11 **30.08.2023**

Ct. No. 04

Ab

FMA 124 of 2022
IA No. CAN 1 of 2020 (Old No. CAN 810 of 2020)

Dipsankar Ray
Vs.
Subhasis Das and another.

Mr. Angshuman Chakraborty,
Mr. Shivaji Mitra.
... for the appellant.

An agreement for sale of the property described therein was entered into by and between the plaintiff/appellant and the defendant/respondent. Subsequently, dispute arose between the aforesaid parties and the plaintiff/appellant decided to rescind the contract/agreement and claimed refund of the earnest money paid on the basis thereof.

It transpires from the pleading that the said property was earlier mortgaged with the Life Insurance Corporation Housing Finance and obviously the sale can only be effected after the entire amount is paid to the said Financial Institution with whom the subject property is mortgaged.

An application for temporary injunction is taken out restraining the defendant including the Financial Institution from selling out, alienating and/or transferring the subject property in favour of a third party till the disposal of the suit. Nothing, which came before us, indicates that the property has been released upon payment of the entire loan amount.

The injunction in such blanket form not only curtails the statutory right conferred upon the Financial Institution to take recourse thereto in the event the default has occurred and, therefore, the court should not pass an ad interim order, which impinges upon the rights conferred upon the Financial Institution by the statute.

The plaintiff/appellant stated to have rescinded the contract because of the interpolation in the agreement for sale relating to the consideration amount and also the period within which the entire transaction is to be completed. The trial court, in our opinion, has observed that the property having mortgaged with the Financial Institution and, therefore, the blanket order of injunction restraining the defendant from alienating, transferring and/or creating a third party interest would not be proper.

Basically, it is a suit for recovery of money though having a blending of a declaration of right to rescind the contract. In such suit, the plaintiff/appellant should come with strong prima facie case and the balance of convenience and inconvenience has to be judged in the parameter of the loss having suffered in absence thereof.

The injunction cannot be granted merely on an assumption, otherwise the basic requirement pertaining to existence of a prima facie case shall be blurred and totally ignored.

We, thus, do not find any merit in the instant appeal and the same is hereby dismissed under Order XLI Rule 11 of the Code of Civil Procedure.

In view of the dismissal of the appeal itself, the connected application being CAN 1 of 2020 (Old No. CAN 810 of 2020) has become infructuous and the same is also dismissed.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)