

10.1.2023
18
Ct. no. 652
sb

C.O. 466 of 2020

Smt. Rudraphee Mondal
Vs.
Ashok Sardar & Ors.

Mr. Gopal Chandra Ghosh
Mr. Rajkrishna Mondal ...for the petitioner

Mr. Pinaki Ranjan Mitra
Mr. Ashim Kr. Roy ...for the opposite parties

Being aggrieved and dissatisfied with the order dated 4th November, 2019 passed by the learned Additional District Judge, 5th Court, Barasat in Misc. Appeal no. 107 of 2018 present application under Article 227 of the Constitution of India has been preferred. By the impugned order, the court below has reversed the order dated 28.8.2018 passed by learned Civil Judge (Junior Division) 1st Court at Barasat in Title Suit no. 511 of 2017.

The opposite parties as plaintiffs jointly filed Title Suit no. 511 of 2017 before the learned Civil Judge (Junior Division) 1st Court at Barasat against the petitioner herein inter alia praying decree for declaration that the petitioner has no right, title and interest to make any construction in or around any portion of the G schedule property which is shown as passage and also for mandatory injunction directing the petitioner to remove

western side fencing and eastern side pucca wall over the G schedule property and restore the original position of the alleged 12 feet common passage leading from west to east referred to in G schedule property and also for permanent injunction.

The opposite party as plaintiff in the said suit alleged that they have respectively become owners of the property as described in "A" schedule to "D" schedule of the plaint and the petitioner is the owner of E schedule and F schedule to the plaint and G schedule alleged to be a 12 feet wide common passage adjacent to the Bidhannagar Municipal Corporation main road known as Super Market Road. The dispute herein is over the so called common passage which appeared to be 6 feet wide in the plan annexed to the deed of the petitioner but other subsequent purchasers including the opposite party herein after purchase agreed with the petitioner that they will construct respective building in the property leaving vacant 3 ft in each plot, with the object to make width of the so called 6 ft wide common passage to 12 ft. Accordingly, the said common passage was expanded to 12 ft. The opposite parties alleged in their plaint, that the petitioner herein/defendant has obstructed the said common passage by setting up Bamboo fencing and dismantling the surface of the alleged 12 ft wide common passage and blocked eastern side thereby making pucca construction but the water connection through the

passage is still there. Petitioner has no right to block the same but ignoring the opposite parties protest, the petitioner obstructed the said so called common passage. Along with the suit the opposite parties also filed an injunction application praying for restraining the petitioner herein and her men and agents from changing nature and character of the property and to make any construction on any portion of E and F schedule property by encroaching G schedule property.

Upon contested hearing the learned trial judge by its order dated 28.8.2018 was pleased to reject the prayer for injunction. Being aggrieved by the said order, the plaintiff/opposite party herein preferred Misc. appeal no 107 of 2018 and the Appellate court reversed the said order.

Mr. Ghosh on behalf of the petitioner submits that learned appellate court upon total misconception of fact and law and without appreciating the position of the plots of land and so called common passage by its judgment and order dated 4th November, 2019 has been pleased to allow the Misc. appeal. He further submits that the order of the appellate court reveals that it is bereft of any logic and reasons assigned are baseless. He has not at all considered and applied his mind to the facts and circumstances of the case, rather mechanically passed the said order which is illegal on its face. The learned appellate court has acted illegally and with material

irregularity in the exercise of his jurisdiction by allowing appeal, which in the facts of the case, deserves dismissal having no merits.

He further submits that learned court below has not considered the sketch map which even at a glance shows the mala fides on the part of the opposite parties and reveals that the story of existence of the common passage, on their own showing, is in imagination. As a result he has caused total failure of justice by passing the order of status quo.

Mr. Ghosh strenuously argued that the observation of the learned appellate court regarding existence of water connection and electric connection through the petitioner's personal and absolute property, taken by third party, who is not a party to the suit, is totally wrong as, the said water connection has already been disconnected by the authority and electricity connection has been directed to remove by this Hon'ble Court in W.P.No. 12030(w) of 2019.

Learned counsel for the opposite party submits that implied grant was given to make the said 6 ft wide passage to be widened to 12 ft wide passage and from the submission of the parties, it is not in dispute that an application under Order XXVI Rule 9 of the Code of Civil Procedure is pending before the trial court. After making local investigation commission and after taking evidence only it can be ascertained whether there exists any

passage measuring 12 ft or not on the G schedule. Learned trial court has not committed any wrong in passing the order of status quo as the order of status quo implies that during pendency of the suit, the parties will keep the property in question in the same position as it exists at the time of filing of the suit. So for the purpose of protection and preservation of the suit property and also considering the fact that the local investigation commission is pending before the trial court and that there was an implied grant for widening 6 ft common passage into 12 ft common passage for the interest of both the parties, the court below rightly passed the order impugned, which does not call for any interference.

Learned counsel for the opposite party also argued that High court in the exercise of its jurisdiction under Article 227 of the Constitution of India cannot enter into the merits of the case, which ought to be set up before the trial court, because in enquiring into the merits, the High Court would transgress the limitation under jurisdiction under Article Article 227 of the Constitution of India. In this context, he relied upon a judgment of Raj Kumar Bhatia Vs. Subhas Chander Bhatia reported in (2018) 2 SCC 87.

I have carefully considered the submissions made by both the parties, it is not in dispute that the defendant's deed was executed on 27th June, 2008 where the passage has been shown as 6 ft wide. In the plaintiff's

deeds and the annexed plan, which were executed subsequently on different dates for the year 2009 to 2015 stated to be existence of a common passage of 12 ft wide. During hearing it is submitted that a common passage if any in between dag no. 3311 and 3309 is amongst the plot owners of RS dag no. 3311 and dag no. 3309 and it cannot be the common passage with the owners of RS dag no. 229 of Chandraberia mouza. It is further submitted that the properly described in "A" to "D" schedule are parts of R.S. plot no. 229 of Chandraberia mouza whereas, petitioner's land is in R.S. dag no. 3309 of Krishnapur mouja. It is further argued that the vendors of the opposite parties and her vendor are different and not co-sharer and as such the question of having any common passage of the opposite parties and the petitioner across Dag no. 3311 and 3309 belonging to the petitioner. During the course of argument, petitioner's counsel denied that there was ever any oral agreement with the opposite parties for widening the said passage. He further submits that the pucca wall at the eastern side was in existence from the petitioner's purchase in the year 2008.

It appears that there is no document regarding agreement for extension of passage. Learned trial court held that at this stage, the plaintiffs have failed to establish the existence of any 12 feet wide common passage either by producing any cogent document or by

producing any such agreement leading to the expansion of the 6 feet wide common passage into 12 feet. The defendant sale deed which is the prior deed states that there is existence of 6 ft wide common passage. Though the plaintiff contended that the defendant agreed that they will construct their respective building by leaving further 3 ft by each plot owners in respect of extension of common passage to make 6 ft wide common passage into 12 ft common passage which will be enjoyed by both the parties but at this stage plaintiffs have nothing to support the same and in the absence of any such support the trial court was justified in observing that the plaintiffs have failed to make out a prima facie case in support of granting injunction. Moreover, the plaintiffs have prayed mandatory injunction at the interlocutory stage for restoration of the original position of alleged 12 ft common passage from west to east but at this stage, the plaintiffs have failed to make out prima facie case over his contention that the schedule passage in 12 feet wide through easement by grant or by easement of necessity. The question of granting temporary and mandatory injunction for restoration of the passage in its original possession assuming that after defendant's purchase, by way of any oral agreement, 6 ft wide passage has been expanded into 12 ft wide passage, is not sustainable at this early stage of hearing without proper appreciation of evidence.

The impugned judgment dated 4th November, 2019 passed by the learned Additional District Judge, 5th Court, Barasat in Misc. Appeal no. 107 of 2018 is hereby set aside and the judgment and order dated 28.8.2018 passed by learned Civil Judge (Junior Division) 1st Court at Barasat in Title Suit no. 511 of 2017 is hereby affirmed. However, this court has not gone into the merits of the case and this order is confined in connection with aforesaid interim order only.

Accordingly, C.O. 466 of 2020 is allowed.

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.)