

10.04.2023  
Item No. 22  
Court No.32  
Avijit Mitra

**FMA 613 of 2022**

**Sk. Mahammad Hossain  
Versus  
Abu Syid & ors.**

Mr. Bratindra Narayan Ray,  
Ms. Shetparna Roy  
...for the appellant  
Mr. Debasish Ray  
....for the respondent nos. 54 to 58

1. The present appeal has been preferred challenging an order dated 28<sup>th</sup> March, 2022 passed by the learned Civil Judge (Senior Division), Kandi, Murshidabad in Partition Suit No.273 of 2021.

2. Mr. Bratindra Narayan Ray, learned advocate appearing for the appellant/plaintiff submits that in connection with the suit for partition, an application under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure (in short, the Code) was filed by the appellant in which an order was passed on 2<sup>nd</sup> July, 2021 restraining the defendant nos. 54 to 58/ respondent nos. 54 to 58 in the present appeal (in short, the said respondents) from making any construction in the suit property till the next date. The parties exchanged their affidavits and thereafter the application was rejected on contest by the order impugned in the present appeal.

3. He submits that inspite of the order of *status quo*, the said respondents in violation of the said directives continued to raise construction. Such conduct itself reveals that the said respondents were intending to complete the construction and to create third party interest in the suit property.

4. He argues that the allegations and counter allegations levelled by the parties ought to have been examined with reference to evidence but a perusal of the order impugned would reveal that the issues involved in the *lis* have been finally decided by the learned Court at the interim stage.

5. He contends that both the appellant and said respondents had admitted the ownership of one Torimunnecha Bibi, who was the original C.S. recorded owner. Torimunnecha Bibi executed oral heba in favour of Amir Hossain, the predecessor-in-interest of the appellant and such fact stands corroborated by the deed of relinquishment being no.9268 of 1974 executed in favour of Amir Hossain by Torimunnecha Bibi. However, the learned Court below erroneously proceeded on the basis that the number of the said relinquishment deed was 4268 of 1974 and refused to pass the interim order as prayed for.

6. Mr. Ray contends that without considering the heirship certificate, the contents of the relinquishment deed, the record of rights and the decree passed in (Civil) Suit no. 180 of 1951, the learned Court below expressed its doubt

about the identity of the appellant and refused the interim order on the basis of surmises and conjectures.

7. He argues that the learned Court erred in law in observing that an oral heba is not permissible in West Bengal without ascertaining as to whether the essential requisites of a gift under Mohammadan law stand satisfied *moreso* when its form is immaterial. In support of such contention reliance has been placed upon the judgments delivered in the cases of *Hafeeza Bibi & Ors. Vs. Shaikh Farid (dead) by LRS. & Ors.*, reported in *AIR 2011 SC 1695* and *Asgar Ali Vs. Tahir Ali & Another*, reported in *AIR 2013 MP 151*.

8. According to Mr. Ray, the learned Court below had also not considered the fact that the land in question is 'Aman' and without obtaining appropriate order for conversion, as required under Section 4C of the West Bengal Land Reforms Act, no construction can be raised by the respondents.

9. Mr. Debasish Ray, learned advocate appearing for the respondent nos. 54 to 58 in the present appeal submits that the arguments advanced on behalf of the appellant are not restricted to the averments made in the plaint and in the injunction application. The plaintiff/appellant has in fact admitted the title of the said respondents in the suit property and has accordingly impleaded them in the partition suit and as such the appellant is estopped from raising any dispute as regards the title of the said respondents. The deed

from which the said respondents derives title has also not been challenged and there is no prayer towards cancellation of the deed.

10. According to Mr. Ray, no *prima facie* case has been made out by the appellant warranting issuance of an interim order. The interim order, as prayed for, is not supported by the averments made in the plaint or in the injunction application. The glaring inconsistencies debar the appellant from availing any equitable relief. In support of such contention reliance has been placed upon judgments delivered in the cases of *Ece Industries Limited (2) Vs. S.P. Real Estate Developers (P) Ltd. & Anr.*, reported in (2009) 12 SCC 776 and *Mandali Ranganna & Ors. etc. Vs. T. Ramachandra & Ors.*, reported in AIR 2008 SC 2291.

11. He argues that the prayer for interim order has been rightly refused by giving cogent reasons and there is no infirmity in the order impugned warranting interference of this Court.

12. Heard the learned advocates appearing for the respective parties and considered the materials on record.

13. While granting an *interim* order of temporary injunction, the Court is required to see whether there exists a *prima facie* case or whether the balance of convenience and inconvenience tilts in favour of the party seeking interim order or whether denial of the interim protection would cause irreparable loss and injury which cannot be compensated by payment of money.

14. A perusal of the judgment would reveal that the Court came to a *prima facie* finding that '*both the plaintiffs and defendants are admitting the ownership of Torimunneccha Bibi who was the original recorded owner*'. The learned Court was also not in a position to finally decide as to whether Torimunneccha and Kamini Bibi were the same and identical person and as regards the identity of Torimunneccha. There are serious disputed questions to be tried in the suit and the same require thorough examination with reference to evidence. The suit is for partition and we do not think that grant of the interim order, as prayed for will cause a greater loss and prejudice to the respondent nos. 54 to 58 than the loss and prejudice in the absence thereof is likely to cause to the appellant.

15. We are unable to accept the contention of Mr. Debasish Ray that no *prima facie* case has been made out by the appellant to obtain the interim order. It is also not a case that the appellant has suppressed material facts or had slept over his rights. The conduct of the appellant does not debar him from availing the interim protection and the denial of the same may lead to alteration of nature and character of the suit property and multiplicity of proceedings.

16. It is well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction in fact or an additional fact may make a lot of difference in decision making process. The judgment is a precedent for the issue of law that is

raised and decided and not observations made in the facts of any particular case. There is no dispute as regards the proposition of law as laid down in the judgments upon which reliance has been placed by the respondents, however, the same are distinguishable on facts.

17. For the reasons, discussed above, the order dated 28<sup>th</sup> March, 2022 passed by the learned Civil Judge (Senior Division), Kandi, Murshidabad in Partition Suit No.273 of 2021, is set aside and the parties are directed to maintain *status quo* as regards the nature, character and possession of the suit property as on date till the disposal of the suit. The parties are also restrained from creating any third party interest over the suit property till the disposal of the suit.

18. The learned Court below is requested to take all necessary steps towards expeditious disposal of the suit, without granting any unnecessary adjournment to either of the parties.

19. With the above observations and directions the appeal and the connected application are disposed of.

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

21. Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties.

**(Partha Sarathi Chatterjee, J.) (Tapabrata Chakraborty, J.)**