

**CIRCUIT BENCH OF CALCUTTA HIGH COURT
AT JALPAIGURI**

10.03.2022
Item No.3
Court No. 01
Saswata

C.O. 105 of 2021

Sapiyal Rahaman & Ors.

-vs-

Monirul Haque & Ors.

Mr. Kunaljeet Bhattacharjee
Mr. Abhishek Palit
...for the petitioners

Mr. Saumyajyoti Dutta
... for the opposite parties

Affidavit of service filed in Court today is taken on record.

The instant revisional application is directed against order no. 11 dated 09/09/2021 passed by the Learned Additional District Judge, 3rd (Special) Court, Jalpaiguri in Miscellaneous Appeal No. 15 of 2021 affirming the order no. 26 dated 08/04/2022¹ passed by the Civil Judge (Junior Division) 2nd Court, Jalpaiguri in Title Suit no. 424 of 2018.

The order of status quo with regard to the nature, character and possession of the suit property passed by the Trial Court is affirmed by the Appellate Court on the premise that the best portion of the undivided property cannot be allowed to be constructed by other co owners, as it would not only create a special equity at the time of final partition but would also diminish the value of the land or the shares of the other co owners.

My attention is drawn by the learned advocate for the opposite parties that it was a simplicitor suit for declaration of title and permanent injunction and not a suit for partition or separation of shares.

The aforesaid fact has not been disputed by the learned advocate appearing for the defendants/petitioners. In a suit simplicitor for declaration of title and permanent injunction, the concept of special equity for the injunction against the co owner at the behest of other co owners does not and cannot arise. The finding of the first Appellate Court in this regard appears to have originated on the basis of the submission of the plaintiffs/opposite parties, which in my opinion, is perverse. There is no discussion in the impugned order relating to the existence of prima facie case, balance of convenience and inconvenience and irreparable loss and injury to be suffered by the plaintiffs, in the event the order of temporary injunction is not passed.

Those being the parameters for consideration of an application for temporary injunction, it was imperative on the part of the Appellate Court to return specific findings thereupon before proceeding to uphold the order of the Trial Court or to interfere therewith. Since the finding which forms the basis of the ultimate conclusion is erroneous and perverse, I do not detain myself to go further deep into the matter as the impugned order is liable to be set aside

on such score alone.

Accordingly, the impugned order is set aside. The matter is remanded to the first Appellate Court to dispose of the same within two weeks from the date of communication of this order after giving a opportunity of hearing to the respective parties in accordance with law.

For abundant precaution, it is hereby made clear that this Court has not gone into the merit of the miscellaneous appeal and, therefore, any findings made hereinabove touching thereupon, shall not have any persuasive effect at the time of disposal of the said appeal.

The revisional application being C.O. 105 of 2021 is, thus, allowed.

There shall, however, be no order as to costs.

(Harish Tandon, J.)