

16.10.2023
Sl. No.11(DL)
srm

C.O. No. 3617 of 2022

Hiran Kumar Mazumdar alias Hiran Mazumder & Anr.

Versus

Paresh Mazumder & Ors.

Mrs. Sulekha Mitra,
Mr. Manas Kumar Das

...for the Petitioners.

By the order impugned dated September 2, 2022, passed in Misc. Appeal No.85 of 2017, the learned Civil Judge (Senior Division), 1st Additional Court, Purba Burdwan allowed the misc. appeal, *inter alia*, setting aside the order dated August 4, 2017 passed in Title Suit No.86 of 2013 by the learned Civil Judge (Junior Division), 2nd Court at Burdwan.

The petitioner along with their mother as plaintiffs, filed the title suit against the opposite parties for declaration and mandatory injunction in respect of 'Ka1' schedule property. The 'Ka1' schedule property is a part of 'Ka' schedule property.

According to the plaintiffs, their bathroom, privy, etc. had been constructed on the 'Ka1' schedule property, which the defendants were trying to encroach, by dispossessing the plaintiffs therefrom. Further prayer was for a declaration that

the defendants did not have any right, title and interest in respect of the 'Kha' schedule property. Mandatory injunction directing the principal defendants to re-construct the boundary wall which they had broken and which was situated on the 'Ka' schedule property was also prayed for.

In paragraph 3 of the plaint, the plaintiffs averred that 'Ka1' schedule property was a part of the 'Ka' schedule property. The plaintiffs had constructed their privy, bathroom on the 'Ka1' schedule property and were enjoying the same, but the defendants were obstructing such usage and trying to encroach the said property. They were engaging in illegal activities to dispossess the plaintiffs from 'Ka1' schedule property.

Per contra, in paragraphs 7 and 8 of the written statement, the principal defendants had specifically stated that the defendants were in possession of 'Ka1' schedule property and they had constructed their bathroom and privy on the said property. The constructions of the defendants were on the basis of a plan. Some old and some new constructions had been made. The old construction consisted of two rooms, one 'Thakur Ghar' and to the west of the said construction was the sanitary toilet and bathroom.

Thus, the claim of the plaintiffs to have constructed a bathroom and privy on 'Ka1' schedule property was denied by the defendants in the written statement and the alternative claim of the defendants was that they had constructed their dwelling house on the basis of a plan. Part of the old construction on the 'Ka1' schedule property consisted of a privy and the bathroom which were enjoyed by the defendants.

During the cross-examination of the DW1, the petitioners filed an application under Section 151 of the Code of Civil Procedure praying for a mandatory order upon the defendants to remove the padlock from the bathroom. The learned trial Judge, on the basis of the commissioner's report passed the order by disposing of the application under Section 151 of the Code of Civil Procedure. According to the commissioner's report, keys of two of the locks had been supplied, but the key to the third lock had not been supplied by the defendants.

Such order was passed on August 4, 2017, which was challenged by the defendant in Misc. Appeal No.85 of 2017 and the order of the learned trial judge was set aside.

The petitioners contend that the defendants have violated the order of *status quo*. The defendants did not ever

raise any dispute with regard to the location of the privy and bathroom as claimed by the plaintiffs and when both the parties were directed to maintain *status quo*, there was no reason as to why the defendants would lock up the privy and bathroom.

The learned lower appellate court, upon considering the submissions of the parties, came to the conclusion that the learned trial Judge had erroneously arrived at the conclusion that the plaintiffs were being deprived from using the bathroom and privy. The learned trial Judge failed to appreciate that in the written statement filed by the defendants, the contention of the plaintiffs with regard to their possession and use of the bathroom and privy in 'Ka1' schedule property, had been specifically denied. In the written statement, it was averred that the defendants were in possession of the bathroom and privy and the said bathroom and privy were in a locked condition. In the written statement, the defendants claimed possession of ka-1 schedule property.

Under such circumstances, the learned lower appellate court set aside the order of the learned trial Judge and held that a simple application under Section 151 of the Code of Civil Procedure with the pleadings, as contained therein, would not suffice issuance of an order of mandatory injunction

of like nature. Moreover, an application alleging violation of the *status quo* order was also pending.

Having considered the order impugned, it appears to this Court that the plaint case is based on the right, title and interest over the 'Ka1' schedule property which the plaintiffs claim to be in their possession. The bathroom and privy are a part of the said property. Whereas, the defence case is that the defendants are in possession of the 'Ka1' schedule property and had constructed their own bathroom and privy. The bathroom and privy were kept in a locked condition and keys are with the defendants.

In my view, the issue is contentious as to who is in possession of the 'Ka1' schedule property and who had constructed the bathroom and the privy standing thereon. This issue is one of the issues to be decided in the suit. It could not have been adjudicated by the learned trial Judge, by directing the defendants to open the padlock on the bathroom so that the plaintiffs could use the same. The plaintiffs have already averred in their plaint that they had their own residential house in which the bathroom and privy exists. The application under Section 151 of the Code of Civil Procedure could not have been entertained.

Under such circumstances, this Court is of the view that the learned trial Judge had adjudicated one of the main reliefs. When there is an allegation of violation of the order of *status quo*, the learned court below ought to have decided the application under Order XXXIX Rule 2A of the Code of Civil Procedure, in accordance with law.

The learned trial Judge is directed to dispose of Misc. Case No.28 of 2014, in accordance with law expeditiously. The suit shall proceed and be disposed of within a year from the next date fixed.

This Court has not gone into the merits of claims of the petitioners.

The revisional application is, thus, disposed of.

There shall be no order as to costs.

Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)