

02 **24.01.**
2023
Ct. No. 37

Ab

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
(Commercial Division).

FMAT 467 of 2022
IA No. CAN 1 of 2022

Sanjay Kumar Bhagat (HUF)
Vs.
Sajan Kumar Bhagat (HUF) and another.

Mr. Rudraman Bhattacharya,
Ms. Suchismita Ghosh,
Mr. Akash Munshi,
Mr. Souvik Kundu.

... for the appellant.

Mr. Pranit Bag,
Mr. Debartha Chakraborty,
Mr. Kritin Sarat.

... for the respondent no. 1.

Although the *ex parte* ad interim order of injunction has been granted on an application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'said Act') filed by the petitioner/appellant, but the instant appeal has been filed solely on the ground that the Tribunal ought to have granted the other interim protections as prayed for therein.

The facts, which emerged from the application for injunction filed before this Court, relate to the dispute concerning the partnership firm, which admittedly owned several immovable properties and derives income by way of rent payable by the several tenants occupying the respective portions thereof.

The foundation to the dispute is based upon a deed of partnership dated 1st April, 2006, though nomenclature whereof given as deed of retirement, wherein the partners shall share the profit and loss in equal share. It would further be revealed from the said

deed that none of the partners can retire or withdraw from the partnership business without given one month's notice in writing to the others. Clause (10) of the said deed contains an arbitration clause and for such reason the approach was made to the Commercial Court by filing an application under Section 9 of the said Act for various reliefs including the protection of immovable properties, which comprised the assets of the partnership firm.

A title suit being no. 1533 of 2016 was previously instituted by the other partners in the City Civil Court at Calcutta wherein the contesting respondents admitted that there are two properties owned by the said Company, which were let out to different tenants and the rents are paid to the said partnership firm. The application for injunction filed in the said title suit was eventually rejected on 24th April, 2017.

Be that as it may, the application under Section 9 of the said Act is filed alleging various misdeeds at the behest of the other partners in respect of the immovable properties belonging to the partnership firm and the misappropriation of income derived therefrom. Subsequently, the appellant by a letter dated 10th November, 2022 conveyed his intention to retire from the said partnership firm and called upon the other partners to dissolve the same treating the said partnership at Will.

In course of hearing, several provisions of the Partnership Act have been relied upon by the respective Counsels to the effect that the moment the partnership firm stood dissolved on and from the date given in the notice, the remaining partners cannot act alone or by reconstituting the partnership in absence of any intention contrary thereto. It is further indicated that the said partnership firm would remain alive for the purpose of settlement of account and distribution of assets after meeting the expenses, debts and liabilities accrued upon the partners of the dissolved firm. It is, thus, alleged

that if the other partners are allowed to deal with the properties belonging to the partnership firm, it would vitally affect the rights of the appellant and, therefore, the Commercial Court below ought to have granted the protection and preservation of those properties.

By the impugned order, the Court below restrained the contesting respondents from disbursing the amount of rent to be collected from the two properties, namely, Allenby Road and 24, Park Street and to be kept in a separate bank account.

It is contended by the appellant that unless the properties are protected and the contesting respondents are restrained from dealing with and/or encumbering the said properties pending adjudication of the disputes, it might bring an irreversible situation.

As indicated above, the moment the dispute has arisen, more particularly, in respect of the immovable properties comprised in the said alleged partnership firm, it is a duty of the Court to protect the said properties and not allowed to be dissipated during the proceedings.

Our attention is drawn to the prayers made in the application under Section 9 of the said Act where the appellant has prayed for an order restraining the contesting respondents to deal with the properties being the assets of the alleged partnership firm and also from collecting the rents and appropriating the same by themselves, which would cause serious prejudice to the rights and contentions of the appellant.

The contesting respondents are very much vocal in their submission that there has been a gross suppression of material facts in the application under Section 9 of the said Act and, in fact, several acts and deeds have been done subsequent thereto, which would demolish the stand of the appellant. It is further contended that an application under Order XXXIX Rule 4 of the Code of Civil Procedure has been taken out in the said proceeding on the ground of suppression of material facts

and the moment it is found that the appellant has not approached the Court with clean hands, the equitable principles for granting injunction should be applied against the appellant. It is also contended that there is no existence of an arbitration clause in a subsequent deed, which is evident from the face of it and, therefore, the proceeding under Section 9 of the said Act is not maintainable. Lastly, it is contended that the Income Tax returns filed before the authority would also reveal the composition of the partnership firm and its partners, which do not justify the allegation of the appellant rather runs counter to it and even on merit the order is liable to be quashed and set aside.

At the very outset, we must record that the scope of the instant appeal is very limited, as the contesting respondents have not challenged the impugned order by way of an appeal. The appeal is filed at the behest of the appellant being the petitioner in the said proceeding seeking a further order which ought to have been passed in addition to the order of injunction passed by the Court below and, therefore, we do not find that we should go into the nitty-gritty of the respective factual stands of the parties at this stage, more particularly, in the instant appeal.

We are not unaware of the proposition of law that the defendants have threefold remedies against an ex parte ad interim order of injunction granted by the trial court; firstly, the defendants can answer to a show cause by filing affidavit-in-opposition controverting and/or dealing with the allegations made in an application for injunction and inviting the Court to decide the same. Secondly, the defendants can file an application under Order XXXIX Rule 4 of the Code on the ground that the appellant is guilty of gross suppression of material facts and had those facts been disclosed, the ex parte ad interim order would not have been warranted and, thirdly, the defendants can approach the appellate forum

under Order XLIII Rule 1(r) of the Code. The moment the third course is adopted, the scope of consideration becomes limited to the application for injunction or in this case the application under Section 9 of the said Act and the documents annexed thereto or relied upon by the party and should not ordinarily go into the defence disclosed by the defendants for the first time before the appellate forum. The Court will confine its consideration in the impugned order on the basis of the same and if satisfied that it does not warrant an ex parte ad interim order of injunction to be passed in such nature, there is no impediment on the part of the appellate court to set aside the said ex parte ad interim order of injunction.

We are not unmindful of the proposition that a person, who does not come with a clean hands or in other words does not disclose all the material facts having relevance in relation to the cause of action pleaded therein shall not be permitted to receive the blessings of the Court in the form of injunction. The injunction being a discretionary as well as the equitable relief does not permit a person who has not approached the Court with clean hands to get an order of injunction in his favour. Since the trial court did not have an occasion to go into the documents or the conduct of the parties discerned from the stand of the defendants at the ex parte stage of the ad interim order, the proper course would be to relegate the party to the trial court to disclose those documents inviting the attention of the Court and there is no fetter on the part of the Court to set aside the ex parte ad interim order of injunction or not to extend the same beyond its duration.

In the instant case, the defendants have resorted to the second option by filing an application under Order XXXIX Rule 4 of the Code obviously on the ground of gross suppression of material facts, which is an ardent duty of the Court to consider the said application with alacrity and giving priority thereto, as nobody would be

allowed to reap the benefits of an order of the Court on the teeth of suppression of material facts.

We, thus, do not find that there is any scope of passing an ex parte ad interim order of injunction in this case, as we feel sufficient protection has already been extended to the appellant in the impugned order. However, we feel that once the serious allegations as to suppression of material facts are made against the appellant before the Court below, such application is required to be decided expeditiously.

We, therefore, direct the appellant to file affidavit-in-opposition to the application under Order XXXIX Rule 4 of the Code within one week from date; reply thereto, if any, shall be filed within three days thereafter and the Court below shall dispose of the said application within fortnight from the date of the expiry of the period for exchange of affidavits after affording an opportunity of hearing to the respective parties or their counsels and by recording proper reasons in accordance with law.

For abundant precaution we hereby make it clear that the consideration at the time of passing an ex parte ad interim order of injunction is different than at the time of considering the application for vacation/variation and/or modification of an order under Order XXXIX Rule 4 of the Code and, therefore, the Court below shall not be swayed by the fact that we declined to interfere with the impugned order and shall proceed to decide the same independently on the basis of the materials disclosed by the respective parties on merit.

The appeal and connected application are disposed of.

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

(Harish Tandon, J.)

(Prasenjit Biswas, J.)

