

10 **12.07.
2023**

Ct. No. 04

Ab

**FMAT 215 of 2023
IA No. CAN 1 of 2023**

**Kamal Ansari
Vs.
Safik Ansari and others.**

Mr. Sanjay Saha.

... for the appellant.

**Mr. Anirban Bose,
Mr. Satyajit Senapati,
Mr. Rahul Nag.**

... for the respondents.

The plaintiff/appellant has filed the instant appeal assailing an order dated 18th March 2023 passed by the learned Civil Judge (Senior Division), 1st Court at Howrah in Title Suit No. 347 of 2021 by which an application for temporary injunction was disposed of on contest directing both the parties to maintain *status quo* with regard to the joint possession in respect of the suit property and alienation of any part to any third party with a liberty to the parties to raise construction of a residential house without prejudice to the interest of the other co-sharers till the disposal of the suit.

It appears from the findings returned in the impugned order that a suit for partition is filed by the plaintiff/appellant claiming the share in respect of a joint property and it is a specific stand of the defendants/respondents that by virtue of oral partition, the joint property was partitioned and thereafter the co-sharers are residing and enjoying their respective allotted portions.

The question, therefore, involved in the suit is whether the property is still a joint property or has been partitioned as claimed by the defendants/respondents. It appears that the defendants/respondents are making construction allegedly on the allotted portion after

obtaining the permission and the plan duly sanctioned from the concerned municipal authority. An application for injunction was taken out that a co-sharer cannot be permitted to make construction over the joint property.

There is no doubt that every co-sharer has a right in every part of the property provided the said property is joint. There is no fetter on the part of the co-sharer in improving the value of the property by making construction when the plaintiff/appellant himself has been enjoying the constructed area situated in the alleged joint property.

It further appears that a substantial construction had already come up and, therefore, it would not be proper to pass an order of temporary injunction restraining the defendants/respondents from completing the construction to make it habitable (See (2008) 11 SCC 1).

However, we noticed that while passing the interim order, the court has not protected the rights of the other co-sharers except to the extent that such construction would be without prejudice to the rights and contentions of the parties.

As suggested in the above noted decision, the Apex Court has indicated that in the event any transfer is effected, it should be reflected therein that the said transfer is subject to the result of the said suit. However, we noticed that the trial court has already enjoined the defendants/respondents from alienating any part thereof in favour of a third party and since the defendants/respondents do not challenge the impugned order, we do not find that any interference is warranted in this regard.

However, we make it clear that in the event the construction is made by the defendants/respondents and ultimately it is held by the court that the property over which such construction has been made is a joint property and was not partitioned earlier, the

defendants/respondents shall not be entitled to claim any equity at the time of final decree.

With these observations, the appeal and connected application are disposed of.

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

(Harish Tandon, J.)

(Prasenjit Biswas, J.)