

26 21.06.23

Ct. No. 04

akd

F.M.A. 301 of 2023
CAN 1 of 2023

Sri Deepankar Chatterjee
Vs.
Smt. Deepanwita Mookherjee & Ors.

Mr. Debjit Mukherjee,
Mr. Kaustav Bhattacharya.
... for the appellant.

Mr. Srikanta Dutta,
Ms. Rituparna Sarkar Dutta.
... for the respondent no. 1.

Mr. Arabinda Sen,
Ms. Rita Ganguly.
... for the proforma respondents.

The instant appeal arises from an order dated 27th February, 2023 passed by the learned Civil Judge (Senior Division), 4th Court, Alipore, South 24-Parganas in Title Suit No. 574 of 2008; by which an application for temporary injunction filed by the plaintiff/respondent is allowed directing the parties to the suit to maintain status quo with regard to nature, character and possession of the properties described in the schedule appended to the plaint till the disposal of the suit.

At the very outset we must record that the manner in which the application for temporary injunction has been decided by the Trial Court is not in commensurate with the principles laid down in this regard. The order does not reveal the findings in relation to existence of prima facie case nor in relation to balance of convenience and inconvenience or irreparable loss and injury.

The Trial Court has proceeded simplicitor on the basis that every co-sharer in a joint property has the right, title and interest therein and, therefore, if a third party right is created, it would cause sufferance to the parties to the suit. Even if we consider that the

aforesaid findings are relatable to balance of convenience and inconvenience and irreparable loss and injury, yet the ultimate order passed by the Trial Court does not appear to be in tune with the aforesaid findings.

Our meticulous reading of the aforesaid findings leaves an impression that it was referable to divestation of right in respect of the joint property, but the order of injunction is passed in relation to the nature, character and possession of the parties therein, which, in our opinion, appears to be inconsistent.

Be that as it may, we do not intend to go much deep into the aforesaid aspect after hearing the respective Counsels appearing before us.

The Counsel appearing for the plaintiff/respondent submits that if the share held in the joint property is transferred, it would bring an anomalous situation at the time of passing the final decree and the creation of a third party right would further jeopardize the case of the plaintiff/respondent. We do not find the nature of the order passed by the Trial Court is in commensurate with the stand of the plaintiff/respondent.

The Division Bench of this Court in case of *Shyam Kumar Panja & Anr. vs. Lakhiniwas Chittiangia* reported in (2020) 1 Cal LT 166 held that the Court should not restrain any of the co-sharers from transferring his share held by him in the joint property, as the transferee pendente lite would be bound by the decision taken in the partition suit and his right, title and interest would be subject to the final decree passed in the said suit. However, the Division Bench observed that so far as the construction to be made in the best portion of the property is concerned, the Court may depending upon the facts of each case pass an order of

injunction as it may sometime invite irreversible situation in the following:

“19. Since the property is a joint property, it is presumed that the parties have their respective right, title and interest to the extent of their shares in the joint property and a co-sharer holds possession not only on his behalf but also on behalf of the other co-sharer as well in such property. The plaintiff has filed a suit for partition thereby admitting that the defendants are his co-sharers. As such no injunction can be passed restraining a co-sharer from possessing the joint property. It is also equally true that a co-sharer cannot be prevented or precluded from divesting his right, title and interest pending the partition suit. There is no law which prevents a co-sharer from transferring his/her share in the joint property. There is no impediment or fetter on the part of the co-sharer in alienating or transferring his share in respect of the joint property as the transferee pendente lite shall be bound by the final decree that may be passed in the instant suit for partition. Thus, no order of injunction should also be passed restraining the defendants from transferring and/or encumbering the suit property.

20. However, in the event the defendants/respondents are allowed to change the nature and character of the suit property, ultimately when the instant suit for partition will be disposed of, the plaintiff may not get the relief which he deserves. In the event the defendant raises any construction on the best portion of the property, the defendant will claim equity in respect of the improvements made to the joint property

and will claim allotment of such portion at the time of final decree. It is not the case of the defendants/respondents that they have commenced the work for construction or that the construction has progressed substantially before the filing of the suit. In the event the defendant is not restrained from changing the nature and character of the suit property during the pendency of the suit, the situation may become irreversible by the time the suit will be disposed of. Thus, the balance of convenience and inconvenience is in favour of the plaintiff/appellants and he will suffer irreparable loss and injury unless an order of injunction is passed in his favour restraining the defendant from changing the nature and character of the suit property.”

It is also to be borne in mind that the Court should not pass an order of injunction restraining the co-sharers from making any construction in a mechanical or routine manner. Any improvement made in the property may be for the benefit of the co-sharers and if such improvements are made during the pendency of the partition suit, sufficient care and protection can be taken by the Court in precluding the said co-sharer from claiming any equity at the time of final decree.

We had perused the schedule appended to the plaint wherefrom it appears that the immovable properties described in Serial nos. 2 to 5 are the tenanted properties except the property mentioned in Serial No. 1. The apprehension that apropos the sale of the shares by the appellant, the possession would be given which would disturb the harmony, privacy and the security of the joint family, is unsubstantiated for the simple reason that once the property is tenanted,

the physical possession lies with the tenant and the landlord retains the symbolic possession, which cannot be construed to have an impact on the security, safety and privacy of the family.

So far as the property mentioned in serial no. 1 is concerned, we find from the cause-title that the co-sharers are residing therein and obviously the possession to a stranger can be prevented by the co-sharer under Section 44 of the Transfer of Property Act.

Since the suit has reached to advance stage as evident from the observations made in the impugned order, it would be proper that the said suit should be brought to its logical end at the earliest.

The Counsels to the parties have uniformly submitted that they would co-operate with the Trial Court in bringing the suit to the final end and shall not indulge any unnecessary adjournment unless necessitated by unavoidable and unforeseen circumstances.

So far as the nature of the order of temporary injunction is concerned, we feel that the same requires modification to the extent that the parties would maintain status quo with regard to the nature and character of the properties described in the schedule appended to the plaint. However, there shall not be any order of restrain in divesting the share held by the co-sharers in respect of the properties in serial nos. 2 to 5.

So far as the property included in serial no. 1 is concerned being a dwelling house, any transfer to a stranger shall not entitle the stranger to have joint possession with the other co-sharer.

It is further made clear that while transferring the share it is to be mentioned in the deed that such transfer shall abide by the result of the partition suit.

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

(Harish Tandon, J.)

(Prasenjit Biswas, J.)