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Ct. No. 04

akd

F.M.A. 783 of 2023

CAN 1 of 2023

Sukhbindar Singh & Ors.

Vs.

Prasanta Maji & Ors.

Mr. Rabi Sankar Chattopadhyay,

Mr. Sayan Chattopadhyay.

... for the appellants.

By an order no. 98 dated 15th July, 2023 the application under Order XXXIX Rule 4 read with Section 151 of the Code of Civil Procedure filed by the appellants for variation and/or modification of the order dated 5th August, 2022 passed in FMAT 227 of 2022 is rejected.

The suit for partition and separation of shares along with permanent injunction is still pending before the Trial Court. Amidst the pendency of the same an application for temporary injunction was taken out alleging that the appellants are making construction on the joint property and have, in fact, attempted to put a gate thereat.

The matter travelled to this Court being FMAT 227 of 2022, which was disposed of on 5th August, 2022 restraining the appellants from carrying on the construction till the preliminary decree is pronounced. However, this Court observed that effort and endeavour must be shown to pass the preliminary decree on or before 31st December, 2022.

An application for variation, vacation and/or modification of the said order appears to have been taken out in the month of July, 2023 on the count that the structure, which was constructed and in existence on the day when the order of injunction was passed by the High Court, is susceptible to be damaged because

of being unattended and, therefore, in order to protect the same and to avoid any disaster, which may likely to occur, they must be permitted to complete the finishing work with an undertaking that they would demolish the entire structure, if the Court ultimately passes such order.

The Trial Court proceeded to dismiss the said application solely on the ground that the modification and/or variation of an order passed by the High Court is sought to be done by filing the aforesaid application to which the Trial Court held that the proper course is to approach the same Court. It is further observed that the moment the High Court has indicated the tenure of the said injunction to operate till the preliminary decree is pronounced, any modification is beyond the competence of the said Court despite the fact that the suit has not reached to the stage of preliminary decree.

The learned Counsel for the appellants is vociferous in his submission that the injunction granted by the High Court was passed with an intent that the preliminary decree would be passed in the near future and having not so passed, the said order of injunction is operating harshly upon the appellants. It is further submitted that because of the natural wear and tear and extreme climate the structure has suffered a damage and some portion has decayed, which if not protected may cause danger. He thus submits that there is no fetter on the part of the Court in modifying the order permitting the appellants to protect the said structure by putting the tiles or the other materials without changing its dimension.

As indicated above, the order of injunction was passed by the High Court with a rider that it would operate till the preliminary decree is pronounced. In the event there is any delay in achieving the stage of passing the preliminary decree the proper course would

be to approach the High Court in this regard. For any modification of the order passed by the High Court, it is proper that the said Court should be approached for such purposes.

We do not find any infirmity in the approach of the Trial Court for the simple reason that the structure which now exists was in existence at the time when the High Court passed the order of injunction against the appellants and we thus do not find any changed circumstances except the passing of time.

Order XXXIX Rule 4 of the Code can be pressed in action more particularly seeking variation, vacation and/or setting aside of the order of temporary injunction passed in presence of the parties on two counts; firstly the variation, vacation and/or setting aside the order is necessitated by a changed circumstances, secondly the order is causing undue hardship on the party applying for such vacation.

As indicated above, we do not find any changed circumstances nor any hardship from the pleadings made in the application captioned under Order XXXIX Rule 4 of the Code. In absence of any such pleading we do not think that there is any illegality in the impugned order.

The appeal is thus dismissed under Order XLI Rule 11 of the Code of Civil Procedure. Consequently the connection application is also dismissed.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)

