

38 **18.10.
2023**

Ct. No. 04

Ab

**FMAT 450 of 2023
IA No. CAN 1 of 2023**

**Sri Anil Kumar Shaw and others
Vs.
Rajen Shaw and others.**

**Mr. Sovan Mukherjee,
Mr. Dilip Kumar Saila.
... for the appellants.**

**Mr. Soumik Ganguly,
Mr. Sourat Nandy,
Ms. Chandana Chakraborty.
... for the respondents.**

The instant appeal arises from an order refusing to pass an *ex parte* ad interim order of injunction in favour of the appellants.

The appellants claiming right in respect of a joint property filed a suit for partition and separation of shares. Though it is claimed in the plaint that the appellants have undivided 1/4th share in respect of the joint property, but from the stand taken before us, the Counsel admitted that they have derived the title from Shib Shankar Shaw, who inherited 1/3rd share from the original owner, namely, Kataru Shaw. The appellants are the grandsons of Shib Shankar Shaw, who had three sons and the father of the appellants left the world leaving behind four sons including the father of the appellants, namely, Dilip Shaw.

Taking into consideration the aforesaid fact, it cannot be ruled out that the appellants have a miniscule share in respect of the property, though they claimed the share in large proportion.

Be that as it may, every co-sharer has a right in respect of a joint property and, therefore, such right cannot be defeated nor can be taken away by any circuitous manner.

An application for temporary injunction was taken out alleging that the respondents are hurriedly making a construction at the joint property.

In course of hearing, it is admitted that three storied building has come up as on day and it is submitted by the Counsel for the appellants that they are contemplating to make a four storied. A substantial construction has come up whether rightly or wrongly but certainly the same cannot be built in a short span of time.

The appellants did not approach the Court immediately when the construction started and allowed the construction to come up substantially and, therefore, at this stage, the Court should be slow and circumspect in passing an *ex parte* ad interim order of injunction without giving notice to the other side. The reference can be made in this regard to the observation made in **Mandali Ranganna and others vs. T. Ramchandra and others**, reported in **(2008) 11 SCC 1** in the following:

“25. In *Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai* this Court held: (SCC P. 294, para 30)

“30. The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff: (i) existence of a *prima facie* case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and (iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands.”

[See also *Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd.*]

26. Rightly or wrongly constructions have come up. They cannot be directed to be demolished at least at this stage. Respondent 7 is said to have spent three crores of rupees. If that be so, in our opinion, it would not be proper to stop further constructions.”

Though the Counsel for the appellants tried to distinguish the above report on the score that in that case the suit for partition was filed seeking declaration that the earlier partition was partial and, therefore, cannot have any effect and, therefore, the moment the Court find the distinguishing facts, it should not applied a law as laid down therein.

We are unable to accept the aforesaid contention for the simple reason that it is a duty of the Court to cull out the ratio laid down in the said judgment and if such ratio has its direct applicability to a given case, there is no difficulty in applying the same. Obviously, if there is a special fact appearing in the report or a judgment of the Supreme Court, which led the decision to be taken thereupon, there is no difficulty on part of the Court in applying the test of parity of facts and the ratio laid down therein to be applied in the given case.

There was a complete silence on the part of the appellants in approaching the Court the moment the respondents started making construction. According to the Counsel for the appellants, two factors must weigh to the Court; firstly, the respondents were in possession of the property and, secondly, suppressing the name of the appellants having not mutated in the municipal record, the building plan was sanctioned behind their back.

So far as the first plea is concerned, it defeats a very stand of the appellants themselves on the factum of the construction having come up substantially. Nobody can make a construction over and above the land unless he is put in possession or the possession has been given to him. There is no allegation that such possession has been forcibly taken taking recourse, which is unknown in

law and, therefore, we cannot accept that the possession remained with the appellants all through. So far as the mutation in the municipal record is concerned, we find that after the death of their father, there was no attempt made by the appellants to record their names in the municipal record.

However, an application was subsequently made and it appears that the said application is still pending. The mutation of the name neither confers title nor extinguishes title. A person who perceived threat over his title can approach the Court alleging that his right had been infringed in view of the provisions contained under Section 34 of the Specific Relief Act.

We, thus, do not find that there is any infirmity in the order of the trial Court in refusing to pass an *ex parte* ad interim order of injunction. However, taking note of the fact that the appellants have share in the undivided property where the construction has come up, any alienation and/or transfer of a portion thereof made by the respondents or any of them, the reflection should be made that such alienation and/or transfer is subject to the result of the instant suit.

With these observations, the appeal and the connected application being CAN 1 of 2023 are disposed of.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)

