18 **11.10. 2023**

Ct. No. 04

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FMAT 212 of 2023
IA No. CAN 1 of 2019
IA No. CAN 2 of 2019

Dipak Selampuria and others
Vs.
Samar Kumar Kundu and others.

Mr. Arijit Bardhan,
Mr. Steven Sourodip Biswas.
... for the appellants.

Mr. Samiran Mondal,
Mr. Abhinaba Dan,
Mr. Nitish Samanta.
... for the respondent no.1.

Mr. Debanik Banerjee,
Mr. Akash Ganguly.
... for the respondent no. 2 & 3.

We invited the Counsels to address us on the merit of the instant appeal.

A suit for specific performance of an agreement for sale for immovable property is filed by the plaintiff/respondent no. 1 and in such suit an application for temporary injunction was taken out for ex parte ad interim order of injunction alleging that the defendants/respondents are contemplating to part with possession and also making certain changes in respect of the suit property.

The suit property as described in the plaint includes within itself the entire property wherein the original defendants allegedly entered into an agreement for sale and also allegedly received the consideration in cash.

At the time of hearing, the Counsel for the plaintiff/respondent admits that the present appellants are the co-sharers in respect of the property described in the schedule and the said purported agreement for sale was executed by two of such co-sharers divesting their right, title and interest, which they have jointly with the other co-sharers and, therefore, there is no impediment in purchasing the share of the co-sharers in respect of the joint property.

The present appeal is filed by non-parties to the proceeding claiming themselves the co-sharers in respect of a joint property and contending before us that the nature of the ex parte ad interim order of injunction vitally affects their right, title and interest in respect thereof.

An application seeking leave to file an appeal was allowed as we find that the order has affected their right, which they possessed, in respect of the joint property and directed the matter to be listed before us for final disposal.

It is the cardinal principles of law in respect of a joint property that all the co-sharers possess the said joint property not only in commensurate with the shares they held but on behalf of other co-owners unless such co-owners claim exclusion. However, the co-owners enjoin possession jointly in every molecule of the property so long the said joint property is not partitioned by a decree of the Court or the deed being executed by the co-owners in respect thereof.

An order of status quo with regard to possession cannot be construed to have been restricted to the possession of some of the co-owners who are arraigned as party in the suit for specific performance of an agreement, as such possession cannot be regarded as exclusive, but jointly with the other co-owners. Every co-owner has a right to make development in the joint property subject to the consent of the other co-owners or sometimes may be permitted to make construction provided they do not claim any equity at the time of final decree to be passed in a partition suit.

The blanket order of status quo with regard to the possession, nature and character of the suit property impact the right of the other co-shares in dealing with the same and, therefore, the Court should be slow and circumspect in passing the order in such form, which would have a larger impact on the rights of the other co-sharers.

On the last occasion, we directed the respondents to produce the original of the agreement for sale, which, in fact, has been produced in Court today. It revealed therefrom that the said agreement is engrossed on the non-judicial stamp paper having valued at Rs. 50/-, though the consideration money shown in the purported agreement is Rs. 50,00,000/-.

A point is taken that the said purported agreement does not contained requisite stamp duty and in view of Section 33 and Section 35 of the Indian Stamp Act, the same cannot be received in evidence but cannot be acted upon and in support thereof, the judgment of five Judges Bench rendered in case of **M/s. N.N. Global Mercantile Private Limited vs. M/s. Indo Unique Flame Ltd. & Ors.**, reported in **(2023) 7 SCC 1**, for the proposition that so long the document excisable to a stamp duty is not impounded, it would be regarded to be void till such time and, therefore, the Court cannot act upon the same.

Though the judgment of the five Judges Bench rendered in the above noted decision has been doubted in a subsequent decision and the matter has been referred to the further Larger Bench yet the law, which has been declared, cannot be overlooked by the High Court. The word “acted upon” as appearing in Section 35 of the Indian Stamp Act has to be understood in proper perspective when admittedly the application for temporary injunction is decided on the basis of an affidavit.

Since the agreement does not contain the requisite stamp duty and the nature of the impugned order is such, which cannot be sustained vis-à-vis the present appellants, we, therefore, cannot concur with the finding of the trial Court in passing an injunction in such form.

Accordingly, the order impugned is set aside.

However, the trial Court shall proceed with the application for temporary injunction after affording an opportunity of hearing to the respective parties and shall dispose of the same in accordance with law.

The instant appeal and the connected applications are disposed of.

It goes without saying that the observations made herein above if incidentally and accidentally touches upon the merit of the allegations made in the pleading shall not have any persuasive effect at the time of deciding the application for temporary injunction on merit and in accordance with law.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)