

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 2359 of 2023

with

C.O. 2360 of 2023

Moti Lal Shah @ Shaw

VERSUS

Malchand Shah & Ors.

For the petitioner:

Mr. Syamal Kumar Das, Adv.

Mr. Smita Pal, Adv.

For opposite party no. 1:

Mr. Niladri Sekhar Ghosh, Adv.

Ms. Sampurna Chatterjee, Adv.

Mr. Sourav Mondal, Adv.

Ms. Labani Sikdar, Adv.

Judgment on: February 09, 2024

Biswaroop Chowdhury,J:

These Revisional applications being inter-connected and arising out of Orders dated 30/01/2023 and 29/05/2023 passed by Learned Civil Judge Senior Division Serampore Hooghly in Title Suit No-49 of 2021 were heard analogously and to be disposed by common Judgement/Order.

The petitioner before this Court is a plaintiff in a partition suit and is aggrieved by Orders dated 30/01/2023 and 29/05/2023

passed by Learned Civil Judge Senior Division Serampore Hooghly in Title Suit No 49 of 2021 in an application under Order VI Rule 17 read with Section 151 CPC filed by the opposite party NO-1/defendant.

The case of the defendant/ opposite party no-1 in the Learned Court below may be summed up thus:

It is the contention of the defendant/opposite party no-1 that pursuant to the filing of partition suit by the plaintiff/petitioner the defendant/opposite party no-1 have entered appearance and contesting the said suit. It is further contended by the opposite party no-1 that pursuant to institution of the suit the plaintiff taking opportunity of the absence of the opposite party no-1 has put a padlock on the shop room in possession of the said opposite party. It is also contended that the shop room which is locked by the plaintiff contains garments and due to padlock put on the shop room the defendant/opposite party no-1 is unable to run business and earn livelihood.

The plaintiff/petitioner contested the said application by filing written objection. The plaintiff/Petitioner denied the allegation of the defendant/ opposite party no-1 that the defendant has been running his garment business from the suit shop room under the name and style Subham Store and have further denied that the plaintiff by taking advantage of the temporary absence of the defendant/ opposite party no-1 has closed the shop room by putting padlock. It is also contended that the disputed shop room is situated in the ground floor

of Municipal holding no. 8, G.T. Road 3rd By Lane, Rishra Hooghly. The predecessor of the parties to this suit Ram Das Shaw was a businessman by profession and he had his business at holding no.1 P.C. Daw Bazar, Rishra as a cloth merchant and as such he out of his own cost made necessary furniture in the said shop room with a view to start another shop room in the ground floor of his residential unit for the purpose of selling cloths, but at that time at the request of one distant relation viz Lakhan Shaw he let out the same in his favour who started his business of cloths under the name and style Apsara Stores but subsequently he left the said shop room and the father of the parties to the suit thereafter let out the said shop room to NTC for running their business of cloths as whole sale and retail basis therefrom but thereafter as per Government, Notification the said business was closed in the year 1995 and the then authority of NTC who were in charge of the said outlet removed all of their articles and cloths therefrom and since then the said shop room is lying vacant and kept under lock and key and the same is the joint property of the parties to this suit. It is contended that the said shop room is kept under lock and key for 17 years without having any goods or articles of either parties to the suit except some vacant furnitures installed by the predecessors of the parties.

Learned Trial Court after hearing the Learned Advocates for the parties was pleased to allow the application made by the Defendant/opposite party no-1 under Section 151 of the Code of Civil

Procedure by Order dated 30/01/2023 directing the plaintiff to break open the padlock of the shop room and give possession to the defendant/opposite party.

As there was allegation of non-compliance of Order dated 30/01/2023 against the plaintiff/petitioner the Learned Court below by Order dated 29/05/2023 directed the plaintiff to open the padlock in presence of Police Authority and in default the defendant was granted liberty to break open the padlock.

The petitioner being aggrieved by the Orders dated 30/01/2023 and 29/05/2023 has come up before this Court with the instant Revisional Applications being CO2359/2023 and CO No. 2360 of 2023.

It is the contention of the petitioner that the Learned Court below has acted illegally and with material irregularity in allowing the Petition under Section 151 of the Code of Civil Procedure filed by the defendant/opposite party no-1 and rejecting the application for injunction filed by the petitioner. It is further contended that the Learned Court below has acted illegally and with material irregularity in allowing the aforesaid application of the defendant/opposite party no-1 by observing that opposite party no-1 is in possession of the said shop room of the suit schedule property and also ordering to break open the padlock of the said shop room by complying the said order dated 30.01.2023.

Pursuant to filing of these applications notice was issued upon opposite party no-1 who appeared and contested the cases. Service of notice upon other opposite parties is dispensed with.

Heard Learned Advocate for the petitioner and Learned Advocate for the opposite party no-1, perused the petition filed and materials on record Learned Advocate for the petitioner submits that the Learned Judge erred in law, by allowing restoration of possession in a partition suit. Learned Advocate further submits that the pleadings of the opposite party no-1 are vague and do not contain particulars as to when the plaintiff took forcible possession of the shop room. Learned Advocate also submits that the Learned Judge further erred in arriving at a decision when application under Order 39 Rule 7 of the Code of Civil Procedure filed in this regard was pending for hearing. Learned Advocate for the opposite party no-1 submits that his client gave specific particulars in the application under Section 151 CPC and have lodged police complaint in this regard also. Learned Advocate further submits that due to forcible closure of the shop room his client is deprived of his right of livelihood. Upon perusing the order passed by the Learned Trial Court it appears that the Learned Court while disposing the application under Section 151 of the Code of Civil Procedure filed by the opposite party no-1 was pleased to observe that plaintiff though had been able to make a prima facie case standing trial in his favour but the balance of convenience and inconvenience is rather tilted in favour of defendant/opposite party no-1 as because he

will suffer financially if the said room is under lock and key. Although the opposite party no-1 relied on documents namely enlistment certificate tax receipt and electric bills which was considered by the Learned Court below while allowing application under Section 151 of the Code of Civil Procedure but the said opposite party has not given details in his petition as to who, carried on the business earlier and from which date he is running the said business and the date when plaintiff/petitioner took forcible possession of the shop room. As the opposite party no-1 contended that garments are lying in the suit shop room which could not be sold and the petitioner/plaintiff contended that there is an old padlock in the suit shop room for a long period which cannot be opened but has to be broken it would have been just and reasonable to issue a commission for inspection and then arriving at a decision upon obtaining the report. Thus the orders dated 30/01/2023 and 29/05/2023 passed by Learned Trial Judge cannot be sustained and the same should be set aside. The application under Section 151 of the Code of Civil Procedure filed by opposite party no-1 is to be re-considered upon obtaining report of the commissioner.

Hence Sri Prosenjit Chatterjee Learned Advocate and member Bar Association City Civil Court Calcutta having mobile no-8420443716 is appointed as Advocate Commissioner to cause inspection of the suit-shop room. Learned Commissioner/Special Officer shall upon notice to all parties and their Learned Advocates

visit the suit shop room and cause inventory of the articles in the said room and take photographs. Apart from making inventory Learned Commissioner shall if any documents are lying in the said room regarding running of business shall collect the documents to be submitted with the report. Upon making the inventory Learned Commissioner shall submit the report before the Learned Trial Court. It is however made clear that the padlock of the suit shop room has to be opened or if necessary broken in presence of the Commissioner. Learned Commissioner is entitled to a remuneration of Rs. 10,000/- (Rupees Ten thousand only) to be shared equally by the petitioner and the opposite party no-1. The transport costs and incidental costs incurred in the inspection work shall also be shared equally by the petitioner and the opposite party no-1. The petitioner shall serve copy of the plaint and application under Section 151 CPC upon the Learned Commissioner. The inspection shall be carried out within 3 weeks from date of communication of this order and report to be submitted within 1 week thereafter.

Hence these Revisional Applications stand allowed. Orders dated 30/1/2023 and 29/05/2023 passed by Learned Civil Judge Senior Division Hooghly in Title Suit No. 49 of 2021 directing petitioner/ plaintiff to break open the padlock of the suit room and in the alternative allowing defendant/ opposite party no-1 to break open the padlock are hereby set aside. The matter is remitted back to the learned Trial Judge to reconsider the application under Section 151

CPC filed by the opposite party no-1 upon submission of report by Learned Commissioner as observed above.

Both C.O. 2359 of 2023 and C.O. 2360 of 2023 are disposed.

(Biswaroop Chowdhury,J)