

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE MADHURESH PRASAD

FMA 713 of 2022
IA No. CAN 1 of 2022

Sanat Kumar Kundu
Vs.
Dilip Kundu (Chitta) & Ors.

Appearance:

For the Appellant : **Mr. Samrat Dey Paul, Adv.**

For the Respondent No. 1 : **Mr. D.K. Adhikari, Adv.**
Mr. Samir Kumar Adhikari

Judgment On : **22.12.2023**

Harish Tandon, J.:

The instant appeal arises from an Order no. 31 dated 08.10.2020 passed by the learned Civil Judge, Senior Division, Jhargram in Title Suit no. 76 of 2018 by which an application under Section 151 of the Code of Civil Procedure seeking a mandatory injunction is postponed on the premise that the relief of mandatory injunction is in final form and, therefore, cannot be granted at the *inter-locutory* stage and directed the said application to be taken up at the time of final hearing of the said suit.

The plaintiff-appellant filed a suit for partition and separation of shares in respect of a joint property in which an application for temporary injunction was filed which was disposed of on 07.02.2019 on consent directing the *status quo* to be maintained till the disposal of the suit. An application for appointment of Advocate-Commissioner was taken out alleging that despite the order of *status quo* subsisting in the said suit, the Respondent no. 1 is constructing two rooms on the courtyard. The resistance was offered in this regard but he did not pay any heed to the same. The Trial Court allowed the said application vide order no. 9 dated 22.07.2019 appointing Advocate-Commissioner to inspect and submit the report before the Court. Pursuant to the said order, the Advocate-Commissioner submitted the report wherein it is indicated that the work of construction of two rooms are in progress in the said suit premises. Despite such report having filed by the Commissioner, the said Respondent no. 1 continued with a construction work and another application for appointment of the Commissioner was filed in order to ascertain whether any further progress have been made with regard to the alleged construction which was eventually allowed on 25.06.2019. The subsequent report revealed that the alleged two rooms have been completed on the open courtyard which constrained the plaintiff-appellant to take out an application under Section 151 of the Code of Civil Procedure seeking the mandatory injunction for demolition of the said two rooms having undertaken in the teeth of the order of temporary injunction. The said application would further reveal that the construction at the joint property is

such that there is an open courtyard in the middle of the property surrounded by the residential rooms. It is further disclosed by the plaintiff-appellant that several ceremonial functions and activities were performed in the open courtyard and, therefore, such construction is in blatant violation of the order of temporary injunction.

The Counsel for the plaintiff-appellant submits that two reports submitted by the same Advocate-Commissioner vividly disclosed the act of violation of the temporary injunction and anything which is done in the teeth of the order of temporary injunction is illegal and it is a duty of the Court to bring the *status quo ante* prevalent at the time of passing the temporary injunction. In support of the aforesaid contention, the reliance is placed upon the Division Bench judgment of this Court rendered in case of ***Indian Cable Company Ltd. vs. Smt. Sumitra Chakrabort* reported in AIR 1985 Cal 248** wherein it is held that there is no fetter on the part of the Court to pass the mandatory injunction at the *inter-locutory* stage provided the Court is satisfied that a wrong has been done in blatant violation of an order of temporary injunction. The Counsel for the appellant further submits that the Apex Court in ***Surjit Singh & Ors. vs. Harbans Singh & Ors. reported in (1995) 6 SCC 50*** held that any act done in defiance of a restraint order is *per se* illegal and the Court should pass an appropriate order protecting the interest of the parties for ends of justice. The Counsel for the appellant further submits that if the Court cannot implement its order at the behest of an unscrupulous litigant it would defeat the very purpose of granting the temporary injunction and placed reliance

upon a judgment of the Supreme Court in ***Dorab Cawasji Warden & Ors. vs. Coomi Sorab Warden & Ors. reported in AIR 1990 SC 867.*** Lastly, it is submitted that if anything is done in violation of an order of status-quo by altering the position existed on the said date, the Court is not powerless to pass a mandatory order and placed reliance upon a judgment of the Supreme Court in case of ***Satyabrata Biswas & ors. vs. Kalyan Kumar Kisku & Ors. reported in (1994) 2 SCC 266.***

The appeal was admitted and because of the serious consequences to follow, in the event, the impugned order is interfered with, we permitted the Respondent no. 1 to file affidavit-in-opposition to an application for stay which in fact, has been done. It is a specific stand of the Respondent no. 1 that there was an old structure standing at the side which was in a dilapidated condition and, therefore, the repair works were undertaken which cannot be said to be changing the nature and character thereof. The plaintiff-appellant denied the aforesaid stand in the affidavit in reply filed in this regard and banked upon the reports of the Advocate-Commissioner which belied such statement or a stand of the Respondent no. 1.

The only ground on which a Trial Court refused to pass a mandatory injunction is that if the mandatory injunction is granted at the *inter-locutory* stage which is in final form, it would cause greater injustice and, therefore, to be decided at the time of final hearing of the suit.

Let us examine the legality of the aforesaid concept perceived by the learned Judge that the mandatory injunction cannot be passed at the *inter-*

locutory stage but to be decided at the time of final hearing of the suit. The Division Bench of this Court in ***Indian Cable Company (supra)*** was considering the said question and held that there is no fetter on the part of the Court to pass a temporary injunction on an *inter-locutory* application taken out by the party with the rider that such power should be exercised sparingly and only in rare of rarest cases as follows:

“9. So far as the second reason assigned by the learned Subordinate Judge is concerned, I feel that it is necessary to clarify the legal position with regard to a prayer for injunction as made in the present case. The learned Subordinate Judge appears to have taken the view that since recovery of possession is the principal relief claimed in the suit, the plaintiff cannot claim restoration of possession on an interlocutory application because that would mean in a manner decreeing the suit even before its trial. Reliance has been placed upon an earlier decision of this court in the case of Rameswar Lath (1936 (40) Cal WN 1201) (supra). But in my opinion the said decision is no authority for an absolute proposition that no relief on an interlocutory application can be granted under any circumstances which may amount to granting of the interlocutory application can be granted under any circumstances which may amount to granting of the main relief prayed for in the suit. McNair, J. in the said decision merely pointed out that as a general rule such a relief is not granted in the absence of apparent urgency and injury to the applicant. When I refer to the decision I find that McNair, J. did take note of and approve of the principle as enunciated in English cases which acknowledged the existence of power in a court to give such a relief on an interlocutory application as may also be the substantial prayer in the suit. The learned Judge took pains to consider whether on the facts of the particular case any such ground had been made out for grant of such a relief

and observed: “There is no statement for pleading as to the injury which would be suffered by the applicant if he does not set the injunction which he now prays for and I am not satisfied that there is any urgency in the matter.” If the bar to the granting of such a relief had been considered to be absolute by the learned Judge, it would not have been necessary for him to go into the question of urgency or the injury to be suffered by the plaintiff. Granting of such a relief was upheld by the court of appeal in the case of *Heywood v. B.D.C. Properties Ltd.*, (1963) 2 All ER 1063 (1067), Reviewing the earlier authority it was observed: “Those cases, I think, do show that it is only in unusual circumstances that the court ought to take the step of granting substantially the whole relief claimed in the action on an interlocutory application. But they equally show that that is a procedure which, in a proper case, is available. In my judgment, having regard to the admitted fact that the alleged contract registered, was not contract at all this is one of those cases in which it is proper and appropriate to grant by way of an interlocutory application the relief which the Judge has granted”. “The same view was expressed by the court of appeal in the case of *Acrow Limited v. Rex Chain Belt*, (1971) 3 All ER 1175, when the appeal court allowed the appeal and granted an interim relief though it took note of the fact that granting such an injunction meant virtually deciding the action and it was observed that: “that often happens”. Mr. Kapoor has rightly drawn out attention to an unreported Bench decision of this court in the case of *Lachmandas Daswani v. Messrs. Philis Berry D Cruz* (A.F.O.O. No. 243/72, O.S. decided on May 17, 1974). In this decision, the Division Bench distinguished the decision in (1936) 40 Cal WN1201 by taking the same view as I have taken in the present case. In my opinion, the principle on the point as it emerges on review of the authorities thereon is that if a court is called upon to grant any relief on an interlocutory application which then granted would mean granting substantially the relief claimed in the suit, the court will be very slow and

circumspect in the matter of granting any such prayer. It is indeed true that such a relief should be granted only in exceptional cases. Though exercise of such a discretion should be limited to rare and exceptional cases, still at the same time no court should think, as has been the view taken by the learned Subordinate Judge, that in law there is any absolute bar to the court granting such a relief. In deserving cases, the court should not hesitate to come in aid of a litigant and uphold the cause of justice by granting such a relief I am, therefore, of the opinion that the learned Subordinate Judge went wrong in reading the decision in (1936) 40 Cal WN 1201 as an authority for a proposition of law there is an absolute bar to the granting of an interlocutory relief as claimed in the present case and, therefore, not deciding on the merits whether the plaintiff had made out any exceptional case in support of his claim.”

(emphasis supplied)

It is further held that the Courts in the country are not denuded of powers in remedying an injury or wrong by passing a mandatory injunction on an *inter-locutory* application as such powers inheres into the Court. It is no doubt true that the Court while dealing with an application for temporary injunction is exercising an equitable jurisdiction and the reliefs are granted on such equitable principles and to render justice in the attending facts and circumstances of each case. The injuries suffered by a litigant by a wrongful act of the other side more particularly, when there is restraint by order of injunction, the Court is not powerless to remedy such wrongful act in passing a mandatory injunction.

In ***Dorab Cawasji Warden (supra)***, though the Apex Court was considering a case covered under Section 44 of the Transfer of Property Act yet held that the Courts are not denuded of any power to grant mandatory injunction at the *inter-locutory* stage in the following:

“10. The trial court gave an interim mandatory injunction directing the fourth respondent not to continue in possession. There could be no doubt that the Courts can grant such interlocutory mandatory injunction in certain special circumstances. It would be very useful to refer to some of the English cases which have given some guidelines in granting such injunctions.

11. In Shepherd Homes Ltd. v. Sandham, (1970) 3 All ER 402, Megarry, J. observed:

“(iii) On motion, as contrasted with the trial, the court was far more reluctant to grant a mandatory injunction; in a normal case the court must, inter alia, feel a high degree of assurance that to the trial it will appear that the injunction was rightly granted; and this was a higher standard than was required for a prohibitory injunction.”

The same principles have been reiterated in a subsequent decision of the Supreme Court rendered in ***Satyabrata Biswas (supra)*** wherein the order of *status-quo* was attempted to be flouted by putting a third party in possession wherein it is held:

“23. Apart from the fact whether A.K. Ghosh had a legal authority to sublease or not it was not open to him to grant a sublease in violation of the order. It is no use contending as Mr. Chidambaram, learned counsel for the respondents does, that there was a bar to such a sublease under the terms of the status quo order. It has the effect of violating the preservation of status of the property. This

will all the more be so when this is done without the leave of the court to disturb the state of things as they then stood. It would amount to violation of the order. The principle contained in the maxim 'actus curiae neminem gravabit' has no application at all to the facts of this case when in violation of status quo order a sub-tenancy has been created. Equally, the contention that even a trespasser cannot be evicted without recourse to law is without merit, because the state of affairs in relation to property as on September 15, 1988 is what the court is concerned with. Such an order cannot be circumvented by parties with impunity and expect the court to confer its blessings. It does not matter that to the contempt proceedings Somani Builders was not a party. It cannot gain an advantage in derogation of the rights of the parties, who were litigating originally. If the right of sub-tenancy is recognised, how is status quo as of September 15, 1988 maintained? Hence, the grant of sublease is contrary to the order of status quo. Any act done in the teeth of the order of status quo is clearly illegal. All actions including the grant of sublease are clearly illegal."

The law enunciated in the aforesaid reports leaves no ambiguity that the Courts are not denuded of any power inheres in it in passing a mandatory injunction at the *inter-locutory* stage to protect, preserve and bring *status-quo ante* prevalent at the time of passing an order of injunction. Any wrongful act done on the teeth of an order of injunction has to be seriously viewed and it is a foremost duty of the Court to bring the position as prevalent at the time of passing the restraint order and should not permit the parties to alter its position. Any lenient view in dealing with such situation would encourage the unscrupulous litigant to march over the orders of the Court and reap the benefit of its own wrong to the prejudice of the other side. The moment it is proved before the Court that its order is

violated, the Court should be reminded of its powers and duties as no person should be allowed to defy or act in defiance of the order of the Court for that the majesty and the sanctity of the Court should be maintained. It is no longer *res integra* that the act done on the teeth of the order of temporary injunction is illegal and such illegality should not be perpetuated to continue.

Reverting to the facts of the instant case, the first report of the Advocate-Commissioner vividly revealed that the construction of the two rooms at the open courtyard is in progress and only the pillars have been constructed without being supported by any walls or the roof. The second report indicates that the construction is complete in all respect so far as the aforesaid two rooms are concerned. The time gap between the aforesaid two reports submitted by the same Advocate-Commissioner is three months but both the reports were filed after the order of *status-quo* passed by the Court on 07.02.2019. If the party proceeded to complete the construction which was at a nebulous stage on the date of passing a restraint order, we are amazed whether the order of restraint in the form of *status-quo* has actually been maintained. Furthermore, the temporary injunction was granted on consent of the parties and, therefore, the respondent no. 1 was aware that the state of things existed on 07.02.2019 shall remain until the final disposal of the suit and, therefore, any act done in defiance of the said order cannot be allowed to stand nor the appropriate decision could be postponed till the final hearing of the said suit. Though a plea has been taken by the respondent no. 1 that there was existence of an old structure and only the

repairs were done but from the stand of the plaintiff-appellant that several ceremonial functions were organised in the said open courtyard which belied such stand. Furthermore, at the time of first inspection, the Advocate-Commissioner found that the pillars have been erected for construction of two rooms in the said courtyard and second report revealed that such construction is complete. Such being the facts emanate from the record, we are unable to comprehend the notion of the learned Judge in the Trial Court that the evidence in this regard is scanty and required to be proved by leading evidence.

We thus find that the order impugned is not in consonance with law enunciated in the above reports and needs interference.

Accordingly the order impugned is set aside.

We direct the demolition of the aforesaid two rooms constructed in the courtyard as reflected in the reports of the Advocate-Commissioner. The demolition of the aforesaid two rooms shall be undertaken in presence of the same Advocate-Commissioner who submitted the report. The respondent no. 2 is directed to demolish the said two rooms in presence of the said Advocate-Commissioner, in the event, it is not done so the plaintiff-appellant is directed to demolish the said two rooms by engaging the men and labourers, the cost of which shall be borne by the respondent no. 1. The appeal and applications are disposed of.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with the requisites formalities.

(Harish Tandon, J.)

I agree.

(Madhuresh Prasad, J.)