

17.08.2023

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Item : 19-20
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Status : DO
Bench ID : 266147
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FMA 329 of 2023

&

FMA 44 of 2023

CAN 1 of 2023

Pradipta Kumar Ghosh & Anr.

Vs.

Sudipta Kumar Ghosh

Mr. Gopal Chandra Ghosh, Advocate

Mr. Satyam Sengupta, Advocate

.....for the Appellant

Mr. Satyam Mukherjee, Advocate

.....for the Respondent (FMA 329 of 2023)

1. Both the appeals are taken up together as the parent order granting *ex parte ad interim* order of injunction was subsequently extended.
2. At the very outset, it is submitted on behalf of the appellant that the parent order dated 08.12.2022 which is assailed in FMA 44 of 2023 is *per se* illegal, infirm and bad in law having passed without recording any reasons. Subsequently, the *ex parte ad interim* order of injunction is extended mechanically without recording any satisfaction which is also *per se* illegal.
3. We had an occasion to peruse the order dated 08.12.2023 wherein the learned Judge without recording the existence of an *prima facie* case, balance of convenience and inconvenience and irreparable loss and injury, surreptitiously jumped to the conclusion that he is inclined to grant *ex parte ad interim* order of injunction restraining the defendant/appellant from creating any third party interest in respect of the suit property. It is a suit for partition and separation of share. It admits no ambiguity to the settled proposition of law that the Court while passing an *ad interim* order of injunction

or temporary injunction, must record its findings on the existence of a *prima facie* case, balance of convenience and inconvenience and irreparable loss and injury.

4. Order XXXIX Rule 3 of the Code of Civil Procedure provides that the Court in all cases except where it appears that the object of granting injunction would be defeated by delay, direct the notice of the application to be given to the opposite party. The proviso appended thereto indicates that in the event, the Court proposes to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting injunction would be defeated by delay. It is thus imperative on the part of the Court to record the reason before it embarks its journey on the peripheral of granting injunction in absence of the defendants. The reason being the heart and soul of the order, cannot be undermined nor whittled down by reproducing the language of the section. Any order, which is bereft of reason, is always regarded as infirm and/or illegal and the Court, be it appellate or otherwise, would not allow such order to operate in judicial parlance. Mere recording the existence of a *prima facie* case, balance of convenience and inconvenience and irreparable loss and injury without returning its finding on each of such aspect, has been deprecated by the Supreme Court in a judgment rendered in case of ***Shiv Kumar Chadha Vs. Municipal Corporation of Delhi & Ors.***, reported in ***1993 SCC (3) 161*** in the following:-

- (i) *The Court should first direct the plaintiff to serve a copy of the application with a copy of the plaint along with relevant documents on the counsel for the Corporation or any competent authority of the*

Corporation and the order should be passed only after hearing the parties.

- (ii) If the circumstances of a case so warrant and where the Court is of the opinion, that the object of granting the injunction would be defeated by delay, the Court should record reasons for its opinion as required by proviso to Rule 3 of order 39 of the Code, before passing an order for injunction. The Court must direct that such order shall operate only for a period of two weeks, during which notice along with copy of the application, plaint and relevant documents should be served on the competent authority or the counsel for the Corporation. Affidavit of service of notice should be filed as provided by proviso to Rule 3 of order 39 aforesaid. If the Corporation has entered appearance, any such ex parte order of injunction should be extended only after hearing the counsel for the Corporation.*
- (iii) While passing an ex parte order of injunction the Court shall direct the plaintiff to give an undertaking that he will not make any further construction upon the premises till the application for injunction is finally heard and disposed of.*

5. In view of the observations made here-in-above, recording of reasons before granting an injunction in absence of the defendant is imperative and cannot be bypassed simply recording the language used in the particular statute. The importance of providing the reasons in judicial dispensation is not only to make the party aware what weighs the Judge in passing such injunction but also assist the appellate Court in understanding the minds of the Judge and the decision making process.
6. This Court thus finds that the order dated 18.12.2022 is completely bereft of reasons for granting the *ex parte ad interim* order of injunction and, therefore, cannot be sustained in the eye of law. Accordingly, the order dated 18.12.2022 is hereby **set aside**.
7. Consequently, the order extending the *ex parte ad interim* order of injunction which is assailed in FMA 329 of 2023 is also **set aside**.
8. The defendant is directed to file written objection to

an application for temporary injunction within a week from date before the Trial Court; Reply thereto, if any, shall be filed within a week thereafter.

9. The trial Court shall fix a date for hearing of the application for temporary injunction immediately after expiration of the period of exchange of affidavits. An endeavour shall be shown to dispose of the same within two weeks therefrom, in accordance with law.
10. For abundant precaution, it is made clear that this Court has not gone into the merit and de-merit of the application and, therefore, none of the observations made here-in-above shall have any persuasive effect at the time of disposal of the said application.
11. With these observations, both the appeals being **FMA 329 of 2023** and **FMAT 44 of 2023** are **disposed of**.
12. In view of disposal of the appeals, the connected application being **CAN 1 of 2023** filed in FMAT 44 of 2023 also stands **disposed of**.

(Harish Tandon, J.)

(Ajay Kumar Gupta, J.)

