

26.06.2023

Court : 04
Item : 39
Matter : FMA
Status : DISMISSED
Bench ID : 266048
Transcriber : NANDY

FMA 374 of 2023

with

CAN 1 of 2023

Kuntal Chakraborty

Vs.

Kajal Chakraborty & Ors.

Mr. Ayan Banerjee, Advocate

Mr. Soumo Chaudhury, Advocate

.....for the Appellant

1. The instant appeal arises from an order no. 4 dated March 3, 2023 by which the prayer for an *ex parte ad interim* order of injunction was refused by the Trial Court. The plaintiff/appellant filed a suit for partition and separation of shares together with the consequential reliefs in the form of permanent injunction against the defendants /respondents from disturbing peaceful possession and enjoyment of the plaintiff/ appellant in respect of the property and also from transferring, alienating and encumbering the same in any manner whatsoever.
2. The Trial Court held that the facts and circumstances pleaded in the application for injunction does not *prima facie* appears to have created any urgency requiring the Court to pass an *ex parte ad interim* order of injunction in absence of the defendants/ respondents.
3. In the instant appeal, it sought to be contended that the defendants/respondents are regularly threatening the plaintiff/appellant to transfer the suit property and also negotiating with the third party for making new construction by raising a multistoried building in the suit property. The averments made in paragraph 13 of the injunction application would reveal that the plaintiff/appellant sought for an order restraining the defendants/respondents from transferring, alienating and/or encumbering the suit property in favour of a

third party in any manner whatsoever till the disposal of the suit. However, in the prayer portion, the injunction with regard to changing the nature and character of the suit property was incorporated therein.

4. So far as the right to transfer the share in respect of a joint property is concerned, we do not think that an *ex parte ad interim* order of injunction to be passed for the simple reason that if alienation and/or transfer is effected in respect of a share in the property, the transferee *pendente lite* would be bound by the decision that would be taken in the partition suit as on the divestation of the shares held by the co-sharers in the joint property, he becomes a co-sharer along with the other co-sharers subject however, the property is not a dwelling house of the co-sharers. Even if such transfer is made in respect of a dwelling house by a co-sharer in favour of a third party, it prevents the stranger purchaser to have a joint possession under Section 44 of the Transfer of Property Act. It would not be proper on the part of the Court to pass an *ex parte ad interim* order of injunction so far as the alienation, encumbrances and/or transfer of the share in the joint property is concerned which in this case admittedly a land that would be evident from the description given in the schedule appended thereto.
5. There is no averments made in the application for temporary injunction filed in the Trial Court that there is any attempt on the part of the defendant/ appellant in making any constructions over the land which according to the plaintiff/appellant is a joint property held by the parties to the said proceedings. The Court should not pass an *ex parte ad interim* order of injunction simplicitor on the *ipse dixit* of the submission made at the Bar ignoring the importance of

pleadings in this regard. The Court should not pass an *ex parte ad interim* order of injunction on mere apprehension unless there is cogent evidence or the materials produced in support thereof which in this case appears to be lacking.

6. However, an improvement can be seen from the application for injunction filed in the instant appeal where it is pleaded that taking advantage of the refusal to pass an *ex parte ad interim* order of injunction with regard to the transfer and/or sale of the share by the co-sharer, a deed of transfer has been executed showing the portion of the joint property as well demarcated. Since the transfer has already been effected and, therefore, the interpretation of the aforesaid deeds or its effect shall be subject to the decision that may be taken at the time of passing a preliminary decree but that itself does not invite the Court to prevent the transfer of the property in favour of the stranger. Furthermore, there is no averments made in the instant application that after the execution and registration of the deed by the co-sharers any attempt has been made for making any construction or any steps are taken to segregate the property by way of demarcation and, therefore the Court should not pass an *ex parte ad interim* order of injunction as the Counsel appearing for the plaintiff/appellant perceived such apprehension.
7. Since there is no pleading with regard to the changing the nature and character of the suit premises even after the divestation of the right, title and interest by the co-sharers in respect of a joint property, we do not think that it is fit case where an *ex parte ad interim* order of injunction should be passed by this Court.
8. Accordingly, we do not find any merit warranting interference with the impugned order.

9. The appeal being **FMA 374 of 2023** is **dismissed**.
The connected application for injunction being **CAN 1 of 2023** also stands **dismissed**.
10. However, we expect that the Trial Court would expedite the hearing of the application for temporary injunction filed in the said suit.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)