

07.05.2024
TUESDAY

Court : 04
Item : 48
Matter : FMA
Status : DO
Bench ID : 266176
Transcriber : NANDY

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

FMA 515 of 2024
with
CAN 1 of 2024

Lilabati Construction Developer Private Limited
Vs.
Sk. Moin Ahammed

Ms. Noelle Banerjee, Advocate
Ms. Sucheta Mitra, Advocate
Mr. Someswar Chakrabarti, Advocate
.....for the Appellant

1. The application for temporary injunction is rejected on contest by the Trial Court despite having found the existence of *prima facie* case but did not find that the balance of convenience and inconvenience as well as the irreparable loss and injury is tilted towards the appellant.
2. The suit for declaration that the property in question is charged under the claim of the plaintiff with a further prayer for monetary decree is filed by the appellant alleging that he acted strictly in terms of the work contract issued for construction of a structure at the property owned by the respondent, was terminated abruptly without giving any notice to the appellant and, in fact, the appellant has been thrown out from the said site by taking the law in hand causing physical injury to some of the masons. It is further alleged that another person has been engaged who is continuing with the construction and the valuable materials belonging to the appellant have been

wrongly confined and/or taken away and, therefore, a permanent injunction restraining the respondent from making further construction at the site should be passed.

3. Apropos the decree for permanent injunction an application for temporary injunction was taken out and it is not in dispute that an ad interim order of injunction from making construction at the site was passed. After service, the respondent entered appearance and took the defence that they being the owner of the property entered into a contract for construction of a structure thereupon and the terms having breached by the appellant, the said contract was terminated and another work order is issued to a person to complete the construction.
4. In course of hearing, it appears that considerable amount as agreed upon by the party is paid to the appellant. It is only a sum of Rupees 10-12 lakhs, which according to the appellant is due and payable under the aforesaid contract. A point is sought to be taken that the moment the Court while passing an ex parte *ad interim* order of injunction found the existence of a *prima facie* case, balance of convenience and inconvenience in favour of the appellant and in the event, the injunction is not granted it would cause immense loss and injury to him, it is not open to the Court at a later stage of the proceeding to hold that the balance of convenience and inconvenience as well as the loss and injury to be suffered in not his favour.

5. We are not impressed with the aforesaid submission for the simple reason that the consideration at the time of passing an *ex parte ad interim* order of injunction is different than the consideration at the time of passing an order on an application for temporary injunction. The Court while passing an *ex parte ad interim* order of injunction, apart from the aforesaid three golden principles of granting temporary injunction considers the case whether the delay in not passing such injunction would defeat the very purpose or destroys the reliefs claimed in the said suit. Furthermore, the Court simpliciter on the basis of the averments made in the application as well as the application for temporary injunction proceeded to pass an *ex parte ad interim* order of injunction by recording reasons which cannot be perceived to be sacrosanct and/or final so as to bind the parties at a later stage of the proceeding as well.
6. The moment the defendant appears and discloses his defence, it is the duty of the Court to see whether the appellant has been able to satisfy the aforesaid three golden principles enshrined for granting the temporary injunction.
7. We thus do not find that once the Court had one stage of the proceeding passed an *ex parte ad interim* order of injunction, it cannot take a conscious decision to reject the application for temporary injunction. Furthermore, we find that the respondent has vociferously taken the stand that the time was given to complete the

construction work which, in fact, lapsed much before, yet there was no intention to complete the construction.

8. It is also stated that the work progress was delayed so that the property should remain in enjoyment of the appellant and perceiving to be so, the contract was terminated and, therefore, there is no lapses and/or breach committed by the respondents. It is simplicitor a work contract without creating any semblance of right, title in respect of an immoveable property. Whether the contract has been rightly terminated or not is a question to be decided after full-fledged trial.
9. In a monetary claim the Court may not ordinarily issue a temporary injunction except when the Court finds that the defendants is about to dispose of the property with a view to defraud his creditors.
10. In view of the nature of the pleadings filed by the respective parties, the claim of the plaintiff is yet to be proved and in absence of any material forthcoming before the Court that there is any attempt on the part of the respondent to dispose of the property, we do not think that there is any incongruity in the impugned order rejecting the application for temporary injunction.
11. The expression “defrauding the creditor” has to be understood in the perspective of the conduct of the parties and the intention to be gathered therefrom that an original claim is sought to be thwarted by such sinister attempt, protection is to be extended immediately.

12. There is no case made out of such nature and, therefore, we do not find that the Trial Court has committed any error and/or illegality in dismissing an application for temporary injunction. However, we have been given to understand that the suit has reached to the stage of trial and, in fact, a date is fixed for recording the evidence of the first witness of the plaintiff/appellant.
13. We, therefore, request the learned Judge in the Trial Court to expedite the hearing of the suit and endeavour shall be shown to dispose of the same within six weeks from the date of communication of this order.
14. In order to adhere the time limit, as indicated above, the learned Judge in the Trial Court may refuse adjournment to either of the parties unless necessitated by unforeseen and unavoidable circumstances.
15. With these observations, the appeal being **FMA 515 of 2024** and the application being **CAN 1 of 2024** are **disposed of**.

(Harish Tandon, J.)

(Maduresh Prasad, J.)

