

Ct.
No.
652

105
106
akb

13.03
2024

C.O. 3 of 2021
With
C.O. 866 of 2020
Sri Shesh Nath Prasad
-Versus-
Karuna Roy & Ors.

Ms. Alotriya Mukherjee
Mr. Ankit Agarwal **...For the Petitioner**

Opposite party No. 1 herein filed a suit for declaration and partition, being Title Suit No. 217 of 2012, where the petitioner herein, entered appearance and filed written statement along with a counter-claim. After adducing the evidence and after considering rival contentions of the parties, the learned Trial Judge was pleased to pass the judgment in the said suit on 24th December, 2019 thereby dismissing the suit as well as the counter-claim.

The petitioner herein thereafter filed Caveat before the learned District Judge, Hooghly, being Caveat No. 2 of 2020 on 9th January, 2020. The petitioner submits that thereafter he received a notice dated 27th January, 2020 along with a copy of an appeal and a copy of an application under Order XXXIX, Rule 1 and 2 of the Code of Civil Procedure wherein they were informed that an appeal has been filed by the opposite party No. 1 challenging the judgment and decree dated 24th December, 2019, being Title

Appeal No. 3 of 2020 before the learned District Judge, Hooghly and it has been clearly mentioned therein that the matter shall be moved on 31st January, 2020. The next day i.e. on 31st January, 2020, being a holiday the said appeal was not heard on that date. The petitioner thereafter was shocked to find out that an order dated 13th February, 2020 has been passed by the learned District Judge allowing the appellants' application for injunction under Order XXXIX, Rule 1 and 2 ex parte against the present petitioner.

After obtaining the certified copy of the impugned order the petitioner came to know that by an order dated 10th January, 2020, the learned Judge had directed the opposite party No. 1 to intimate present petitioner that the application under Order XXXIX, Rule 1 and 2 will be taken up for hearing on 12th February, 2020. It is alleged that the said notice was not served upon petitioner. Moreover, learned District Judge had not recorded any satisfaction in the impugned order to the fact that such notice as mentioned in the order dated 10th January, 2020 had in fact been served upon the petitioner. By the impugned order the learned Judge in fact restrained the petitioner from raising construction over his portion of the property in dispute without recording any prima facie satisfaction that the petitioner was making any illegal construction.

Being aggrieved by that order the petitioner herein filed a revisional application before this Court challenging the order of injunction dated 13th February, 2020 being C.O. 866 of 2020. The said revisional application was taken up for hearing by this High Court and this Court by an order dated 16th March, 2020 was pleased to pass an order directing the stay of operation of the order dated 13th February, 2020 upto 31st August, 2020. Thereafter, nationwide lockdown was announced and for which the petitioner could not appear before the learned Judge. However, the interim stay granted by this High Court on 16th March, 2020 was extended from time to time due to blanket order of extension of interim orders as ordered by the Apex Court and such blanket order was lastly extended till 28th February, 2021.

Thereafter, the petitioner was shocked to learn that in spite of continuance of the stay order passed by this High Court, opposite party No. 1 herein had filed an application for local inspection commission under Order XXXIX, Rule 7 of the Code on 14th October, 2020. Petitioner further submits that the order dated 16th March, 2020 passed by this High Court about granting interim stay was duly communicated to the learned Judge which is apparent from the order dated 14th October, 2020. However, ignoring the

same, learned Judge also disposed of the opposite parties' application for local inspection under Order XXXIX, Rule 7 of the Code by an ex parte order dated 19th October, 2020 and thereby allowed one Advocate Commissioner for making the local inspection commission.

Ms. Alotriya Mukherjee, learned Counsel appearing on behalf of the petitioner submits that the petitioner being on caveat since filing of the said appeal and the earlier revisional application, being C.O. 866 of 2020 having been filed challenging the order dated 13th February, 2020 which had been passed without proper service upon the petitioner, the Court below has passed both the orders impugned arbitrarily without application of mind and he failed to appreciate that the opposite party No. 1 herein did not serve any notice upon the petitioner for moving the petition under Order XXXIX, Rule 7 read with Section 151 of the Code. He also failed to record any satisfaction in the impugned order that any copy of the application for local inspection commission have been served upon the petitioner. Learned Judge also failed to appreciate that the petitioner being on caveat, the said application could not be heard ex parte. Accordingly, the petitioner has prayed for setting aside both the orders and for passing a direction to hear both the applications in presence of the petitioner herein.

I have considered the submissions made on behalf of the petitioner. On perusal of the order No. 1 dated 21.1.2020 passed in Title Appeal No. 3 of 2020, it appears that the petitioner had duly lodged caveat, being Caveat No. 2 of 2020. It further appears that by order No. 6 dated 10th February, 2020 the Court below has specifically directed the appellant to serve copy upon the learned Advocate of the Caveator and thereby the matter was fixed for hearing on 12th February, 2020 at 12.30 p.m. It further appears that by order No. 7 dated 12th February, 2020 the matter was taken up for hearing and accordingly, the order of injunction was passed on 13th February, 2020. However, there is no recording about the satisfaction of the Court that the order dated 10th February, 2020 regarding service has been compiled. It further appears that being aggrieved by that order of ex parte injunction, the petitioner herein preferred revisional application before this Court, being C.O. 866 of 2020 and by an order dated 16th March, 2020 this High Court was pleased to stay operation of the order dated 13th February, 2020 upto 31st August, 2020. It is a fact that during that period Covid Pandemic was continuing and as such the stay which were operative continued till February, 2021. It is also submitted that even the appellants' application for local inspection commission was heard and

disposed of without serving copy of the application upon the respondents and without giving to the present petitioner any opportunity of hearing.

On perusal of the order No. 22 dated 10th October, 2020 passed in Title Appeal No. 3 of 2020, it further appears that the Court below had not recorded any satisfaction that copy of the application for local inspection commission was served upon the respondent/petitioner herein in spite of the fact that by the order dated 14th October, 2020, the Court below directed the appellant to serve a copy of the application for local inspection commission upon the opposite party/respondent in the meantime.

Having considered the facts and circumstances of the case, I find that the Court below was not justified in hearing both the applications, being application filed under Order XXXIX, Rule 1 and 2 as well as the application filed under Order XXXIX, Rule 7 of the Code without giving any opportunity to contest to the petitioner herein/caveator and to dispose of the same ex parte in a hurry. Where a caveat had been lodged, it becomes the duty of the Court to serve notice as well as copy of the interlocutory application to the other party and to fix a date of hearing giving the caveator an opportunity to oppose. Since it is reflected that it has not

been done by the Court below in proper manner, the only recourse open before this Court is to set aside the impugned orders with direction to rehear both the application afresh after giving opportunity to both the parties to contest.

In such view of the matter the order impugned No. 22 dated 19th October, 2020 and order No. 8 dated 13th February, 2020 passed in Title Appeal No. 3 of 2020 are hereby set aside.

The learned District Judge Chinsurah, Hooghly is directed to hear both the applications afresh after giving opportunity to both the parties to contest and to pass fresh order in connection with both the applications filed under Order XXXIX, Rule 1 and 2 and application under Order XXXIX, Rule 7 of the Code of Civil Procedure.

I make it clear that I have not gone into the merits of the allegations made in the application and the Court below will dispose of both the applications without being influenced by any observations made therein.

C.O. 3 of 2021 and C.O. 866 of 2020 are accordingly disposed of.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)

