

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 2594 of 2022

Sri Paritosh Saha

VERSUS

Sri Subhash Chandra Basu

For the petitioner:

Mr. Arnab Mukherjee, Adv.

Mr. Souparno Pyne, Adv.

Mr. P. Barman, Adv.

for the opposite parties:

Mr. Sudip Ghosh, Adv.

Mr. Pankaj Halder, Adv.

Last Heard on: January 13, 2023

Judgment on: February 03, 2023

Biswaroop Chowdhury, J.:

The petitioner before this Court is the respondent in the Learned Appellate Court and is directed against the Order passed by the Learned Court in setting aside the ad-interim Order of injunction passed by the Learned Trial Court.

The case of the petitioner may be summed up thus:

- 1) In the month of February 2021 the plaintiff/ petitioner filed the suit being T.S. No. 236 of 2021 before the Learned Civil Judge (Junior Division) 3rd Court at Howrah against the defendant/opposite party by praying inter alia for a decree of declaration against the defendant to the effect that the plaintiff is a tenant, under the defendant, decree for permanent injunction an Order for temporary injunction and other reliefs.
- 2) The petitioner/plaintiff along with the plaint also filed an application under Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure for grant of temporary injunction.
- 3) The application for temporary injunction was moved before the Learned Court below and the Learned Court was pleased to grant ad-interim temporary injunction and the defendant was restrained from disposing the plaintiff/petitioner in respect of the suit property.
- 4) The defendant/opposite party filed an application for rejection of plaint under Order 7 Rule 11(d) of the Code of Civil Procedure and also filed his objection to the petition under Order 39, Rule 1 and 2 read with section 151 of the Code of Civil Procedure filed by the petitioner/plaintiff. Apart from filing petition under Order 7 Rule 11 CPC and objection to the injunction application an application for framing of preliminary issue on jurisdiction and for deciding maintainability of the suit under Order 14 Rule 2(2)(a) and (b) of the Code of Civil Procedure.
- 5) The opposite party by challenging the order dated 23-02-2021; passed by the Learned Civil Judge (Junior Division) 3rd Court Howrah in Title Suit No.-236 of 2021 preferred an appeal being Misc. Appeal No. 82 of 2021 before the Learned Additional District Judge 3rd Court Howrah alongwith petition for condonation of delay and petition for stay.

- 6) The petitioner is a patient of lungs disease and due to his illness he was advised by doctor not to move outside home. During the period of November 2021 he had suffered with acute lungs problem and it was not possible for him to contact and to hold conferences with his advocate and the petitioner was not represented before the Learned Appellate Court.
- 7) By Judgment dated 14-07-2022 the Learned Appellate Court allowed the Misc. Appeal No. 82 of 2021 ex-parte and Order dated 23-02-2021 passed by the Learned Civil Judge (Junior Division) 3rd Court Howrah, was set aside.

The petitioner being aggrieved by the Order dated 14-07-2022 passed by the Learned Appellate Court has come up with the instant application. It is the contention of the petitioner that the Learned Appellate Court below failed to appreciate that the plaintiff/petitioner is a tenant under the defendant/opposite party. It is further contended by the petitioner that the Learned Appellate Court below failed to appreciate that in absence of any order of injunction the plaintiff may be ousted from the suit premises by the defendant forcefully. It is also contended by the petitioner that the Learned Appellate Court below failed to appreciate that on a different Cause of action T.S.No-770 of 2017 was instituted and it has no nexus with the present suit. The opposite party/defendant filed affidavit in opposition to the petition. It is contended by the opposite party that Title Suit No-236 of 2021, was filed in full suppression of the fact that earlier Title Suit No-770 of 2027 was filed before the Learned Court for declaration and injunction with regard to self same suit property and self same relief against the self same parties except five persons who are excluded though their names were mentioned in paragraph-no-4 and who are also necessary parties to the suit. It is contended that the suit property was 'Thika property' and the defendant/opposite party was/is 'Thika Tenant' of Holding No.86, Sadar Bose Lane, P.O. Howrah P.S. Howrah, District-Howrah and the plaintiff/petitioner is the

‘Bharatia’ under the thika tenant/Landlord/defendant/opposite party.

Heard Learned Advocate for the petitioner. Perused the petition filed and materials on record. Learned Advocate for the petitioner submits that his client has obtained the ad-interim Order of injunction after satisfying the Learned Trial Court with documents of being a tenant. It is further submitted by the Learned Advocate that only on one day Learned Advocate for the petitioner was absent and the Learned Appellate Court erred in allowing the appeal ex-parte although the petitioner could not contact his Learned Advocate due to illness.

Learned advocate for the opposite party submits that the petitioner has not come with clean hands, as he has suppressed material facts. Learned Advocate further submits that the suit filed by the petitioner/plaintiff is not maintainable. Learned Advocate also submits that the Learned lower Appellate Court had rightly set aside the ad-interim Order of injunction passed by the Learned Trial Court.

Upon hearing the Learned Advocates and considering the facts of the case this Court is of the view that in Order to decide as to whether the Learned Trial Court erred in passing ad-interim Order of injunction it is necessary to consider the provisions contained in Order XXXIX Rule 1 and 2 of the Code of Civil Procedure.

Rule 1 and Rule 2 of Order XXXIX of the Code of Civil Procedure provides as follows:

Rule – 1 Cases in which temporary injunction may be granted – Where in any suit it is proved by affidavit or otherwise-

- a) that any property in dispute in a suit is in danger of being wasted damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree or.

- b) that the defendant threatens or intends to remove or dispose of his property with a view to [defrauding] his creditors, or
- c) that the defendant threatens to dispossess the plaintiff otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging alienation sale removal or disposition of the property or dispossession of the plaintiff or causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit until the disposal of the suit or until further Orders.

Rule-2-Injunction to restrain repetition or continuance of breach.

- 1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind whether compensation is claimed in the suit or not the plaintiff may at anytime after the commencement of the suit and either before or after judgment apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract of injury complained of or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.
- 2) The court may be Order grant such injunction on such terms as to the duration of the injunction keeping an account giving security or otherwise as the Court thinks fit.

Rule 3 provides that the Court shall in all cases except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction direct notice of the application for the same to be given to the opposite party.

Thus upon reading the provisions contained in Rule 1 and 2 of Order XXXIX of the Code of Civil Procedure it will appear that

Courts have power to grant temporary injunction when the Court is prima-facie satisfied that there is apprehension of the suit property being wasted or damaged, or that the defendant may dispossess the plaintiff or apprehension that the defendant may remove or dispose of his property with a view to defrauding his creditors.

As per Rule-3 Court may grant injunction without notice to the opposite party if it appears to the Court that the object of injunction would be defeated by delay.

In the case of Axis Bank ltd. V MPS GREENARY DEVELOPERS reported in (2010) 3 CAL (LT) P-87 the Hon'ble Division Bench of this Court observed as follows:

'There is no dispute with the proposition of law that an application for temporary injunction whether at the ad-interim stage or at the final hearing stage is decided on the basis of Prima facie case of the applicant to go for trial. If the prima facie case is established the Court dealing with such application considers the other two factors namely whether the balance of convenience and in convenience is in favour of granting the injunction and the question of irreparable injury of the applicant if the prayer is not allowed However in the absence of proof of prima-facie case the other two factors indicated above are insignificant.

We are quite conscious that the word 'prima facie' case does not mean a case proved to the hilt, but is one which is at least 'an arguable one' at the time of trial. At the stage of considering the prima facie case, the Court has however a duty to see whether the suit is maintainable before the Court. In other words the Court at that stage also should be prima-facie satisfied with the existence of its jurisdiction to entertain such suit be it territorial pecuniary or inherent.'

In the case of Shree Krishna Timber vs MGA International reported in 2009(4) CAL (LT) P-92 the Hon'ble Division Bench of this Court observed as follows:

‘the Code of Civil Procedure 1908 permits grant of ex-parte Order of injunction where the Court is satisfied that the delay caused by Service of Notice would defeat the purpose for which the injunction is proposed to be made. (See Order XXXIX Rule-3 of the Code of Civil Procedure 1908) Once an Order of injunction is passed such injunction may be discharged or varied only on an application made by any party dissatisfied with such order. An exception to the above rule is when a party has obtained such Order of injunction by making a false or misleading statement in the application in which such ex-parte Order of injunction was granted. (See Order XXXIX. Rule 4 of the Code of Civil Procedure 1908).

Thus upon reading the provisions contained in Rule 1, 2 and 3 of the Code of Civil Procedure and the judicial decisions quoted above it is clear that Courts have power to pass an Order of injunction either at the final stage or at the ad-interim stage when the Court is satisfied about the prima facie case of the plaintiff the balance of convenience and inconvenience and that the plaintiff will suffer irreparable loss and injury if the prayer for injunction is not allowed. In the event the Court is satisfied that delay in considering application for injunction will be defeated the Court may dispense with the service of notice and pass an ad-interim Order of injunction. It is true that Court has a duty to see whether the suit is maintainable before that Court but at the time of passing ad-interim Order of injunction in case of urgency the Court has to confine itself to the pleadings of the plaintiff and has no scope to consider the pleadings of the written statement or argument of the defendant. On the pleadings of the plaintiff the Court has to satisfy as to whether the suit is maintainable. The Court at the time of considering the case of the plaintiff as stated

in the plaint should presume the pleadings as correct and not proceed with the presumption that the plaintiff has come with a false case. Thus when an appeal is preferred against an ad-interim Order of injunction normally the appellate Court should not interfere in the event from the pleadings of the plaint it appears, that the suit is maintainable and that there is prima-facie case for the grant of ad-interim injunction. The Appellate Court should not traverse beyond the plaint to decide the question of maintainability when the appeal is from an ad-interim Order of injunction. The point of maintainability where it involves consideration of plaint and written statement should be left open to be decided by the Trial Court on contest. Now with regard to the suppression of material fact in the suit and obtaining ex-parte injunction it is necessary to consider the provisions contained in Rule – 4 of Order XXXIX of the Code of Civil Procedure.

Rule 4, of Order XXXIX of the Code of Civil Procedure provides as follows:

Any Order for an injunction may be discharged or varied or set aside by the Court on application made thereto by any party dissatisfied with such Order.

Provided that if in an application for temporary injunction or in any affidavit supporting such application a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party the Court shall vacate the injunction unless for reasons to be recorded it considers that it is not necessary so to do in the interest of justice.

Thus where a party is aggrieved by an ad-interim Order of injunction on the allegation of false statement or suppression of material fact must first exhaust his remedy in accordance with the provision contained in Rule-4 of Order 39 of the Code of Civil

Procedure before preferring an appeal. In the case of Narendra Singh Rajwat vs Thakur Mohan Sing Konota reported in AIR – 2002 Raj-P-218 the Hon'ble High Court observed that the proceedings pertaining to grant of temporary injunctions are supplemental proceedings and the Court should refrain from giving a finding on merits of the case. Thus it is clear that while considering the prayer for temporary injunction, both the Trial Court and Appeal Court should refrain from giving a finding on the merits of the case. Although while considering the prayer for grant of injunction the Court has duty to consider the point of maintainability of suit but no observation should be made with regard to the merits of the case.

Upon perusal of the Order no-2 dated 23-02-2021 passed by the Learned Trial Court it appears that the Learned Trial Court after being satisfied about prima-facie case and balance of convenience and irreparable loss which plaintiff will suffer in the event injunction is not allowed decided to pass the ad-interim Order of injunction. By Order of injunction the defendant was restrained from dispossessing the plaintiff in respect of the suit property without due process of law. It is well settled principle of law that no person can be dispossessed from his property, save and except by due process of law. Thus upon considering the pleadings of the plaint the reasons given by the Learned Trial Judge this Court is of the view that there is nothing wrong in the Order passed by the Learned Trial Court.

Now upon perusal of the Judgment dated 14th July 2022, passed by the Learned Appellate Court in Misc Appeal No. 82 of 2021 it appears that the Learned Court instead of confining itself to the pleadings of the plaint and the Order passed by the Learned Trial Court proceeded to consider the documents and objections filed by the defendant/opposite party which ought not to have been done. When the defendant has already entered appearance in the suit and filed objection to the injunction

application, application under Order 7 Rule 11(d) of the Code of Civil Procedure, and petition to decide maintainability of the suit the Learned Appellate Court erred in assuming the jurisdiction of the Trial Court and making observation that the Learned Trial Court has no jurisdiction and the suit is barred under law, instead of leaving it to the Trial Court to decide the same. Making observation that the Trial Court has no jurisdiction and the suit is barred by law, the Learned appellate Court has left no scope for the Trial Court to consider and decide the issue of maintainability of suit when petition under Order 7 Rule 11(d) of the Code of Civil Procedure and petition for deciding issue of maintainability is pending before the Learned Trial Court for disposal. Thus the Order passed by the Learned Appellate Court cannot be sustained and the same should be set aside. Although it is contended by the opposite party that the petitioner/plaintiff in his plaint has not stated as to the nature of tenancy but the fact that the possession of the petitioner in the suit property is not disputed and it is a well settled principle of law that nobody can be dispossessed of his property save and except by due process of law this Court is of the view that the ad-interim Order passed by the Learned Trial Court should be restored.

In the facts and circumstances discussed above this revisional application stands allowed, the impugned Judgment and Order passed by Learned Additional District Judge 3rd Court Howrah in Misc. Appeal No. 82 of 2021 is set aside, the parties are relegated to the Trial Court i.e. Learned Civil Judge Junior Division 3rd Court at Howrah for the purpose of disposal of the application for temporary injunction in T.S. 236 of 2021 in accordance with law. The Learned Trial Court shall take decision on the application for temporary injunction after hearing the parties on all relevant aspects including all the questions relating to the maintainability of the suit. It is however made clear that the Learned Trial Court while deciding the application for temporary injunction including

the point of maintainability of the suit shall not be influenced by the observation made by the Appellate Court or this Court.

As the impugned Order of the Appellate Court, is set aside the ad-interim Order of injunction, passed by the Trial Court shall come into operation. The Trial Court is requested to dispose the application for temporary injunction at an early date preferably within 5 weeks from the next date fixed.

The Revisional Application C.O. 2594 of 2022 stands disposed.

Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury, J.)