

16 **17.08.**
2023

Ct. No. 04

ab

FMAT 109 of 2023
IA No. CAN 1 of 2023

Mahadeb Ghosh and others
Vs.
Pijush Kanti Ghosh @ Mangala Charan Ghosh.

Mr. Partha Pratim Roy,
Mr. Debasis Sur,
Mr. Hare Krishna Halder,
Ms. Anindita Chatterjee.

... for the appellants.

Mr. Souri Ghosal,
Mr. Subhojit Mukherjee,
Mr. Prabhat Kumar Singh.

... for the respondent.

We have invited the respective Counsels to argue the matter on merit so far as it relates to the manner in which the application for temporary injunction is disposed of by the trial court.

Astonishingly, while passing an *ex parte* ad interim order of injunction, the court recorded the facts pleaded in the plaint wherein it is categorically averred that the defendant/appellant nos. 1 and 3 are the sons of one Kamala Ghosh, who had an undivided right, title and interest in respect of the property and further averred that the defendant/appellant nos. 1 to 4 along with the plaintiff/respondent are entitled to 1/7th share and defendant/appellant nos. 5 to 16 are entitled to 3/7th share in respect of 'ka' and 'kha' schedule property.

It is not a case that the property is partitioned and an exclusive right is claimed by either of the parties to the suit. The moment the plaintiff/respondent filed a suit for partition and separation of shares impleading the defendants therein, ordinarily it is presumed that the defendants/appellants have a semblance of right, title and interest in respect of the said property jointly with

the plaintiff/respondent.

The trial court while passing an *ex parte* ad interim order of injunction recorded the prima facie finding in relation to the undivided interest in the subject properties as well as the possession and directed the parties to maintain *status quo* in respect of the nature, character and possession thereof.

Interestingly, when the application for temporary injunction came up for final disposal, the court without recording a prima facie satisfaction on the existence of a case having made out and the balance of convenience and inconvenience and the irreparable loss and injury proceeded to dispose of the said application solely on the ground that in a suit for partition, the order of *status quo* with regard to nature, character and possession is an ordinary fall out of the same.

We are unable to countenance such perception of law having projected in the impugned order no. 18 dated 11th August 2022 that in all conceivable situations it is a matter of rule that the moment the suit for partition is filed, the order of *status quo* with regard to the nature, character and possession is inevitable. The court has to record the existence of a prima facie case and must also record its independent finding on the balance of convenience and inconvenience as well as the injury to be suffered in the event the injunction is not passed. Such consideration is conspicuously absent in the impugned order.

It is a paramount duty of the court to record finding while adjudicating a right of the parties may be at interlocutory stage. We are conscious of the proposition of law that the finding recorded at the stage of temporary injunction is mere tentative and shall not have any impact at the time of finding disposal of the suit after full-fledged trial.

It is further to be remembered that the possession

of a co-sharer in respect of the joint property is a possession not only in commensurate with the share but on behalf of the other co-sharers unless there is an exclusion at the behest of such co-sharer. We do not find from the pleading in the plaint that any exclusion is claimed or in other words the exclusive right as to the possession is claimed and, therefore, the court should not make any observation de hors what has been made at the time of passing an ad interim order of injunction.

Since the order is bereft of any reasons, the order no. 18 dated 11th August 2022, so far as it relates to the disposal of the temporary injunction is concerned, is hereby set aside.

We further find that the written objection has already been filed by the contesting defendants and, therefore, request the learned Judge to fix a date for hearing of the application for temporary injunction, which should not exceed beyond fifteen days from the date of communication of this order and shall dispose of the same by affording an opportunity of hearing to the respective contesting parties by recording proper reasons in accordance with law within fortnight therefrom.

The instant appeal and the connected application being CAN 1 of 2023 are disposed of.

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

(Harish Tandon, J.)

(Ajay Kumar Gupta, J.)

