

September 4, 2023
Sl. No.38
Court No.19
s.biswas

CO 2820 of 2023
Sudarsan Adhikari
vs.
Kasinath Barman and others

Mr. Sukanta Das

... for the petitioner

By the order impugned, the petitioner's application under Section 151 of the Code of Civil Procedure was rejected. The petitioner prayed for permission to complete the construction of a two storeyed building during the subsistence of an order of injunction.

Both the parties were directed to maintain status quo with regard to possession of the suit property, with a further condition that the existing nature and character of the suit property would not be changed till the disposal of the suit.

The petitioner did not file any appeal from the said order. Instead, the petitioner filed an application under Section 151 of the Code of Civil Procedure for permission to complete the construction of the entire unfinished work in respect of the two storeyed construction.

It was urged that the building could not be constructed and the construction remained unfinished on account of the order of injunction. The building materials were lying wasted and the completion of the unfinished work was necessary.

It is pertinent to mention that the ad interim order was passed in January 15, 2021, directing status quo with regard to nature, character and possession of the suit property. The ad interim order was made absolute by order dated September 1, 2021. No appeal was preferred.

In my view, although the said application has been titled as an application under Section 151 of the Code of Civil Procedure, in effect, the said application was in the nature of an application under Order 39 Rule 4 of the Code of Civil Procedure.

In the decision of ***Subhankar Kundu vs. Municipal Returning Officer and ors.*** reported in ***(2015) SCC OnLine Cal 7177***, the Hon'ble Court had held that contents of the application were required to be looked into while rendering justice. The averments and the purpose for which such application has been filed were relevant consideration of the reliefs, even if the same had been filed in the guise of an application under Section 151 of the Code of Civil Procedure.

Clearly, the application had been filed for variation and/or modification of the order of the temporary injunction. The petitioner has not filed any appeal from the order of injunction. An application for permission to construct on the ground that the order of injunction was not correctly

passed, and others were already residing in their respective portions upon making their own constructions, amounts to a prayer for variation, modification and discharge of the order of temporary injunction. The order of temporary injunction was passed in respect of the plaintiffs and the petitioner (defendant No.1).

Moreover, the learned court observed that a Misc Case challenging violation of the order of injunction was pending. Allegation was that the floors, other works and installation of the frames of the windows and doors etc. were completed in violation of the order of injunction. Misc Case No.6 of 2021 was still to be adjudicated.

According to the court, if the construction was allowed, the Misc Case would become infructuous. Moreover, the court considered the commissioner's report and found that the cantilever of the building had been extended considerably and further construction may cause inconvenience to the plaintiff's access.

The learned court below had exercised jurisdiction vested upon him by law. The court had not exceeded such jurisdiction. The order had been passed on the basis of the materials on record. Interference under Article 227 of the Constitution is not called for.

In very exceptional cases, repairing of an undivided property, minor construction to protect such property and/or construction in a time bound scheme of the government, are allowed subject to the result of the suit, upon exercise of inherent powers. However, the case of the petitioner, does not fall within the above categories. The facts as discussed above and the pendency of the Misc Case, do not warrant interference under Article 227 of the Constitution of India.

The correctness of the averments made in the application under Section 151 of the Code of Civil Procedure and the findings of the learned court below with regard to the practical difficulties and injustice the plaintiffs would face if such construction was permitted, cannot be adjudicated in this proceeding.

The petitioner ought to have preferred a Misc Appeal, in accordance with law, if the petitioner wanted to challenge the order on merits and on the factual aspects dealt with by the court.

Liberty is granted to the petitioner to take back the certified copy of the impugned order, upon furnishing a photocopy thereof.

The revisional application is thus dismissed.

All the parties are directed to act on the basis of the server copy of the order.

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

(Shampa Sarkar, J.)