

IN THE HIGH COURT AT CALCUTTA**(Civil Revisional Jurisdiction)****Appellate Side**

Present:

The Hon'ble Justice Bibhas Ranjan De**C.O. 167 of 2023****Invention Infra Projects Pvt.Ltd. & Ors.****Vs.****Smt. Rita Rani (Ghosh) Paul & Ors.**

For the Petitioner	:Mr. Aniruddha Chatterjee, Adv. Ms. J. Chatterjee, Adv. Mr. Rahul Dugar, Adv. Mr. A. Roy, Adv.
For the Opposite parties	:Mr. Probal Kumar Mukherjee, Sr. Adv. Mr. Sounak Bhattacharya Mr. Sounak Mondal Mr. Sahidur Rahaman Mr. Abhirup Haldar

Heard on : April 11, 2023

Judgment on : May 08, 2023

Bibhas Ranjan De, J.

1. The order dated 23.12.2022 passed by Learned Additional District Judge, Baruipur, District 24 Parganas (South) in connection with Miscellaneous Appeal No. 34 of 2022 is under challenge.
2. By the order impugned Learned Judge affirmed the order dated 16.09.2022 passed by Leaned Civil Judge (Senior Division) 2nd Court, in Title Suit No. 504 of 2022.

Background facts:-

3. The subject property being 11 decimal of land appertaining to R.S Plot no. 1332 originally belonged to one Priyanath Ghosh who died before Hindu Successions Act, 1956 came into force leaving behind his 3 sons - Amulya Charan Ghosh, Charu Chandra Ghosh & Putiram Ghosh. Wife of said Priyanath Ghosh predeceased him. Thereby, 3 sons of Priyanath Ghosh inherited 1/3rd share each in the subject property. Putiram Ghosh died leaving behind his widow Jamuna Bala Ghosh only. Accordingly, names of Amulay Charan Ghosh, Charu Chandra Ghosh & Jamuna Bala Ghosh have been duly recorded 1/3rd against share each under R.S Khatian No. 532. Jamuna Bala Ghosh transferred her 1/3rd undivided share to

Charu Chandra Ghosh on the basis of a registered sale deed no. 10520 dated 12.12.1962 and delivered possession. Thereby, Charu Chandra Ghosh became owner of $2/3^{\text{rd}}$ share of subject property.

- 4.** Amuly Charan Ghosh died intestate leaving behind his widow (Radharani Ghosh), two sons (Ratan Ghosh & Madan Ghosh) and 3 daughters (Gita Ghosh, Rikta @ Ritarani Ghosh Pal & Menoka Das). Thereby, all the heirs of Amulay Charan Ghosh got $1/18^{\text{th}}$ share each in the subject property. Among them Menoka Das & Rikta Rani @ Rita Rani Ghosh Paul are plaintiff no. 1 & 2.
- 5.** Gita Ghosh died intestate leaving behind her two sons (Ranjit Ghosh & Dinesh Ghosh) and 3 daughters (Tinku Ghosh, Pratima Ghosh & Mithu Mandol). Thereby, all sons and daughters of Gita Ghosh inherited $1/19^{\text{th}}$ share each in the subject property. All of them were made as plaintiff no. 3 to 7 in the suit. All in all plaintiff nos. 1 to 7 jointly had $1/6^{\text{th}}$ share in the property in question.
- 6.** Radha Rani Ghosh, Ratan Ghosh, Madan Ghosh & Charu Chandra Ghosh having $5/6^{\text{th}}$ share jointly transferred the entire plot to one Sadek Ali Saikh by a registered sale deed no.

3119 / 1973. Thereby, Sadek Ali Saikh got 5/6th share in the subject property. Said Sadek Ali Saikh having 5/6th share in the property in question died leaving behind his first wife (Belati Seikh), daughters of first wife (Asma Bibi, Najma Bibi & Minati Khatun Bibi), 2nd wife (Mamtaz Seikh), three sons of 2nd wife (Salauddin Seikh, Kabul Seikh and Habibar Seikh) and two daughters of 2nd wife (Surhiya Begam & Minu Mondal).

7. Salaudddin Seikh died issueless leaving behind his mother Mamtaz Seikh and widow Rahima Biwi. Legal heirs of Sadek Ali jointly sold the plot share to the petitioners/defendants.
8. Plaintiffs filed the suit being no. 504 of 2022 before the Learned Civil Judge, (Senior Division), 2nd Court at Baruipur, District 24 Parganas (South) along with an application under Order 39 Rule 1& 2 read with Section 151 of the Code of Civil Procedure with a prayer for temporary injunction restraining in the defendants from changing the nature and character of the subject property and /or from raising any construction over the subject property and/ or restraining the defendants from alienating the subject property to any 3rd party. Learned Judge allowed ex-parte injunction directing both the parties to maintain *status quo* in respect of their possession.

9. Feeling aggrieved the petitioners /defendants preferred an appeal before Learned Additional District Judge at Baruipur, District 24 Parganas (South). The said appeal being no. 34 of 2022 was heard and Learned Judge affirmed the order dated 16.09.2022 passed by the Learned Civil Judge (Senior Division), 2nd Court at Baruipur, 24 Parganas (South).
10. Being aggrieved by and dissatisfied with the order dated 23.12.2022 passed by Learned Additional District Judge Baruirpur, 24 Parganas (South) preferred this application under Article 227 of the Constitution of India.
11. Learned advocate, Mr. Aniruddha Chatterjee, appearing on behalf of the petitioners/defendants has contended that according to opposite party/plaintiffs legal heirs of Sadek Ali having 5/6th share over the property transferred entire 11 decimal of land in the suit plot in favour of the defendants by the conveyance deed of 1973 & 2011 were not challenged in the suit. Mr. Chatterjee has further submitted that Appellate Court rejected the appeal solely relying upon principle laid down in ***Jitesh Pandey Vs. Smt. Urmilata Sinha and others*** {(2000) 2 CHN 865} recorded his finding that the petitioners/defendants preferred an appeal instead of taking

course of Provision of Order 39 Rule 4 of Code of Civil Procedure and for the reasons learned appellate Court did not consider the fact that the construction on the subject property came up to G+5. Mr. Chatterjee has submitted that ratio of **Jitesh Pandey** (supra) was overruled by the Hon'ble Division Bench of this Court in a case of the **Bengal Club limited vs. Sushanta Kumar Chowdhury** reported in **(2002) 3 CHN 322**. Mr. Chatterjee has further argued that learned Appellate Court did not look into the suppression of fact of construction up to G+5.

12. Mr. Chatterjee next contended that even if the opposite parties/plaintiffs had a right in the subject property, the said right was extinguished by the passage of time in terms of the Provision of Section 59 of the Limitation Act.

13. Mr. Chatterjee has further contended that the suppression of construction up to G+5 was sufficient to refuse the interim injunction. In support of his contention, he relied on a case of **Madali Ranganna and others Vs. T. Ramchandra and others** reported in **{(2008) 11 Supreme Court Cases 1}** wherein Hon'ble Court observed :-

“ 22. Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal

with the properties exclusively, ordinarily would not be entitled to an order of injunction. The court will not interfere only because the property is a very valuable one. We are not, however, oblivious of the fact that grant or refusal of injunction has serious consequence depending upon the nature thereof. The courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the courts is imperative. Contentions raised by the parties must be determined objectively.”

- 14.** In opposition to that, Learned senior advocate, Mr. Probal Kumar Mukherjee, appearing on behalf of the opposite parties/plaintiffs, at the outset, has referred to the written objection filed by the petitioners/ defendants to the injunction application before the Trial Court admitting the right of the opposite parties/plaintiffs over the subject property by taking a plea of adverse possession from the date of their purchase by a sale deed no. 3119 of 1973 and after lapse of 12 years from 28.04.1973 adverse possession of Sadek Ali Seikh was perfected by way of adverse possession. Thereby, Mr. Mukherjee has contended that plea of adverse possession cannot be taken into consideration at the initial stage after going into a mini trial.

15. Mr. Mukherjee relied on a case of **Israil vs. Shamser Rahman** reported in **18 Calcutta weekly notes 176** wherein it was held as follows:-

“The Subordinate Judge has held that inasmuch as the Respondents were in sole occupation of the land with the consent of their co-sharers, they were entitled to erect buildings thereon and that the Plaintiffs were in no way prejudiced by the erection of such a building, because in the event of a partition of the entire joint property of the parties, the Plaintiffs might be awarded some other piece of land. In our opinion, the view taken by the Subordinate Judge is opposed to the well-established rule applicable to cases of this description. As was pointed out, by this Court in the case of Dwijendra Narain Roy v. Purnendu Narain Boy [11 C.L.J. 189 (1910).] , the mere circumstance that one co-sharer has taken possession of a portion of joint property does not entitle the other co-sharers to claim joint possession: in other words, sole occupation by one co-sharer does not necessarily constitute ouster of the other co-owners. At the same time it does not follow that because a co-owner is, with the tacit or express consent of his co-sharer, in sole occupation of a portion of joint property, he is entitled to change the nature of that possession or to use the property in a mode different from that in which it had previously been used. It is not necessary for our present purposes, indeed it is not right, that we should further examine this point with reference to the special facts before us and thus anticipate the decision of the question in contention between the parties, in the suit. What the Court has, at this stage, to determine is, whether there is a bonâ fide contention between the parties, or, as was said by Mr. Justice Markby in Moran v. R.S.N. Co. [14

B.L.R. 352 (1875).] , whether there is a fair and substantial question to be decided as to what the rights of the parties are". To the same effect is the decision of their Lordships of the Judicial Committee in the case of Walker v. Jones [L.R. 1 P.C. 50 (1865).] , where Turner, L.J., observed as follows:—

"The real point is, not how these questions ought to be decided at the hearing of the cause, but whether the nature and difficulty of the questions is such that it was proper that the injunction should be granted until the time for deciding them should arrive". It is quite sufficient if the Court find a case which shows that there is a substantial question to be investigated and that matters should be preserved in statu quo until that question can be finally disposed of [Jones v. Pacaya [[1911] 1 K.B. 455 (1910).]]. Now upon the facts stated in the present case, there is no room for controversy that the Court has to decide a fair and substantial question as to what were the relations subsisting between the parties, and what were the rights and obligations flowing from those relations. Under circumstances like these, the matter for consideration at this stage is, whether does the balance of convenience lie: is it desirable that the statu quo should be maintained or is it right that the Defendants should be allowed to continue to alter the character of the land. It is well settled that the Court will not refuse an injunction in a case of this description so as to give the Defendants an undue advantage over the Plaintiffs. If the Defendants in the case before us were allowed to proceed to the completion of the building which has been erected by them on the land, it is indisputable that they will be placed in a position of undue advantage over the Plaintiffs. In this connection reference may be made to the judgment of Sir George Jessel in the case of Aynsley v. Glover [???] , where that learned Judge observed as follows at all events, this

being an interlocutory application, let me continue my building, and I will undertake to pull down if the Court shall so think fit. That is a very specious argument to address to the Court, but one must have regard to the effect of allowing such a proceeding. Supposing a Defendant erects a building at great cost, when he comes to the hearing he will say to the Court: 'compare the injury to me, in pulling down the building with the injury to the Plaintiff in allowing the building to remain'. Ought or ought not the Court to give weight to such a representation 1 I think upon this point the observations of Vice-Chancellor Kindersley in the case of the Curriers' Company v. Corbett [4 D.J. and 764 : 2 Dr. and Sm. 355, 360 (1865).] are very important. The Vice-Chancellor says: 'If the Defendant's buildings had not been completed, there would have been ground for interference by injunction; but as they have been completed, the question is, whether the Court ought to or would order the pulling down of the buildings, or give compensation in damages. The Defendant's new buildings are of considerable magnitude and importance, while the two houses of the Plaintiffs are comparatively of small value and importance: and it has been decided that in such a case the Court will not as a matter of course order the Defendant to pull down his new buildings but will give to the party-injured by the erection of those buildings compensation in damages. It appears to me that this is precisely one of such cases. Consequently the learned Vice-Chancellor considered that, the buildings being erected, the comparative values of the Defendant's buildings and the Plaintiff's were sufficient to induce him to refrain from granting an injunction in a case where, if the buildings had not been erected, he would have granted the injunction. If that is so, and if those considerations are to weigh with the Court upon the question of damages or injunction, I ought not to allow the Defendant

to proceed with his building, which will put him in such an advantageous position as regards the Plaintiffs when the case comes to a hearing". To the same effect is the decision in *Newson v. Pender* [???] . In the case before us, therefore, *primâ facie*, the Defendants should not be allowed to proceed to complete the building which they have erected. Rut the case for the Plaintiffs is materially strengthened when we bear in mind the conduct of the Defendants. The Court of first instance found that there was good reason to hold that a substantial portion of the building had been erected after the Defendants had become aware of the institution of this suit and of the application for temporary injunction. In a case of this description, the Court would, if necessary, proceed not only to grant a temporary injunction restraining the further erection of the building, but also to direct that the building already erected be taken down. In *Daniel v. Ferguson* [[1891] 2 Ch. 27.] , the 'Plaintiff filed a suit for an injunction restraining the Defendant from building so as to obstruct his ancient light and gave notice of motion for an interim injunction. The Defendant, thereupon, working day and night, ran up the wall to a height of 40 ft. Mr. Justice Sitrling granted an injunction restraining future building and ordering the removal of the wall, and this order was confirmed on appeal. Similarly, in the case of *Von Jaol v. Hornby* [[1895] 2 Ch. 774.] , when the Defendant had evaded notice of the writ in the action and continued to build until substituted service was effected, a temporary injunction was granted ordering the Defendant to pull down all that had been built since the Plaintiff had warned him of his intention to bring an action. In the case before us, the Plaintiffs did not invite the Court to direct the Defendant to take down so much of the building as had been erected after the 6th June, 1913: they simply ask that the Defendants

should be restrained from proceeding with the building any further. In our opinion, upon the merits of the case, there is no room for controversy that the order made by the Subordinate Judge cannot possibly be supported. The only question for consideration is whether this Court is competent to interfere in the exercise of its revisional jurisdiction. We do not feel pressed by the objection suggested, because obviously it is competent to this Court to interfere under sec. 15 of the Charter Act: and in view of the conduct of the Defendants which, in substance, amounts to a defiance of the authority of the Court, we are of opinion that this is a case in which ample ground has been made out to justify our interference.

The result is that this Rule is made absolute, the order of the Subordinate Judge discharged and that of the Court of first instance restored. The Petitioners are entitled to the costs of these proceedings in all the Courts.”

16. Mr. Mukherjee has further relied on a case of ***Parimal De vs. Anita Agarwal and others*** reported in **(2014) 4 ICC 171** wherein Hon’ble Court observed that any construction made on the base portion of the land in excess of share , the Court should protect the interest of other co-sharer by the order of injunction.
17. Mr. Mukherjee also relied on an unreported judgment in FMA 2446 of 2015 passed on 10.08.2015 wherein Hon’ble Division bench observed as flows:-

“So long as the property remains joined, no share holder has any right to nature and character of the suit property. If any share holder is allowed to change the nature and character of the suit property ultimately the relief which the co-shares deserve in the said partition suit, may not be ultimately granted to them.”

- 18.** Mr. Mukherjee has further referred to a case of ***Home care retail Marks Pvt. Ltd. Vs. New Era Fabrics Limited*** reported **(2009) 17 SCC page 429** wherein Hon’ble Apex Court ruled as follows:-

“ 4. On a thorough reading of the judgment of the High Court which is under challenge before this Court and also the orders of the courts below, it can be said that there is some arguable point to be gone into for the purpose of deciding whether the plaintiff/appellant is entitled to an order of injunction restraining the respondent from interfering with the access to the said premises from the Mogul Lane side by the appellant and its customers in addition to the gate on the other side of its Hypermarket. Since this is a question to be gone into on evidence at the time of trial and in view of the fact that the plaintiff/appellant and their customers were using the said entry from Mogul Lane to the Hypermarket, we are of the view that at this stage, the High Court was not justified in exercising its power under [Article 227](#) of the Constitution to set aside the concurrent orders of the Courts below which by any means cannot be said to be perverse or arbitrary.”

19. The fact divulged in forgoing paragraphs makes it clear that the legal heirs of Sadek Ali transferred entire 11 decimals of land of the plot in dispute, to the petitioners/defendants in the year 2011 as Sadek Ali purchased entire land of the plot in question in the year 1973, from the co-sharer of the plot having 5/6th share only.

20. In terms of facts pleaded inclusive of argument advanced I have to resolve following issues:-

A. Two deeds for the year 1973 & 2011 remained unchallenged in the suit filed by the plaintiffs.

B. Defendants title over the entire land of suit plot inclusive of share of the plaintiff has been perfected by way of adverse possession because of the knowledge of the plaintiffs regarding the deed executed in the year 1973.

C. Substantial portion of the building i.e. G+5 has come up at the instance of the defendants on the purchased plot in question.

21. I am not oblivious of the fact that I am dealing with an order of ad interim injunction and to add to that injunction petition under Order 39 Rule 1 & 2 of Code of Civil Procedure is awaiting for adjudication by the Learned Trial Court. I am

also not oblivious of the fact that the petitioners/defendants chose to pry into the long track of 'appeal' in terms of ratio decidendi in **Bengal Club** (supra) overruling the ratio of **Jitesh Pandey** (supra) prescribing short rout of vacating ad interim injunction through Provision of order 39 rule 4 of the Code of Civil procedure. From that point of view reliance of **Jitesh Pandey** (supra) by the learned appellate court was not correct.

Issue No. A:-

22. Tone and tenor of the argument advanced by Mr. Chatterjee is that opposite parties/ plaintiffs ought to have made consequential relief of cancellation of those two deeds, resulting to dismissal of suit in terms of Provision of Section 34 of the Specific Relief Act.

23. From the pleadings of the parties to this revision application it appears that vendors of the two deeds for the year 1973 and 2011 had no right, title ad interim beyond 5/6th share of the suit plot. Therefore, transfer of 1/6th share of opposite parties/plaintiffs cannot be said to be valid rather void ad initio. Alternatively, dismissal of suit cannot be contemplated at this stage restricting the right of the opposite

parties/plaintiffs to include consequential relief by way of amendment.

Issue No. B:-

- 24.** I am dealing with an order of ad interim injunction promulgated in a suit for partition. The pleas based on title and adverse possession are mutually inconsistent and the later does not begin to operate until the former is renounced. *Animus possidendi* is a requisite ingredient of adverse possession. Mere possession of the land will not ripen into possessory title for the said purpose. Possessor must have *animus possidendi* and hold the land adverse to the title of the true owner. For the said purpose not only *animus possidendi* must be shown to exist but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the period prescribed by Limitation Act. Mere long possession for a period of more than 12 years without anything does not ripen into a title. And to add to that possession of other co-owners/co-sharers can be said to be holding the entire property for and on behalf of other co-owners/co-sharers till ouster is **pleaded and proved**. In the case in hand, at this nascent stage, question of proving

“*animus possidendi*” and “ouster” does not arise even injunction application under Order 39 rule 1& 2 of the Code of Civil procedure is still awaiting for disposal.

Issue No. C:-

25. Mr. Chatterjee strenuously contended that G+5 construction already came up and further construction cannot be halted by any order of ad-interim injunction which was obtained by suppression of fact of construction. Mr. Chatterjee, in support of his submission, relied on ***Mandali Ranganna*** (supra) where Hon’ble Apex Court dealt with a different facts in disposing an appeal in connection with application under Order 39 Rule 1 & 2 of the Code of Civil Procedure unlike that of ours.

26. In the case in hand co-owners/ co-sharers having title over 5/6th share of the suit plot sold out entire plot including 1/6th share of other co-sharer. It is also not the case of the petitioners/defendants that construction came up on 5/6th share of the suit plot only.

27. Having regard to the aforesaid facts and situation, I am unable to interfere with the concurrent findings of the Learned Trial Court and Learned Appellate Court while injunction

application under Order 39 Rule 1& 2 of the Code of Civil Procedure is still pending for disposal, where parties are at liberty to raise all issues.

28. Thus, application under Article 227 of the Constitution of India stands dismissed without any order as to costs.

29. Learned Trial Judge is requested to dispose of the injunction petition within six weeks from the date of communication of the order, without being influenced by this order.

30. All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.

31. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]