

16.03.2023

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**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

C.O. 1493 of 2022

Eman Ali Khan

versus

Nesar Ali Khan & ors.

Mr. Samiran Giri
... For the petitioner

Mr. Tanmoy Mukherjee
Mr. Kallol Kr. Maity
Mr. Souvik Das
... for the opposite party

Affidavit of service filed on behalf of the petitioner
is taken on record.

This revisional application has been preferred by
defendant no.1-petitioner under Article 227 of the
Constitution of India challenging order No.8 dated 31st
May, 2022 passed by the learned Civil Judge (Senior
Division), 1st Court, Contai in Title Suit No.81 of 2022
rejecting the application of defendant no.1 for
permission to complete construction of his residential
building over 'Ka' Schedule property.

The brief fact of the case is that the plaintiff-
opposite party no.1 filed a suit for declaration and
partition of 'Ka' Schedule property. In the said suit, the
plaintiff filed an application under Order XXXIX Rule 1
and 2 read with Section 151 of the Civil Procedure Code.
Upon hearing, the learned Trial Court directed the

plaintiff and defendant nos.1 and 2 to maintain *status quo* as regards nature, character and possession over 'Ka' Schedule property. The petitioner-defendant no.1 took out an application in the said suit under Order XXXIX Rule 4 of the Civil Procedure Code seeking permission to complete the work of construction undertaken by him. On consideration of the materials on record, the learned Trial Court rejected the prayer of the petitioner-defendant no.1 as above.

Being aggrieved by and dissatisfied with the impugned order passed by the learned Trial Court, the petitioner-defendant no.1 has preferred the present revisional application.

Mr Samiran Giri, learned Advocate for the petitioner submits that the defendant no.1-petitioner has undertaken the work of construction over the suit property under the scheme '*Pradhan Mantri Abash Jojona*' and for completing such construction under the scheme of the Government the petitioner-defendant no.1 under compelling circumstances approached the Court for appropriate order. However his prayer was turned by the learned trial Court without any sufficient reason. He undertakes that such construction, if allowed to be made, will be subject to the result of the suit and therefore, the question of prejudice to the interest of the plaintiff does not arise at all. In support of his contention, he relies on the decision of the Hon'ble

Supreme Court passed in ***Mandali Ranganna & Ors. versus T. Ramachandra & Ors.***, reported in ***AIR 2008 SC 2291***. In light of his aforesaid submissions, he prays that petitioner-defendant no.1 be allowed to proceed with the completion of the construction work at the earliest and the order of the learned Trial Judge be set aside.

Mr Tanmoy Mukherjee, learned Advocate appearing on behalf of the opposite party at the outset submits that since the impugned order has been passed under Order XXXIX Rule 4 read with Section 151 of the Civil Procedure Code hence, in view of the provisions embodied under Order XLIII Rule 1(r) such order is appealable order and no revision lies from such order. Thus, the instant revision is not maintainable. He relies on an unreported decision of this Court passed in ***C.O. 2571 of 2016 (Smt. Suchanda Jana nee Ghosh alias Tultuli versus Sri Samiran Chandra Ghosh & ors.)***.

So far as the merit is concerned, Mr. Mukherjee submits that the 'Ka' Schedule property is a 'dhosa' and not a 'bastu' land and to undertake work of construction the nature of land needs to be converted however, defendant no.1 has not produced any document of conversion of the nature of the land. He also indicates that no such document concerning allotment under the scheme 'Pradhan Mantri Abash Jojona' or the extent of construction work undertaken has been placed on

record to primarily establish existence of any work of construction being undertaken. In view of his above submissions, he prays that the revisional application be dismissed and the order passed by the learned Trial Judge be affirmed.

Mr. Giri, learned Advocate for the petitioner, in reply, advances his submission with regard to maintainability of the present revisional application. He submits the order passed by the learned Trial Court consists of two parts, first part relates to rejection of permission to make construction and second part relates to modification of order under Order XXXIX Rule 4 of the Code. The petitioner-defendant no.1 herein has challenged the order of the learned trial Court rejecting permission to make construction under Section 151 of the Code, which is revisable.

Since the point of maintainability of the revisional application has been raised, hence at the outset such point is taken up for consideration. From the records it reveals that an order of *status quo* was passed by the learned Trial Judge at the instance of the plaintiff vide order no.2 dated 22nd March, 2022. The application filed by the petitioner-defendant no.1 is under Order XXXIX Rule 4 of the Code seeking permission for completion of work of construction over 'Ka' Schedule property. Since there is an order of *status quo* in existence, hence prayer seeking permission for completion of work of

construction can only be passed upon varying or modifying such order of *status quo* under Order XXXIX Rule 4 of the Code. The order under challenge manifest that it has been passed rejecting such prayer under Order XXXIX Rule 4 readwith Section 151 of the Code. Mr Giri, learned advocate for the petitioner tried to impress upon the court that the order consists of two parts one with regard to Order XXXIX Rule 4 and another with regard to 151 of the Code, the portion of order passed under Section 151 of the Code is revisable. By no stretch such order can be read in segregation to be one under Order XXXIX Rule 4 and another under Section 151 of the Code. Therefore, the arguments advanced on behalf of petitioner falls short of merit. As per provisions embodied under Order XLIII Rule 1(r) of the Code the order passed under Order XXXIX Rule 4 is an appealable order. Thus, the instant revisional application is not maintainable. I find substance in the submissions of Mr Mukherjee, learned advocate for opposite party-plaintiff relying on *Smt. Suchanda Jana nee Ghosh alias Tultuli's Case (supra)* in this regard.

Since the revisional application is found to be not maintainable hence I recuse for making any observation with regard to arguments advanced on merit and ratio passed in *Mandali Ranganna's Case (supra)*.

In view of the above discussions, the Civil Revisional application being **C.O.1493 of 2022** stands dismissed as not maintainable.

It is informed that the application under Order XXXIX Rule 1 and 2 of the Code is still pending. Learned trial Court is directed to dispose of the said application as expeditiously as possible.

All connected applications, if any, stand disposed of.

Interim order, if any, stands vacated.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of necessary legal formalities.

(Bivas Pattanayak, J.)