

16 **22.08.
2023**

Ct. No. 04

Ab

**FMA 669 of 2023
IA No. CAN 1 of 2023**

**Sree Anath Gorai and another
Vs.
Sree Paban Gorai and others.**

**Mr. Sharanya Chatterjee,
Mr. Nepesh Majhi.**

... for the appellants.

Since the defendant/respondent nos. 2 to 4 have not challenged the impugned order, we do not delve to go into the legality, veracity and tenability of the said order.

The instant appeal is filed at the behest of the plaintiffs/appellants against the aforesaid order simplicitor on the ground that the trial court ought to have restrained the defendant/respondent no. 1 as well from making any construction over the joint property.

We invited the attention of the Counsel for the plaintiffs/appellants to apprise us whether any case pertaining to the temporary injunction to be granted against the defendant/respondent no. 1 has been made out in an application for temporary injunction.

The application for temporary injunction is annexed to the application for stay filed in connection with the instant appeal containing four paragraphs. The first paragraph relates to the institution of the suit by the plaintiffs/appellants for partition in respect of a property mentioned in the schedule appended to the plaint and the grounds on which such partition is sought. The leave was also sought to refer the plaint at

the time of hearing of the said application. The second paragraph relates to the property being the subject matter of the suit to be an ancestral property of the plaintiffs/appellants and the defendant/respondent no. 1 and the father of the plaintiffs/appellants by registered deed of gift gifted undivided fifty percent share therein and on the basis thereof the record of rights was also corrected. The third paragraph proceeds with the allegation of illegal act of the defendants/respondents in connivance with the defendant no. 2 and 4, which compelled the plaintiffs/appellants to file a suit for partition and also an application for temporary injunction. The fourth paragraph is reproduction of the golden parameters required for consideration of an application for temporary injunction viz. existence of prima facie case, balance of convenience and inconvenience and the irreparable loss and injury.

There is no averment relating to any act of the defendant/respondent no. 1 averred in the said application for temporary injunction nor there is any narration of the facts relating to an illegal act alleged to have been committed by the said defendant/respondent. Except for reference of the plaint for which the leave was sought for, we do not find any element pertaining to making out a prima facie case, balance of convenience and inconvenience in granting the injunction and irreparable loss and injury to be suffered in the event injunction is granted.

However, in paragraph five of the plaint, the plaintiffs/appellants have disclosed that the defendant/respondent no.1 in collusion with the defendant/respondent nos. 2 to 4 have attempted to

make a foundation in the undivided plot, more particularly, in the best portion of the same by collecting bricks, sands, stone chips etc. with an intent to make certain construction thereat.

Astonishingly, there is no relief claimed on the basis of the averments made in paragraph five of the plaint in the form of a decree for permanent injunction. An argument is sought to be advanced that the moment the plaintiffs/appellants craves leave to refer the plaint, it would be construed that whatever has been pleaded in the plaint is impliedly pleaded in an application for temporary injunction.

We are unable to comprehend such conception vis-a-vis the provisions contained in the Code of Civil Procedure. A litigant against whom an order of injunction is sought is required to defend his right or resist the prayer for temporary injunction on the basis of the averments made in an application for temporary injunction. Since the application for temporary injunction is bereft of any such allegation, naturally, the written objection to the temporary injunction was restricted to what has been alleged in the application for temporary injunction.

We have an occasion to peruse the written objection filed by the defendant/respondent no. 1 wherefrom we do not find any pleading with regard to the allegation made in the plaint, more particularly, paragraph five thereof. It further appears that the said defendant/respondent has dealt with the same in the written statement, which he is supposed to do, as any avoidance to deal with the allegation made against him may operate counter-productive by virtue of non-denial

or evasive denial envisaged under the provisions of the Code.

The pleading has an important role in adjudication of a right between the party in an adversarial system. The party against whom allegation is made has a right to defend the same and, therefore, the application for temporary injunction must disclose the clear right to sue and the basis of passing an order of temporary injunction.

The court should not pass an order of temporary injunction on the *ipse dixit* of the fact that it is a suit for partition without venturing to return its finding on the aforesaid golden parameters recognized in judicial parlance in relation to a refusal or grant of temporary injunction.

We do not find any allegation having made out in the application for temporary injunction and mere reference to the plaint does not cure the initial defect of not pleading the relevant facts required for such purpose.

The matter can be viewed from the another angle. In the event, the plaintiffs/appellants found that certain illegal act has been done by the defendant/respondent no. 1 in connivance with the defendant/respondent nos. 2 to 4 and having pleaded the same in the plaint, we find no reason as to why a relief based upon the aforesaid allegation is not prayed for in the plaint.

The court passes an interlocutory order in the form of temporary injunction in aid of final relief. In the event the final relief is not sought for, we are amazed whether

by pleading that the averments made in the plaint would be relied upon at the time of moving the said injunction application, it itself dispensed with the importance of pleading the necessary ingredients being the foundation for determining as to whether the court should pass a temporary injunction or not.

We, thus, do not find any merit in the appeal and the same is hereby dismissed.

In view of the dismissal of the appeal itself, the connected application being CAN 1 of 2023 has become infructuous and the same is also dismissed.

(Harish Tandon, J.)

(Ajay Kumar Gupta, J.)