

18 **11.07.
2023**

Ct. No. 04

Ab

**FMA 68 of 2023
IA No. CAN 1 of 2022**

**Mir Tasraf and others
Vs.
Sahabuddin and others.**

**Mrs. Shohini Chakraborty,
Ms. Prajaaini Das.**

... for the appellants.

**Mr. Masud Karim,
Mr. R. Talapatra.**

... for the respondent nos. 1 to 16.

Astonishingly, the trial court despite passing an *ex parte* ad interim order of injunction at the initial stage of the suit proceeded to dismiss the application for temporary injunction solely on the ground that certain allegations made by the defendants/respondents are required to be proved by way of evidence.

The plaint case proceeds simplicitor on the basis that one Mirzafar Ali (Mondal) was the owner of the subject property and died upon leaving behind him surviving five sons. The heirs of the aforesaid five sons are before this Court. It is stated in the plaint that the property left by said Mirzafar Ali (Mondal) is a joint property of the plaintiffs/appellants and the defendants/respondents and, therefore, their shares have to be separated by the decree of partition.

An application for temporary injunction was taken out alleging that taking advantage of the situation, defendant nos. 1 to 16 are trying to make construction in respect of the subject property, which was, in fact, a vacant land, claiming themselves to be the absolute owners thereof. The trial court directed the parties to maintain *status quo* but later on vacated the same upon rejecting the application for temporary injunction on the findings as indicated herein above.

It is a specific case of the aforesaid contesting defendants that the aforesaid five sons during their life time amicably partitioned the said property and, in fact, the plaintiffs have executed several sale deeds in respect of the portion allotted on the basis of the said partition. Since such defence was taken, the trial court proceeded that unless the evidence is led in this regard, it would not be proper to pass an order of injunction and proceeded to dismiss the application for temporary injunction.

There is an apparent fallacy in the order of the trial court for the reason that the application for temporary injunction is decided on three golden parameters, namely, the existence of prima facie case, balance of convenience and inconvenience and irreparable loss and injury. The prima facie case should not be confused with the prima facie title. The support can be lend to a judgment of the Apex Court rendered in case of **Dalpat Kumar and another vs. Prahlad Singh and others**, reported in **(1992) 1 SCC 719** in the following:

“Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is “a prima facie case” in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in “irreparable injury” to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that “the

balance of convenience” must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood or injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.”

The court at the time of considering an application for temporary injunction is not actually holding a mini trial but on the basis of the materials disclosed, if the court is satisfied that the triable case is made out, will protect the interest of the parties pending adjudication of the suit. The primary object of granting a temporary injunction is to protect and preserve the interest of the parties pending final adjudication and, therefore, the moment the court arrived at the finding that a prima facie case has been made out and other two ingredients are eminent from the pleadings and the documents annexed thereto, there is no impediment on the part of the court to pass an order of temporary injunction.

We do not persuade ourselves to concur with the findings of the trial court that the nature of defence requires an evidence to be led in support thereof and, therefore, an application for temporary injunction is liable to be rejected. The moment the court finds that the triable issue is raised, it invites the existence of a prima facie case and, therefore, the court should allow the application for temporary injunction if the balance of convenience and inconvenience as well as irreparable loss and injury are found in favour of the plaintiffs/appellants.

The order impugned is, thus, set aside.

Since no document was produced by the defendants

in support of the pleadings that the aforesaid five brothers have amicably partitioned the joint property and, in fact, the plaintiffs/appellants have executed several sale deeds, the court should not have refused to pass a temporary injunction. Furthermore, it is averred in the application for temporary injunction, which has not been denied by the contesting defendants, that there is no attempt to make construction at the said vacant plot of land.

Any construction if allowed to be made on a vacant plot of land, which is distinct from a construction over the joint property having existing structures by the respective co-sharers, it would not only diminish the value of the property but would also bring the irreversible situation at the time of passing a final decree in the partition suit.

The photographs annexed to the application for injunction filed before this Court would reveal that the construction is at the nebulous stage and, therefore, we restrain the defendant nos. 1 to 16 from making any construction in respect of the property shown in the application for temporary injunction till the disposal of the suit.

The appeal and the connected application are disposed of.

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

(Harish Tandon, J.)

(Prasenjit Biswas, J.)

