

CO 2378 of 2022

Sri Sajan Roy

vs.

Sri Bholanath Mittra

Mr. Partha Pratim Roy
Mr. Dyutiman Banerjee
Mr. Debayan Roy

... for the petitioner

Mr. Swarup Banerjee
Mr. Arindam Chatterjee

... for the opposite party

1. This revisional application arises out of an order dated July 7, 2022, passed by the learned Civil Judge (Senior Division), 2nd Court at Howrah, in Misc. Appeal No.5 of 2022, thereby, reversing the order dated January 21, 2021, passed by the learned Civil Judge (Junior Division), 6th Court at Howrah in title suit no.242 of 2019.
2. The opposite party/plaintiff, filed a suit for declaration of title and injunction against the petitioner/defendant. The said suit was registered as Title Suit no.242 of 2019. The plaint case was that the plaintiff and the defendant, by a registered deed of sale dated April 26, 2013, became absolute owners in respect of A schedule and B schedule properties respectively. Upon acquisition of title in respect of A schedule property, the plaintiff had been possessing the same peacefully, openly, uninterruptedly and was exercising all rights including payment of revenue taxes before the appropriate authorities as true and lawful owner thereof. Such rights were exercised by

the plaintiff to the knowledge of all, including the defendant. Similarly, the defendant became absolute owner of the B schedule property by virtue of the self-same registered deed and both the properties were well demarcated by their boundary walls. Description of the properties were also delineated in the respective deeds. The B schedule property was situated on the adjoining eastern side of the A schedule property. Trouble arose for the first time on January 25, 2019, when the defendant fixed an iron gate on the western side boundary wall of the B schedule property and tried to create a passage through the A schedule property for ingress and egress to and from B schedule property. Due to timely intervention of the plaintiff and some persons in the locality, the defendant could not succeed in his aforesaid illegal attempt. Subsequently, the defendant gathered a few anti-social elements and on February 24, 2019 engaged some labourers to create a brick-built passage through the A schedule property. Again, due to timely intervention of the plaintiff and some persons in the locality, the defendant's attempt was frustrated.

3. Threatened by alleged illegal attempts, intimidation and show of muscle power by the defendant, the plaintiff/opposite party filed the suit for declaration and for permanent injunction. An application under

Order 39 Rules 1 and 2 of Code of Civil Procedure was also filed by the plaintiff, praying for temporary injunction restraining the defendant and his men and agents from interfering with the peaceful possession of the plaintiff in respect of the A schedule property, from creating any passage or pathway through the A schedule property and from changing the nature and character of the A schedule property.

4. The defendant/petitioner filed a written objection to the said application, thereby, denying all the material allegations. The specific case of the defendant was that the demarcation of the property as stated in the schedule A of the plaint and in the injunction application, were false and incorrect. The plaintiff had failed to mention the existence of the wide road through the plaintiff's property which was running from south to north and which had been used by the defendant for ingress and egress. To enable access to such wide road and for free ingress and egress, the iron gate had been fixed on the western side of the B schedule property. The defendant also stated that the plaintiff did not have possession in respect of the property in question and the A schedule property was being used as a public road. The defendant further stated that there was no alternative entrance to the B schedule property.

5. It appears from the records that an advocate commissioner was appointed to file a report with regard to the local features of the A and B schedule properties and on the other points mentioned in the application.
6. The advocate commissioner filed a report, which indicated that the commission was held upon notice to the parties. A “Karkhana” (factory) in the name of **“Infotech India”** was running on B schedule property. The report further stated that the defendant did not enjoy use of any road through the A schedule property. It was also recorded that there was no alternative route to enter into the B schedule property. It was indicated that a car and two motor cycles were standing over the A schedule property and a van-rickshaw and motorcycle were passing through. During inspection, the plaintiff had mentioned to the commissioner that an alternative passage for entrance to the B schedule could be created. The commissioner found that there was an electric post, fixed at the door, adjacent to the A schedule property.
7. The application for injunction came up for hearing before the learned Civil Judge, (Junior Division) 6th Court, Howrah. By an order dated January 21, 2021, the learned Civil Judge (Junior Division) 6th Court, Howrah, disposed of the application, thereby,

rejecting the prayer for injunction. The said learned judge was of the view that the registered deed of sale indicated that the B schedule property was surrounded on all sides by other properties and did not have a separate entrance. The report of the learned Advocate Commissioner also clarified the position that there was no separate entrance for egress and ingress to and from the B schedule property. Taking note of such situation, the learned trial judge held that the defendant could not be restrained from using the A schedule property as a passage, as he would suffer immense hardship and irreparable loss and injury, if he was restrained in any way.

8. The plaintiff challenged the said order by filing a Misc. Appeal before the learned Civil Judge (Senior Division) 2nd Court at Howrah. By order dated July 7, 2022, the said appeal was allowed on contested hearing.
9. The learned lower appellate court was of the view that the learned trial judge had failed to appreciate that the plaintiff had established a, prima facie, case in respect of his right, title and possession over the A schedule property. That the plaintiff and defendant both purchased their individual well demarcated A and B schedule properties, by a common deed of conveyance. There was no specific covenant in the

deed of conveyance that in the absence of any public pathway, the defendant would use the A schedule property for ingress and egress. The balance of convenience and inconvenience as well as irreparable loss and injury, titled in favour of the plaintiff and the plaintiff was entitled to get an order of temporary injunction, for protection and preservation of the property in question.

10. The learned lower appellate court further observed that the advocate commissioner's report clearly indicated that the defendant did not have any passage through the A schedule property. Thus, the defendant was enjoined from using the A schedule property. Hence, the revisional application has been filed.

11. Mr. Parthapratim Roy, learned Advocate appearing on behalf of the defendant/petitioner, submits that the defendant had purchased a landlocked property and the persons running the factory in the B schedule property, did not have any access to the B schedule property. A continuing business, would come to a standstill, if the workers of the factory and the persons in the management were restrained from entering into the B schedule property through the A schedule property. It is also contended that the learned lower appellate court had decided the issue of the title, by coming to a finding that the

plaintiff had proved his right, title and possession in respect of property in question. He urged this court to reject the order of the lower appellate court on the ground that at the stage of hearing of the injunction application, the said court was not required to go into the question of title. The order amounted to allowing the suit in its present form, at the interlocutory stage. Only, prima facie case, the balance of convenience and inconvenience of the parties and irreparable loss and injury, should be the parameters governing the question as to grant or non-grant of an order of temporary injunction. In this case, the commissioner's report would clearly show that the defendant did not have any other entrance to the B schedule property. That the gate had been fixed for such purpose and alleged alternative route, could not be identified by the commissioner.

12. Learned Advocate, Mr. Swarup Banerjee for the opposite party/plaintiff, submits that both the parties knowingly purchased the well-demarcated properties sometime in 2013. Since then, the plaintiff and the defendant have been enjoying their respective demarcated portions and have been exercising all their rights as lawful owners thereof. Only in January, 2019, for the first time an iron gate was fixed and the defendant tried to create a passage through the A schedule property. The plaintiff raised

an objection and with the intervention of the local people, he was able to prevent the defendant from such illegal activities. Again, similar activities were undertaken, when labourers were engaged to construct a brick-built passage. At that juncture, the plaintiff and the local people intervened and the attempts of the defendant were again frustrated. Being threatened by such unlawful and forceful attempts of encroachment of the A schedule property, the plaintiff filed the suit and an order of injunction was prayed for.

13. Learned Advocate for the plaintiff/opposite party further submits that both the properties were separated by brick-built walls. The said fact was confirmed by the Advocate Commissioner.

14. Having heard the learned Advocates for the respective parties, this court finds that the suit had been filed for declaration of right, title and interest of the plaintiff in respect of the A schedule property, with a further declaration that the defendant did not have any right, whatsoever, in respect of A schedule property. The plaint case was that the defendant was trying to create a passage through the A schedule property and an injunction order was necessary to restrain the defendant from disturbing the peaceful use of the A schedule property by the plaintiff and from doing any overt acts in respect of A schedule

property, which would amount to denial of the right, title and possession by the plaintiff in respect of the A schedule property.

15. Specific allegation was that on two occasions, the defendant tried to encroach into the property and create a passage through the A schedule property for entrance to the B schedule property. An iron gate was fixed for such purpose. Under such situation, an injunction order was prayed for during the pendency of the suit.

16. The learned trial judge, upon coming to a finding that the defendant had purchased a landlocked property and there was no alternative access to the B schedule property, allowed the application for injunction.

17. In my view, the learned trial judge proceeded on the basis that the defendant would face immense hardship, if he could not access the B schedule property, through the A schedule property. The learned trial judge erred, inasmuch as, the inconvenience caused to the defendant, was not of primary importance in the case. The plaintiff was a lawful purchaser and owner in respect of the property in question. There was no dispute with regard to the title of the plaintiff. The plaintiff tried to protect his A schedule property, which was a well-demarcated property, separate and distinct from the B schedule

property. Each of the property was well demarcated by brick-built boundary walls. The learned trial judge failed to take into consideration that the parties knowingly purchased their respective properties at their own risk and peril. In the registered deed of sale, the properties had been delineated.

18. Thus, the learned trial judge ought to have approached the issue on the prima facie case of the plaintiff, the balance of convenience and inconvenience of the parties and the irreparable loss and injury, on the facts pleaded in the plaint.

19. The learned lower appellate court came to the finding that both the parties purchased individual well demarcated properties. Both the parties were enjoying their properties as lawful owners thereof. Both the properties were separated by brick-built boundary walls. The commissioner's report clearly indicated that no passage was enjoyed by the defendant through the A schedule property. The learned court further observed that there was no counter-claim of the defendant in the suit in the nature of a declaration of right of easement of necessity and for use of a passage, through the A schedule property. The deed also did not indicate that the defendant ever enjoyed any egress and ingress through the A schedule property. According to the learned lower appellate court, consideration of

the, prima facie, case of the plaintiff and the balance of convenience and inconvenience and irreparable loss and injury, justified the issuance of an injunction order against the defendant.

20. In my opinion, the learned lower appellate court proceeded on the correct proposition of law that the plaintiff had established a prima facie case for a declaration that the plaintiff had right, title and interest in respect of the A schedule property and for an injunction restraining the defendant who had right title and interest over the B schedule property, from creating any passage through the A schedule property. The B schedule property was situated on the adjoining eastern portion of the A schedule property. The commissioner's report indicated that there was no passage through the A schedule property, which was used by the defendant. The existence of a public road running from south to north of the A schedule property, as claimed by defendant, was negated by the learned Advocate Commissioner's report. The learned Advocate Commissioner's report clearly indicated that the defendant did not enjoy any passage through the A schedule property and there was no public road through the A schedule property. One or two vehicles were parked on the A schedule property, which could not be indicative of the fact that there was a road, which was used by the

defendant since long. Only because the defendant did not have any passage to and from the B schedule property and the B schedule property was a landlocked property, the defendant, in my prima facie, view could not be allowed to use the plaintiff's land. It is an admitted case of both the parties that the plaintiff was the absolute owner of the A schedule property.

21. It would be a different case altogether, if the defendant had any rival claim to the user of the property. At the time of disposal of the matter of injunction, there was no counter-claim and the deed of conveyance did not indicate anything about user of A schedule property, as a passage.

22. In the suit for declaration and permanent injunction, the learned lower appellate court had rightly passed the order restraining the defendant from using the plaintiff's property as a passage, during the pendency of the suit. The specific case of the plaintiff was that the defendant was creating a passage through the A schedule property. The defendant, prima facie, could not establish his right of user of the said A schedule property as a passage, either on the basis of his title deed or on the basis of any other document.

23. Under such circumstances, the revisional application is dismissed.

24. The order of the learned lower appellate court is hereby upheld.

25. There will be no order as to costs.

26. Parties are directed to act on the server copy of this order.

(Shampa Sarkar, J.)