

**235 18.12.
2023**

Ct. No. 04

Ab

**FMA 392 of 2021
IA No. CAN 1 of 2023**

**Sudipta Basu
Vs.
Susmita Dey.**

**Mr. Tanmoy Mukherjee,
Mr. Souvik Das,
Ms. Paromita Maitra.**

... for the appellant.

The affidavit of service filed in Court today is taken on record. Despite service there is no representation on behalf of the respondent.

The service was directed to be effected upon the respondent so that the appeal and the connected application can be disposed of for the simple reason that the instant appeal arises from an order by which an application for temporary injunction was allowed directing the parties to maintain *status quo* with regard to the nature, character and possession of the suit property till the disposal of the suit.

We are not unmindful of the proposition of law that in a suit for partition, the parties shall not be permitted to alter their possession and the Court must protect the property, but the Court should be cautious and circumspect in passing an order of *status quo*, which is capable of being misused in the hands of an unscrupulous litigant. The Court must also record the specific finding on the stand of the respective parties before proceeding to pass an order of injunction in the form of *status quo*, more particularly, when the *status quo* with regard to the possession is passed by the Trial Court.

It is an ardent duty of the Court to record its findings on the possession of the parties in respect of a joint property before passing an order of *status quo* with regard to possession. It appears from the record that

there is no dispute on the shares of the parties in respect of the joint property. The plaintiff/respondent being a daughter of the original owner intended to separate her share in respect of the joint property from the defendant/appellant being her brother.

In such scenario, an application for temporary injunction was filed alleging that the defendant/appellant has stacked building materials at the site with an intent to make a further construction at the said property without the consent and concurrence of the plaintiff/respondent.

The defendant/appellant denied the aforesaid allegation and on the conspectus of the respective stands, the Court proceeded to allow the said application for the temporary injunction solely on the finding that the property is joint.

Interestingly, the learned Judge in the Trial Court did not record any independent finding on the allegation of the plaintiff/respondent that the defendant/appellant is attempting to make a new construction over and above the joint property and, in fact, held that such allegation is required to be proved at the time of trial. If such being the finding returned by the Trial Court and there is no finding returned thereupon, directing the parties to maintain *status quo* with regard to the nature, character of the suit property, is not warranted. Furthermore, the possession of the plaintiff/respondent in respect of the joint property is also disputed by the defendant/appellant for the simple reason that she after marriage is residing in her matrimonial house at Ahmedabad.

Be that as it may, the possession of the co-sharer in respect of a joint property is not only on the basis of his undivided right but on behalf of the other co-sharer as well. The Court must, therefore, arrive at the independent finding that the possession of the plaintiff/respondent is physical and, therefore, the

blanket order of *status quo* in this regard is susceptible to be misused to the great extent.

Considering the above facts, we invited the attention of the learned Counsel for the appellant as to whether any attempt is made to raise new construction at the joint property; to which learned Counsel submits on instruction that the defendant/appellant never intended to make any new construction. However, he submits that the appellant was making repairs in order to protect and preserve the said joint property by mending the cracks and putting a plaster. It is further submitted that the painting of outer wall is still pending and at this juncture the order of temporary injunction is passed.

In view of the aforesaid facts and stand taken by the defendant/appellant before us, we do not think that there is any attempt to make a new construction, which may tantamount to changing the nature and character of the joint property nor we find any element of proof that the appellant is attempting to alienate the property so as to impair constructive possession of the plaintiff/respondent.

We, thus, find that the Trial Court is not justified in passing the order of *status quo*. The order impugned is set aside.

The appeal and the connected application being CAN 1 of 2023 are allowed.

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

(Harish Tandon, J.)

(Madhuresh Prasad, J.)

