction work on the said hutments over plot no. 997, said defendant nos. 6 to 9 were obstructed by the plaintiff.

The petitioner contested the said application by filing written objection and contended that in the title deed, the name of the predecessor in interest of defendant nos. 6 to 9 are manufactured and that are not binding upon the plaintiff. The plaintiff is the absolute owner of plot no. 997 and accordingly they prayed for rejection of the injunction application.

Learned trial court by an order dated 2.4.2018 was pleased to reject the said application for injunction filed by the opposite parties. Being aggrieved by the said order of rejection, the said opposite parties preferred an appeal before the learned District Judge, Purba Medinipore being Misc. appeal no. 35 of 2018 and learned appellate court was pleased to allow the said appeal filed by the opposite parties by setting aside the order dated 2.4.2018 passed by the trial court.

Learned advocate for the petitioner submits that learned court below acted illegally in not considering the latest record of rights in respect of the said plot as well as the order of competent authority whereby prayer of the defendant nos. 6 to 9 for mutation in respect of said plot of land in their names has been rejected. The

learned court below acted illegally in deciding the prima facie title based on the report of the Commissioner which was not even formally made a part of the record. Learned court below acted illegally in allowing the appeal by shifting the burden upon the plaintiff to prove that defendants are not entitled to get an order of injunction. Learned court below acted illegally in allowing the misc. appeal in spite of the fact that opposite parties/ defendants have failed to prove their possession and title over the property in question by adducing sufficient evidence.

On perusal of the order passed by the learned trial court being order no. 103 dated 12.4.2018, it appears that before the trial court, the plaintiff/ present petitioner and the defendant nos. 6 to 9 both claimed title over plot no. 997. While the plaintiff claimed title in respect of the entire property, the defendant nos. 6 to 9's claim was in respect of 2 2/3 decimals of land in the said plot and both the parties filed their respective sale deeds and also filed RSROR and LRROR but after careful scrutiny, the trial court observed that defendant nos. 6 to 9 could not prove prima facie title in respect of suit property. The trial court is also of clear view that the object of local inspection commission is not to collect evidence and learned commissioner also did not mention who are in possession of the said property, and learned trial court did not rely upon the assertion made by the

said defendants that they are possessing the hutment marked H-1 and to prove the same evidence is required and held that the matter of dispute is a matter of trial. Trial court further held that he is not convinced from defendant's documents that money is indeed sanctioned for construction of the defendant's house. The trial court further held that no survey commission has been held in connection with suit property and local inspection commission has not been prepared in accordance with scale.

The Trial court held that right, title and interest of the parties has not been decided by the court. All these matters are required to be contested during trial and there is every chance that the injunction order might be used as a licence to do nuisance and he further held that balance of convenience or inconvenience is also not in favour of the defendants.

When the matter came up before the appellate court, the first appellate court observed that the learned trial court did not notice the commissioner's report from where it reveals that the present defendant nos. 6 to 9 are settled possession with a portion of the suit plot and there is urgent necessity on the part of the defendant nos. 6 to 9 to renovate/reconstruct their house situated on the said plot of land. He also observed that the defendant nos. 6 to 9's prayer for mutating their names in the record of rights has been turned down by a the

competent authority in respect of the said property. However, the first appellate court came to the conclusion that the plaintiff claimed absolute title in respect of the said plot but at the same time, the defendant nos. 6 to 9 have also claimed title and possession over the self-same property to the extent of  $2\frac{2}{3}$  decimal of land by virtue of title deed as acquired by their predecessor in interest. He also observed that in order to decide as to whether the plaintiff is absolute owner of the suit property or not and as to whether the defendant nos. 6 to 9's claim over the plot to the extent of  $2\frac{2}{3}$  decimal of land are tenable or not, those who are to be considered at the time of trial on evidence. However, the learned first appellate court heavily relied upon the local inspection commissioner's report and observed as follows:-

“it reveals from the Commissioner's report that the said advocate commissioner prepared a field note in course of commission in presence of both the sides and at that time the said Commissioner noticed the existence of a one-storied hutment on the western side of the middle portion of the suit plot of land. The Commissioner further noticed that inside the said hutment seven numbers of pucca pillars have been constructed. Admittedly, the defendant nos. 6 to 9 claimed that such hutment belongs to them which the plaintiff duly denied. But, in their written objection the plaintiff threw no light to whom such hutment belongs especially when it is the specific plaint case that the plaintiff is exclusively occupying the suit plot as full owner thereof. In course of hearing of the instant appeal. Learned advocate for the defendants/appellants also could not give any plausible explanation with regard to the title and possession of the said hutment which has been marked with the letter 'H1' in the field note of the advocate Commissioner dated 28.3.2018. it is equally pertinent to mention herein that in course of hearing, learned advocate for the plaintiff/respondent also could not give any satisfactory explanation as to what steps the plaintiff had taken as against the defendant nos. 6 to 9 especially when the

defendant nos. 6 to 9 by filing their written statement dated 29.1.2018 claimed co-ownership over the suit plot of land to the extent of  $2\frac{2}{3}$  decimal of land.”

The defendant nos. 6 to 9 were thus granted injunction by the Appellate Court below restraining the plaintiffs from making any interference with the work of construction of defendant nos. 6 to 9 with the observation that the defendant nos. 6 to 9 are successful in establishing their prima facie title and possession over the suit plot of land and further observed that the defendant nos. 6 to 9 prima facie succeeded in establishing that the hutment belongs to them and they have successfully established prima facie case for obtaining the order of injunction and thereby the learned first appellate court enjoined the plaintiffs from making any interference with the work of construction of defendant nos. 6 to 9 over the entire plot no. 997 till the disposal of title suit no. 15 of 2010 though the trial court held that plaintiff claimed absolute ownership in entire plot no. 997 and defendants had claimed only  $2\frac{2}{3}$  decimal of land over the said plot.

It is settled position of law that the purpose of local inspection commission is not to fish out evidence of possession and as such, so far as the possession is concerned, learned court below had no reason to rely upon the Commissioner's report to determine the defendant nos. 6 to 9's possession over the said hutment, when the trial court specifically observed that

the prayer of defendant nos. 6 to 9 for mutating their names in the record of rights claiming possession has been turned down. Commission under order XXXIX, rule 7 has the object of keeping on record the existing condition of the property, so that if the same is subjected to any change later on any deterioration or mischief by any party or by any other agency, that can be known by the court, if and when desired or required but by no stretch of imagination such report of the commissioner can be treated as evidence in support of possession.

Both the court below was also of clear view that the question of plaintiff's absolute ownership over the plot no. 997 and defendants claim of ownership in respect of  $2\frac{2}{3}$  decimal of land over the same plot are subject matter of trial and as such it is not understandable how the court below came to the conclusion that the defendant nos. 6 to 9 have prima facie established their title and possession in the suit property and passed the impugned order injuncting the plaintiff in respect of entire plot no. 997, when it is not even claim of defendants in respect of entire plot no. 997.

In view of above, the order impugned is not sustainable and as such the impugned order dated 28.11.2019 is hereby set aside and order passed by the learned trial court being order no. 103 dated 12.4.2018 is hereby affirmed.

Accordingly, C.O. 4300 of 2019 is disposed of. Therefore, the applications being CAN 1 of 2022 and CAN 3 of 2022 are also disposed of.

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.)**