

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION

Present:
Hon'ble Justice Shampa Sarkar

CO 2775 of 2022

Jyotirmoy Batabyal
Vs.
Amila Modak and others

For the petitioner : Mr. Rahul Karmakar,
Mr. Debabrata Roy,

For the opposite parties : Mr. Samir Kumar Dutta,
Mr. Subrata Mukherjee

Hearing concluded on: 08.04.2024
Judgment on: 18.04.2024

Shampa Sarkar, J.:-

1. The revisional application arises out of an order dated May 19, 2022 passed by the learned Civil Judge (Junior Division) 2nd Court, Sealdah in Title Suit No.221 of 2013. By the order impugned, the learned Court rejected an application for addition of the Kolkata Municipal Corporation (hereinafter referred to as the Corporation) as a party to the suit. The petitioner's application under Order 1 Rule 10(2) of the Code of Civil Procedure, was rejected.

2. The learned Court was of the view that as the gift deed filed by the defendant did not reflect that the property involved in the suit and the property which the defendant were claiming by virtue of the said deed, were the same, the application for addition of the Corporation should not be allowed. The Court held that it was for the plaintiffs to prove the allegations

of unauthorized construction against the defendant, on the western side of the boundary wall of the suit property. The allegation of encroachment of the area owned and occupied by the plaintiffs was also to be proved by the plaintiffs. Thus, the addition of the Corporation was not required when the onus was on the plaintiffs to prove their case.

3. Mr. Karmakar, learned Advocate appearing on behalf of the plaintiffs submitted that the Corporation was a necessary and a proper party as there were allegations of illegal construction. The suit was for declaration and permanent injunction. A declaration that the property mentioned in the schedule belonging to the plaintiffs. Along with the said prayer for declaration, a prayer for permanent injunction restraining the defendant and her men and agents from making any construction on the western side boundary wall of the plaintiffs and/or from attempting to make any construction on the boundary wall of the property of the plaintiffs had also been made. An ad interim order of injunction was being enjoyed by the plaintiffs. In paragraph 4 of the plaint, the categorical averment of the plaintiffs was that the premises of the defendant was situated on the western side boundary wall of the plaintiffs. The plot of land belonging to the defendant was very small. The defendant proposed to demolish the boundary wall and to merge the land of the defendant with the passage of the plaintiffs, for joint ingress and egress. The plaintiffs did not agree. Thereafter, the defendant proposed for grant of right of easement through the private passage of the plaintiffs for a consideration, which was again refused by the plaintiffs.

4. Mr. Karmakar further drew the attention of the Court to the allegations in the plaint. It was alleged that the defendant and her husband, in connivance with some local persons tried to open a passage from the extreme western side of the plot without leaving an inch of land on the said plot, thereby attempting to start the construction on the western side boundary wall of the plaintiffs. Such construction was illegal and the matter was required to be looked into by the Corporation. If the defendant carried out the construction on the boundary wall of the plaintiffs, the air and light which was being enjoyed by the plaintiffs would be blocked. Moreover, the safety, security and privacy of the plaintiffs would also be compromised. The construction was also contrary to the building rules. According to Mr. Karmakar, the specific allegation in the plaint case was that the fact of encroachment was required to be looked into by the Corporation.

5. The schedule of the property with the boundaries were placed before this court. The property of the defendant was numbered as premises No.21B, Baldeo Para Road, which was on the western side of the suit property being premises No. 19/1A and 19/1B, Baldeo Para Road.

6. Drawing the attention of the Court to the application for injunction, averments in paragraph 5 thereof had been relied upon. The said averments dealt with the matter of illegal construction by the defendant on the western side boundary wall of the plaintiffs. Specific statement was made that the Corporation should look into the matter. Reference was further made by Mr. Karmakar to paragraph 4 of the application under Order 39 Rule 4 of the Code of Civil Procedure, filed by the defendant. It was specifically pleaded by the defendant that the presence of the Corporation was a must and the suit

should fail for non-joinder of necessary party. Paragraph 6(e) of the said application was specially referred to by Mr. Karmakar in support of the grounds to implead the corporation as a necessary and proper party. The defendant contended that the defendant was the owner of the house on premises No.21B Baldeo Para Road. The defendant duly applied to the concerned department of the Corporation seeking permission to carry out urgent re-construction and repair. That the structure of the defendant was old and dilapidated, which needed urgent repair and reconstruction. The concerned department of the Corporation accorded necessary permission/sanction to the defendant to carry out the necessary repair and renovation. Pursuant to such sanction, the re-construction, renovation and repair was being carried out at premises No.21B Baldeo Para Road, Kolkata 700006.

7. Mr. Karmakar submitted that upon coming to know of such fact, an application for addition of party was filed. The matter should be adjudicated in the presence of the Corporation in view of the specific pleading that the construction was illegal and unauthorized.

8. Mr. Karmakar submitted that the land belonging to the defendant was so small that no re-construction could not be permitted by the Corporation. Moreover, the existing construction was a tile shed house, thus, the question of re-construction of a roof or a staircase would not arise.

9. Mr. Karmakar submitted that the plaintiffs was the *dominus litis* and if the plaintiffs wanted to implead the Corporation as a defendant or a proforma defendant, the Court should not have rejected such prayer, upon

conclusively holding that the plot on which the construction was going on, was not the suit property.

10. Learned Advocate for the opposite party/defendant relied on some decisions of the Hon'ble Apex Court and submitted that the learned trial Judge, upon consideration of the record and the gift deed came to the finding that the property over which the construction was being raised by the defendant, was not the suit property. The question of impleading the Corporation as a defendant in the suit would not be necessary. This court under Article 227 of the Constitution of India should not interfere with such factual finding of the learned trial court. Learned Advocate further submitted that the property of the defendant was premises No.21B Baldeo Para Road. The defendant had acquired the same by a deed of gift from the other heirs of Late Krishna Chandra Datta.

11. As per the boundary of the property in the gift deed, to the west was a passage measuring 10 ft. x 3 ft. belonging to premises no.21 C Baldeo Para Road and to the east was premises No.20 Baldeo Para Road. The suit property was not situated either in the east or in the west of the defendant's property. The construction was being raised on a different property, which was not the subject-matter of the suit. The question of impleading the Corporation under such facts and circumstances, would not arise.

12. Having considered the rival contentions of the parties, this court finds that the specific plaint case was that a property devolved upon the plaintiffs as per their allotments mentioned in the partition deed. The entire plot was surrounded by boundary walls. To the west of the boundary wall of the plaintiffs, there was an existing private passage created out of the land

belonging to the plaintiffs. The private passage measured around 4 ft. and 3 inches. The passage was connected to the main road which the plaintiffs used for their ingress and egress. The premises of the defendant was situated on the western side boundary wall of the plaintiffs. The plot of the defendant was very small. The defendant came up with various proposals for amalgamation of the land with the passage of the plaintiffs, which were denied by the plaintiffs. Thereafter the defendant, without leaving any space on the eastern side of her plot attempted to raise a construction almost resting on the western side boundary wall belonging to the plaintiffs.

13. The plaintiffs alleged that the construction was illegal and was required to be looked into by the Corporation. Such overt act of the defendant had deprived the plaintiffs of their right to property and user of the land in question. Thus, the suit for declaration and injunction was filed.

14. “The schedule of the suit property is quoted below :-

All that piece and parcel of Bastu land measuring more or less 2 (two) cottahs 4 (four) chittacks 23 (twenty three) square feet sounded by boundary wall together with building standing thereon within the limits of the Kolkata Municipal Corporation being the Northern portion of premises No.19/1, now renumbered as 19/1A & 19/1B, Baldeo Para Road, Police Station – Manicktala, Kolkata – 700006, District – 24 Parganas (South) which is butted and bounded as follows:-

On the north : Northern portion of premises no.19/1 Baldeo Para Road.

On the south : By common passage,

On the east : By premises No.19, Baldeo Para Road,

On the west : By property of the defendant (not known) and being premises no.21 B, Baldeo Para Road. ”

15. The schedule indicates that in west, the suit property was butted and bounded by the property of the defendant being premises No.21B, Baldeo Para Road. It further appears that in the application under Order 39 Rule 4

of the Code of Civil Procedure, the defendant had categorically stated that the construction was being raised upon a sanction being granted by the Corporation and the presence of the Corporation was a must. As the Corporation was not added as a party defendant in the suit, the suit was bad for non-joinder of necessary party.

16. Para 4 is quoted below :-

“That your petitioner further states that since the disputes involved in the instant application for injunction as well as in the suit itself are with regard to making construction alleged to have been resting on the western side boundary wall of the plaintiffs, as well as reconstruction of building situated within the limits of the Kolkata Municipal Corporation, the presence of the Kolkata Municipal Authority is a must but since the Kolkata Municipal Authority has not been impleaded as party defendant to the said suit which is also accordingly bad for non-joinder of necessary party.”

17. It further appears that the defendant contended in the said application that the Corporation had granted permission to the defendant to effect urgent reconstruction, repair and renovation of the old and dilapidated structure. On the basis of such sanction, the construction was being made. This court finds that the defendant also averred that the Corporation was a necessary party. Secondly, the specific case of the defendant was that reconstruction/renovation and repair was being made with the permission from Corporation. While the plaintiffs’s contention was that the area occupied by the defendant was so small that the Corporation could not have given any permission, the defendant contended that such reconstruction was permitted. The plaintiffs also contended that the land of the defendant was inadequate for any construction and permission for reconstruction of roof and staircase could not be granted over the existing tiled shed structure.

18. Such facts were sought to be incorporated by an application for amendment of the plaint. The said application for amendment of the plaint is also pending adjudication. The plaintiffs, accordingly, filed the application to implead the Corporation as a party, in view of the fact that the adjudication of the dispute could not be completely and effectively achieved, unless the Corporation was a party to the proceeding.

19. In my opinion, the Corporation is a proper party, if not a necessary party. The adjudication as to whether reconstruction/renovation and repair had been permitted by the Corporation or not and/or whether such permission was granted in the manner in which the reconstruction was being taken up, had to be decided finally in the suit and also at the time of disposal of the injunction application, to arrive at a finding as to whether the plaintiffs had a prima facie case or not.

20. The dispute with regard to the boundary and the allegation of illegal construction will be decided finally in the suit on evidence. The Corporation is a proper party and the injunction hearing should also be held in the presence of the Corporation. While deciding the application, the court could not have come to a definite finding, without any evidence that the property of the defendant on which the construction was going on was not the suit property. The boundary dispute, the allegations of the plaintiffs that the Corporation could not have permitted such reconstruction/renovation and repair etc., were to be decided in the presence of the Corporation. Thus the learned Judge pre-judged the issue, inter alia holding thus:-

“On careful perusal of the petition, it has clear from the annexure deed filed by the defendant that the said property is not the schedule property and not concerned and related with this suit. The plaintiffs

by their own efforts and documents has to prove their allegations against the defendant that the defendant have tried to raise construction on the western side of the boundary wall of the schedule property as the defendats' property is not at all comes under the perview of the schedule property, henceforth there is no requirement of taking explanation from Kolkata Municipal Corporation as be made party to this suit."

21. The learned judge proceeded on the basis that the contention of the plaintiffs was that the construction was on the suit property. Such finding was misconceived as the allegation in the suit was that the defendant was raising an illegal construction on the western side of the suit property, thereby, encroaching upon the western side boundary wall of the plaintiffs.

22. The decision cited by the learned Advocate for the opposite party, i.e., ***Babhutmal Raichand Oswal vs. Laxmibai R. Tarte and Anr.*** reported in ***AIR 1975 SC 1297*** will not be applicable in the facts of this case. This court has not interfered with any finding of facts while holding that the order of the learned trial judge suffered from material irregularity.

23. The Corporation is the authority without whose permission no reconstruction/renovation and repair work of such nature could be carried out. Moreover, the Corporation has its specific building rules which were to be followed by the defendant while making such reconstruction/renovation and repair etc. The presence of the Corporation will aid the court to decide the suit effectively.

24. When the specific case of plaintiffs was that the construction was contrary to law and unauthorized which was required enquiry by the Corporation, I do not find any reason why the Corporation should not be added as a defendant in the suit in order to enable the court to pinpointedly decide the dispute raised by the plaintiffs. The defence case also rests on the

plea that the alleged construction was permitted by the Corporation. The presence of the Corporation would be justified and will be in aid of the suit.

25. In the matter of ***Baluram vs P.Chellathangam & Ors.*** reported in ***AIR 2015 SC 1264***, the Hon'ble Apex Court held that a proper party was a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree was to be made.

26. In the matter of ***Mumbai International Airport(P) Ltd. vs Regency Convention Centre & Hotels(P) Ltd.*** reported in ***(2010) 7 SCC 417***, the Hon'ble Apex Court held that the general rule with regard to impleadment of parties was that the plaintiffs in a suit, being dominus litis, may choose the persons against whom he wishes to litigate.

27. In ***Udit Narain Singh Malpaharia v. Addl. Member Board of Revenue***, reported in ***AIR 1963 SC 786***, the Hon'ble Apex Court held that there may be parties who could be described as proper parties, that is, parties whose presence would not be necessary for making an effective order, but whose presence may facilitate the settling of all the questions that may be involved in the controversy.

28. In the matter of ***Vishal Ashok Thorat v. Rajesh Shrirambapu Fate***, reported in ***(2020) 18 SCC 673***, the Hon'ble Apex Court held that a necessary party was one without whom no order could be made effectively. A proper party was one in whose absence an effective order could be made, but whose presence was necessary for a complete and final decision on the question involved in the proceeding.

29. Upon the discussions as above, this Court sets aside the order impugned. The learned court is directed to add the Kolkata Municipal Corporation, represented by the Commissioner, having its registered office at 5 S.N. Banerjee Road, Kolkata 700013, as proforma-defendant in the suit, in terms of the prayer in the application under Order 1 Rule 10(2) of the Code of Civil Procedure filed by the plaintiffs.

30. Accordingly, the revisional application is allowed.

31. There shall be no order as to costs.

32. Parties are to act on the basis of the sever copy of this order.

(Shampa Sarkar, J.)