

IN THE HIGH COURT AT CALCUTTA

(Civil Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

FMA No. 338 of 2012

(FMAT No. 1583 of 2012)

With

IA No.CAN 1 of 2011 (Old No. 11742 of 2011)

CAN 23 of 2012 (Old No. CAN 10419 of 2012)

Umapada Bandopadhyay

Vs

Gouri Shankar Mahato & Ors.

For The Appellant

: Mr. Badal Saha.
Ms. Sharanya Chatterjee.
Mr. A. Ghosh

For the Respondent

: Mr. Shuvajit Bose.

Hearing Concluded on

: 11.06.2024

Judgment on

: 25.06.2024

Shampa Dutt (Paul), J.:

1. The Appeal has been preferred against Order No. 2 dated 12.12.2011 passed by the Learned Civil Judge Senior Division in Charge, at Asansol in Title Suit No. 169 of 2011 (***Umapada Bandyopadhyay –Versus- Gouri Shankar Mahato & Ors.***)
2. The said order under appeal in a suit for partition is as follow :

“Title Suit No. 169 of 2011

Order No. 2 dated 12/12/2011

Ld. Advocate for the plaintiff moved the petition. U/O 39 R.1 and 2 dated. 03.12.2011. Ld. Advocate for the plaintiff also prayed for an ad-interim order of injunction.

Perused the documents.

It is admitted that plaintiff has purchased an undivided share of the property which is not demarcated yet from the joint owner of the property. Considered the prima facie case. Considered the balance of convenience and inconvenience. Considered the chances of irreparable injury.

Hence Ordered,

Issue notice upon the defendant no.1 to 8 to show cause within 7 days from the date of receipt of the notice as to why the plaintiff's petition for temporary injunction shall not be allowed.

Requisite at once.

Fix 13/01/2012 for return of notice.

I have not found any extra ordinary urgency to pass any ad-interim order. So, the prayer for ad-interim order is hereby refused at this stage.

Sd/-

C.J. Sr. Divn. In-charge, Asansol”

3. The Appellant/Plaintiff's case is that :-

- i) *The Land and Property appertaining to R.S. Khatian No. 240 and R.S. Plot No. 1082, measuring. 78½ Satak and Plot No. 1169, measuring .23 Satak within Mouja-Kulti,*

Police Station-Kulti , District – Burdwan was Originally owned and possessed by Lokan @ Lokhan Mahato (since deceased) who purchased the same by virtue of Registered Deed of Sale in the year 1954 from Devendra Nath Chowdhury and others and name of the aforesaid purchaser was duly been recorded in the R.S. Record of Rights.

- ii) The said Lokan @ Lokhan Mahato died intestate on 10.02.1991 leaving behind his three sons i.e. Defendants/Respondents Nos. 1, 2 and 3 and three daughters i.e. Defendant/Respondents No. 8 and Proforma Defendant/Respondents Nos. 9 and 10 as his sole heirs and successors, who have jointly inherited the said land and property each having one Sixth Share therein.*
- iii) That one of the sons of said Lokan @ Lokhan Mahato (since deceased) namely Gouri Shankar Mahato, the Defendant/Respondent No.1 filed a Suit for partition against the other Legal heirs of said Lokan @ Lokhan Mahato (since deceased), being Title Suit No. 130 of 1992 in the Court of the Assistant District Judge at Asansol praying interalia for Partition of the said/and by metes and bounds and for declaration of his undivided 1/6th share therein.*

- iv) Title Suit No. 130 of 1992 was dismissed for default on 06.05.1993.
- v) That two daughters of the said Lokan @ Lokhan Mahato (Since deceased) i.e. Proforma Respondents Nos. 9 & 10 have transferred their respective 1/6th share regarding the said land and property in favour of the Plaintiff/Appellant by virtue of a Registered Deed of Sale being No. 2411 for the year 2011 of Asansol Sub-Registry office and the Plaintiff/Appellate became/become the owner to the extent of 1/3rd undivided share of the said land and property.
- vi) That the Defendants/Respondents No. 1 & 2 mischievously sold and are selling portions of the aforesaid land and property to different purchasers projecting themselves as the absolute owners thereof, exceeding their respective 1/6th shares therein.
- vii) The Defendants/Respondents No.4 to 7 allegedly purchased different undivided portions of the said land and are illegally trying to grab and cover the best portion of the said land unlawfully.
- viii) **That the entire land is undivided and joint and no partition and apportionment has taken place in respect of the said land, till date.**

ix) *That Defendants/Respondents No.1 and 2 in collusion with Defendants/Respondents No. 4 to 7 are trying to grab and erect illegal construction over the best portions of the undivided Joint land for which the Plaintiff/Appellant will suffer irreparable loss and injury.*

4. The Appellants/Plaintiffs prayed for an *ad-interim* order of injunction restraining the defendants/respondents nos. 1, 2, 4, 5, 6 and 7 from changing the nature and character of the said land and further restraining them to make any construction over the said land.
5. To make out a prima facie case, the Appellants / Plaintiffs, filed copies of records of rights and deeds in support of their prima facie right, title and interest in the suit land.
6. In a suit for partition of a Dwelling house the Supreme Court in , ***Dorab Cawasji Warden Vs. Coomi Sorab Warden & Ors., 1990 SCC(2) 117, decided on 13th February 1990***, laid down the following guidelines while considering a prayer for Mandatory Injunction (Interlocutory):-

“Held:

- (1) *The courts can grant interlocutory mandatory injunction in certain special circumstances. [340E]*
- (2) *The relief of interlocutory mandatory injunction is granted generally to preserve or restore the status quo of the last non- contested status which preceded the pending controversy until the final hearing when full relief may be granted. But since the granting or non-granting of such an injunction may cause great injustice or irreparable harm to one of the parties, the Courts have evolved certain guidelines.[343F-H]*
- (3) *Generally stated, the guidelines are: (1) the plaintiff has a strong case for trial. That is, it shall be of a*

- higher standard than a prima facie case that is normally required for a prohibitory injunction; (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money; (3) The balance of convenience is in favour of the one seeking such relief. [344A-B].*
- (4) *Being essentially an equitable relief, the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. [344C]*
 - (5) *In considering the question of interim mandatory injunction in a suit filed under section 44 of the Act, the Court has also to keep in mind the restriction on the rights of the transferee to joint possession under that section. [344D]*
 - (6) *In order to attract the second paragraph of section 44 of the Act the subject-matter of the transfer has to be dwelling house belonging to an undivided family and the transfer is of a share in the same to a person who is not a member of the family. [345A]*
 - (7) *The ratio of the decisions rendered under section 4 of the Partition Act equally apply to the interpretation of the second paragraph of section 44 as the provisions are complementary to each other and the terms "undivided family" and "dwelling house" have the same meaning in both the sections. [349B]*
 - (8) *Even if the family is divided in status in the sense that they were holding the property as tenants in common but undivided qua the property, that is, the property had not been divided by metes and bounds, it would be within the provisions of section 44 of the Act. [350D]*
 - (9) *In the absence of a documents evidencing partition of the suit house by metes and bounds and on the documentary evidence showing that the property is held by the appellant and his brother in equal undivided shares, the plaintiff/appellant has shown a prima facie case that the dwelling house belonged to an undivided family consisting of himself and his brother. Therefore, the transfer by defendants 1 to 3 would come within the mischief of second paragraph of section 44 of the Act. [350B-C]*
 - (10) *Clause 6 of the agreement to sell clearly shows that the fourth respondent knew that respondents 1 to 3 had only a limited right to transfer their undivided*

one half share to a stranger purchaser and they contemplated litigation in this regard. The said sale was itself hurriedly executed in a hush-hush manner keeping the entire transaction secret from the appellant. The purchasers were also inducted in the premises in a manner which clearly suggests that the respondents were attempting to forestall the situation and to gain an undue advantage in hurried and clandestine manner defeating the appellant's attempt to go to court for appropriate relief. The respondents in such circumstances cannot be permitted to take advantage of their own acts and defeat the claim of the appellant in the suit by saying that old cause of action under section 44 of the Transfer of Property Act no longer survived in view of their taking possession. [351 F; 352D-E]

- (11) *The facts in the instant case clearly establish that not only a refusal to grant an interim mandatory injunction will do irreparable injury to the appellant but also balance of convenience is in favour of the appellant for the grant of such injunction. [352F]"*

7. A Division Bench of Calcutta High Court in *Prasanta Maji & Ors. Vs Sukhbindar Singh & Ors.*, FMAT 227 of 2022, decided on 05th August 2022, held:-

*"The general principles for grant of interim injunction were laid down in **Morgan Stanley Mutual Fund vs. Kartick Das** reported in (1994) 4 SCC 225. Paragraph 36 is important and is set out below:-*

"36. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the Court in the grant of ex parte injunction are—

(a) Whether irreparable or serious mischief will ensue to the plaintiff.

(b) Whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve.

(c) The Court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented.

(d) The Court will consider whether the plaintiff had acquiesced for some time and in such circumstances it will not grant ex parte injunction;

(e) The Court would expect a party applying for ex parte injunction to show utmost good faith in making the application.

(f) Even if granted, the ex parte injunction would be for a limited period of time.

(g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court.....

25. The need to see that a prima facie case is made out, before a Court grants an ad interim injunction, cannot but be over-emphasized. Prima facie case also should be such that it should appear on record that there is a bonafide contest between the parties and serious questions is required to be tried. If the plaintiff has no right, title or interest in the property, normally there is no question of granting equitable relief in his

favour. The fact of dispute could hardly be a ground. In this regard, reference may usefully be made to the following observations of the Supreme Court in the case of *United Commercial Bank vs. Bank of India*, (1981) 2 SCC 766, which was quoted with approval in *Morgan Stanley's case* (supra) at page 787.”

Prima facie case is also seen as one arising out of a “bonafide contest between the parties” or where serious questions are required to be tried. (See United Commercial Bank vs. Bank of India and Ors. reported in (1981) 2 SCC 766.)

To what extent the appellants were required to prove their title, to establish a prima facie case for the purpose of obtaining an order of injunction restraining construction by the respondents?

In Sopan Maruti Thopte and Anr. Vs. Pune Municipal Corporation and Anr. reported in AIR 1996 BOMBAY 304, the Bombay High Court held in relation to a title suit that the plaintiff had to show some right, title or interest in the property to get an order of injunction against the defendant.

The plaintiff seeking a restraint order on the defendant from making construction on a property is required to prove prima facie that he has title to it or is entitled to possession thereof or both. Assertion of title or title and 5 possession in the pleadings, with the necessary details is sufficient for this purpose. There is no requirement to produce the original title deeds. However, this prima facie case is subject to displacement by the defendant upon his showing on affidavit evidence that such claim of the plaintiff is absolutely non-existent. In that case, the order of injunction may be refused.

The averments in the plaint disclosing the title of the appellants which also included the source thereof, at the stage of consideration of the interim application should have been considered as sufficient for the court. The appellants had also produced the record of rights which prima facie showed that they were in possession of the property. The respondents could not prove at that stage on affidavit evidence that the assertion of title had got absolutely no basis and that the appellants were devoid of any right whatsoever to the property. On that basis, the court had to consider grant of an injunction. They were not required at the interim stage to produce the original title deeds.

The appellants had been able to discharge their onus of making out a prima facie case.

The respondents have been unable to displace this prima facie case.

If injunction was refused and the respondents continued with the construction and ultimately, the appellants were able to establish their title, it may not be possible for the court to easily reverse the effect of construction and restore the land or property to the said position it was prior to the construction. On the other hand, if an injunction was granted and ultimately the appellants lost, it would be open to the court to consider award of damages to the respondents for being unable to make construction during

this period. This is how the balance of convenience ought to have been adjudged.

In this kind of a suit for declaration of title and partition, the title is determined by a preliminary decree, on trial, by examination of witnesses and proof of documents. Till this exercise was completed by the court below, on the prima facie case made out by the appellants and considering the balance of convenience, they were entitled to an order of injunction restraining the respondents from making construction.

I pass an order of injunction restraining the respondents from carrying on construction till the preliminary decree is pronounced. We request the learned court below to pronounce the preliminary decree by 31st December, 2022. Only after pronouncement of the preliminary decree, it would be open to the respondents to make an application before the learned court below to carry on the construction, which the learned court below will consider in the light of the preliminary decree.

The impugned judgment and order is set aside”.

8. In the present Case, it is on record that the property in this case is till date a joint property and on partition has been carried out.
9. It is also on record that the appellant herein is a co-sharer in respect of the **land** in this case and thus their being a *prima facie* case, having been made out, and also having the balance of convenience and inconvenience in his favour, the Appellant/Plaintiff is entitled to protection as prayed for or else he will suffer irreparable loss and injury.
10. Thus let there be an order of status-quo in respect of the suit land in respect of the parties to the suit till its disposal and all parties are also further restrain from changing the nature and character of suit land in any manner whatsoever.
11. **The order under appeal is thus Set-aside.**

12. FMA 338 of 2012 is thus allowed.
13. **Trial Court to dispose of the Suit of 2011 within a period of one year.**
On adducing evidence and hearing both parties, in accordance with law.
14. All connected applications, if any, stand disposed of.
15. There will be no order as to costs.
16. Interim order, if any, stands vacated.
17. Copy of this judgment be sent to the learned Trial Court.
18. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)