

29 **22.08.
2023**

Ct. No. 04

Ab

**FMA 436 of 2023
IA No. CAN 1 of 2023**

**Sri Kishor Kumar Banerjee
Vs.
Sri Malay Kumar Banerjee and others.**

**Mr. Sounak Bhattacharyya,
Mr. Abhirup Halder.
... for the appellant.**

**Mr. Debasis Sarkar.
... for the respondent no. 1.**

Two orders passed on 17th August 2022 and 28th September 2022 respectively in Title Suit No. 45 of 2014 passed by the learned Civil Judge (Senior Division), 10th Court, Alipore, have assailed in the instant appeal.

The facts unfurled from the record would reveal that the plaintiff/appellant succeeded in obtaining the *ex parte* ad interim order of injunction in the said suit, which was instituted way back in the year 2014 yet was resisting the final disposal of an application for temporary injunction, which would be evident from the recording of the observations made in paragraph 1 of the order dated 17th August 2022.

The trial court was facing inconvenience at the resistance of the plaintiff/appellant, which appears to the learned Judge, creating obstacle in disposal of the application for temporary injunction and the said date was fixed as a last chance. Paragraph 2 of the said order would reveal that despite the date being fixed as a last chance for hearing of the temporary injunction application, an adjournment was sought and simultaneously an application was filed for extension of the ad interim order of injunction. The application was called on by the learned Judge repeatedly on the said

date yet the plaintiff/appellant did not respond nor appear to move the said application. There is no option left to the learned Judge, who has shown alacrity in disposal of the application for temporary injunction but was facing an obstacle and/or hurdle from the plaintiff/appellant obviously when he has been blessed with an ad interim order of injunction and does not want the same to be vacated and/or set aside by the court while disposing of the application for temporary injunction.

The conduct of the plaintiff/appellant is apparent on the face of the findings recorded by the learned Judge in the court below and, therefore, we do not find any illegality and/or infirmity in the said order that not only the application seeking extension of the ad interim order was dismissed but also the application for temporary injunction.

It is sought to be contended that the court cannot reject the application in absence of the petitioner, which does not appear to be correct upon a meaningful reading of the observations recorded by the trial court. Though the word 'rejection' has been used but such word has to be construed in the context in which it is used and cannot be segregated from the next words "as not moved".

There is no ambiguity in our mind that the learned Judge dismissed the application for extension as well as the application for temporary injunction as the plaintiff/appellant did not appear in the matter for his default. We do not find any impediment on the part of the learned Judge nor any deterrence in dismissing the matter in absence of the plaintiff/appellant without venturing to go into the merit. Therefore, we do not intend to interfere with the order dated 17th August 2022 in the instant appeal.

So far as the order dated 28th September 2022 is concerned, it appears that an application under Section 151 of the Code of Civil Procedure was taken out for recalling an order dated 17th August 2022. Since the said application is filed for recalling the order in exercise of the inherent powers enshrined under Section 151 of Code, the contention of the plaintiff/appellant that it is in relation to the temporary injunction and, therefore, to be regarded as an order passed on an application for temporary injunction, is unacceptable to us. It is an application for recalling an order and, therefore, the remedy by way of an appeal is not available.

In view of the findings recorded herein above, the appeal and the connected application being CAN 1 of 2023 are dismissed.

However, the dismissal of the appeal shall not stand in the way of the plaintiff/appellant in exhausting the remedy available in law in relation to the order dated 28th September 2022.

(Harish Tandon, J.)

(Ajay Kumar Gupta, J.)