

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

C.O. 3335 of 2023

Sri Monoj Roy

Versus

Premangshu Mondal & Ors.

For the Petitioner	:	Mr. Supratim Dhar Mr. Dhananjay Nayak
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For the opposite parties	:	Mr. Joydeep Kar, Sr. Adv. Mr. Supriya Kr. Roy Mr. Ayan Banerjee Mr. Tamal Banerjee Ms. Puja Rajbhor
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Heard on	:	29.08.2024
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Judgment on	:	21.11.2024
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Dr. Ajoy Kumar Mukherjee , J.:

1. The instant civil Application has been filed challenging the impugned order dated 8th August 2023 passed by Additional District Judge, Baruipur in Misc. Appeal no. 22 of 2017. The petitioner/plaintiff filed a suit for partition with regard to his $\frac{1}{36}$ th share out of plot of land measuring an area of 89 decimal under R.S. dag no. 232 in Mouza Balia. By the order

impugned learned court below set aside the order of injunction passed by the Trial Court and thereby allowed the aforesaid Misc. Appeal.

2. Fact of the case as pleaded by plaintiff/petitioner in the plaint is that one Kalicharan Mondal was the absolute owner of the aforesaid land measuring 85 decimal and he died intestate leaving behind his wife Haridasi Mondal and three sons namely Srikanta, Bechulal and Subodh and one daughter Amdo Bala. Further case of the plaintiff is that on 15.01.1978 a deed of partition was executed among the aforesaid legal heirs of late Kalicharan and by virtue of allotment Srikanta and Bechulal became the absolute joint owners of the said land measuring 89 decimal. It is further alleged in the plaint that said Bechulal and Srikanta never partitioned the suit property among themselves in accordance with section 14 of the West Bengal Land Reforms Act 1955 but they went on to transfer the said suit schedule property to different persons.

3. Said Srikanta and Bechulal jointly gifted their alleged undivided 1/4th share measuring about 22.25 decimal out of said plot no. 232 to Premangshu Mondal, the opposite party/defendant no.1 by a registered gift deed. Plaintiff alleged that the said suit schedule property was never demarcated as per the requirement of law by its co-sharers and in the deed of gift it was only mentioned that the gifted land situates extreme northern side of the suit schedule plot. Thereafter on 16th Feb. 1981, said Srikanta and Bechu jointly gifted their alleged undivided 1/4th share measuring 22.25 decimal situates extreme southern side of suit plot to Debangshu Mondal i.e. opposite party/defendant n.2 by another registered deed of gift. Subsequently said Srikanta and Bechu jointly gifted their another 1/4th

alleged undivided share to Pratap Mondal/opposite party by another registered gift deed mentioning that the land adjacent to the extreme southern portion of the suit schedule property is the gifted property. Finally said Srikanta and Bechu jointly gifted their remaining undivided $1/4^{\text{th}}$ share of land measuring 22.25 decimal to one Santap Mondal i.e. opposite party /defendant no.8 by a registered gift deed mentioning that the southern portion of the suit schedule plot is the gifted property.

4. Plaintiffs specific case is that said nature of vague demarcation of land as mentioned in the deeds of gift has no recognition under the law as the same is not sufficient to identify the land involved in the gift deed. Subsequently aforesaid defendant no.8/opposite party Santap Mondal while possessing his share of land out of suit measuring $22 \frac{1}{4}$, sold a portion of land measuring 1 katha 8 chittack of land out of suit property i.e $1/36^{\text{th}}$ share to Monoj Roy, who is the plaintiff/petitioner herein by a registered sale deed without demarcating said land for identification of the portion of the land of the petitioner/plaintiff.

5. Plaintiff/petitioner's further case is after purchase of the undivided share of the suit schedule land by the petitioner/plaintiff, the opposite party/defendant no.1 on the ground of non notified co sharer filed a case for preemption which was registered as Misc. Case no. 114 of 2014 and sought to preempt his prior right of purchase of the said land, but the said preemption case was subsequently withdrawn. Plaintiff/Petitioner in this context submitted that opposite party/defendant no.1 by filing the aforesaid preemption case has admitted that the suit property is ejmal property of the plaintiff and the defendant and no partition has taken place

in respect of the suit property. In this context he relied upon judgment reported in **72 CWN 867** Plaintiffs/Petitioner's further specific case is that after the aforesaid consecutive transfers, the plaintiff has 1/36th share in the suit property and the opposite party defendant no. 1 and 2 each has 1/4th share in the suit property and defendant no. 3-7 jointly have 1/4th share.

6. Since the opposite party party/defendant no. 1-8 in collusion and conspiracy with each other and also with the help of some local men were trying to make construction in the best portion of the suit schedule plot, the same has compelled the petitioner/plaintiff to file the suit for partition being T.S. No. 282 of 2013. In the said suit the plaintiff/petitioner also filed an application under order XXXIX rule 1 and 2 and the Trial Court was pleased to grant an ex-parte ad interim injunction directing the plaintiff and defendants to maintain status quo in respect of nature and character and possession of the suit schedule property. Thereafter by an order dated 28.08.2017 the Trial Judge was pleased to allow the petition for temporary injunction after contested hearing, directing both parties for maintaining status quo in respect of nature, character of suit land till disposal of the suit.

7. Opposite parties defendant no. 1 and 2 being aggrieved by the said order of temporary injunction preferred the aforesaid Misc. Appeal being no. 22 of 2017 and the Id. Appellate court by the impugned order has been pleased to set aside the order of temporary injunction granted by the Trial Court.

8. Mr. Dhar learned counsel appearing on behalf of the petitioner submits that the opposite parties/defendants in the said suit filed an application under order VII rule 11 for rejection of plaint alleging that plaint does not disclose any cause of action, in view of the fact that all the transfers were made in respect of demarcated portion of the plot and thereby plaintiff/transferee ceased to be a co-sharer and he has no right to initiate partition suit. Learned court below upon hearing rejected defendants aforesaid prayer for rejection of plaint. Being aggrieved by the said order, defendant preferred Revisional Application before this High Court bearing CO No. 4067 of 2014 and this court was pleased to dismiss the said Revisional Application, confirming the order of the Trial Court.

9. Petitioner/ plaintiff further submits that defendants/opposite parties obtained revised sanction plan from the municipality by suppressing pendency of the aforesaid partition suit and the aforesaid injunction order and for which plaintiff made a representation before the municipality, challenging the sanction plan but as he did not get any relief from the municipality, he preferred writ petition being **WP No. 5061 (W) of 2017** before this court which was disposed of directing the Municipality to dispose of the representation dated 17.11.2016 filed by the petitioner/plaintiff. It was found that that the developer being the attorney of the opposite parties/defendant no. 1 and 2, constructed the building violating the courts order, even against his own undertaking given before the Division Bench in MAT no. 1129 of 2016. He further submits that opposite parties have suppressed the material facts before the court below

as well as the previous litigation and the orders thereto passed by the Hon'ble Division Bench of the High court in MAT no. 1506 of 2023.

10. Mr. Supratim Dhar on behalf of the petitioner further argued that by the deed of partition dated 15.01.1978, Srikanta and Bechu Mondal became the joint co sharer of the said land measuring 89 decimal and it is admitted fact that said Srikanta and Bechu after becoming the co-sharer of the said suit schedule property, has not partitioned the property under section 14 of the Act of 1955 and as such the petitioner/plaintiff is the co sharer of the suit schedule land. He further argued that the description of land as mentioned in the schedule of the aforesaid four gift deeds cannot be accepted as demarcated property. In this context petitioner relied upon a judgment of this court passed in ***Anil Kumar Jana Vs. Kamal Jana in CO No. 4131 of 2016.***

11. Mr. Dhar further argued that pending litigations between the parties the suit schedule property needed to be taken care of, as plaintiff has sufficiently proved his prima facie case. He further argued that it is settled principle of law that Appellate Court should interfere in an order passed by learned court below when the impugned order is perverse. Accordingly he submits that at this stage of deciding the application for temporary injunction, the court is not required to go into the merits of the case in detail, but it only require to examine whether plaintiff has the prima facie case to go for trial and whether protection is necessary to the petitioner by order of injunction and thirdly the mischief or inconvenience likely to arise from withholding injunction will be greater than which likely to arise from granting it and at this stage mini trial is not permissible.

12. Accordingly Mr. Dhar concluded that there are serious disputed questions to be tried in the suit and there is also probability that the plaintiff will be entitled to the relief asked for and if the *status quo* order passed by the trial court is vacated at this moment, the defendants will go on for constructions over the suit property, which will invite multiple litigations in future. He argued that under the modern concept of jurisprudence chance of multiplicity of proceeding is relevant factor to be considered at the time of granting order of injunction. Accordingly he has prayed for setting aside the impugned order and to affirm the order of injunction passed by the Trial Court.

13. Mr. Kar Learned counsel appearing on behalf of the opposite party raised vehement objection against the submission made by the petitioner/plaintiff. He submitted that in the instant suit plaintiff/petitioner did not pray for any permanent injunction and without prayer for permanent injunction, no temporary injunction could be granted as it is only in aid of the main relief that a temporary injunction could be granted. In this context he relied upon judgment of ***Gadadhar Barman Vs. Ranendra Mohan Paul, 1997 SCC Online Gau 122***. Accordingly Trial Court committed error in passing the order of temporary injunction. He further submits that the vendor of the petitioner/plaintiff Santap Mondal was enjoying his portion of land exclusively without any unity of title or interest with others as reflected from the recital of the aforesaid gift deeds. He further submits that the petitioner is estopped from claiming the jointness of the property and he is also debarred from filing partition suit and as such he has no legal authority to claim any order of injunction on

the pretext of jointness of possession. Relying upon judgment of the Apex court in ***State of A.P. and others vs. Star bone mill and fertilizer company*** reported in **(2013) 9 SCC 319** he further argued that no person can grant a better title than he himself hold and no one can give what he has not got and no one can bestow or grant a greater right or a better title than he himself has. He further argued that plaintiff cannot claim co ownership with adjacent owners, since she has failed to make out any prima facie case and that compensation in money would be adequate, even if injunction be not granted.

14. While rebutting the argument made on behalf of the petitioner, Mr. Kar submitted that the plaintiff has no right title or interest in the property which is under occupation of the opposite party and he cannot claim any injunction. He further submits that application for preemption was filed under a mis conception and not pursued and cannot give a cause of action to the plaintiff, since the plaintiff is not a co sharer and he has no right to maintain the preemption suit. In this context he further submitted that it is settled principle of law that even if a party made an assertion which is not tenable in the eye of law, the said assertion would have no value and cannot give a cause of action to the third parties. Accordingly Mr. Kar submits that the order impugned is fully justified and has been made in accordance with law and does not call for interference.

Decision

15. Needless to say that one of the cardinal principle in granting or refusing prayer for injunction is whether plaintiff has succeeded in making out a prima facie case or not. The existence of prima facie right of

enjoyment of his property, is a condition for the grant of temporary injunction. However, prima facie case is not to be confused with the prima facie title which has to be established on evidence at the trial. At this stage only the prima facie case along with balance of convenience and inconvenience and the question of irreparable loss and injury are to be considered.

16. In the present context it is not in dispute that Kalicharan was the original owner of 89 decimal of land and the legal heirs of Kalicharan executed a registered deed of partition in the year 1978 and by virtue of the partition deed, the two legal heirs of Kalicharan namely Srikanta and Bechulal became the joint owners of entire 89 decimal of land in plot no. 232 which is the suit plot. Further admitted position in the present case is said Srikanta and Bechulal jointly transferred and delivered their entire share of land i.e. 89 decimal in plot no. 232 by executing four registered deeds of gift and thereby gifted $22\frac{1}{4}$ decimal each to Santap Mondal i.e. the vendor of the petitioner, Pratap Mondal, Premangshu Mondal, Debangshu Mondal. It is also not in dispute that by the deed of gift plaintiffs vendor Santap got $22\frac{1}{4}$ decimal of land in the suit plot

17. The dispute between the parties lies on the interpretation of the recital made in the deeds. While the plaintiffs/petitioner's case is such gift deeds did not confer any demarcated areas to the donees and the property remained joint but on the contrary the case of the opposite party is that the gift deeds conferred defined/demarcated areas to the donees who became individual owners to the properties gifted to them and the property never remained the joint property among themselves. In this context their further

case is each donee mutated their names as the independent owner of the properties and continued to enjoy the same as individual owners by payment of tax. The developer executed development agreement with Premangshu and Debangshu (defendant No.1& 2) in respect of the suit plot measuring an area of $(22 \frac{1}{4} + 22 \frac{1}{4}) = 45$ decimal of land. The site plan approved by the Municipality stands in the name of Premangshu and Debangshu. On perusal of recital of the sale deed no. 1060 of 1988 it appears that the vendor of plaintiff has clearly declared that he is enjoying his specific land of $22 \frac{1}{4}$ decimal of land exclusively and without any unity of title and interest with others. In the said deed no. 1060 Santap annexed a map also with red color showing the transferred portion and boundary of property also specifically mentioned in the deed. In the schedule of Santap's deed it has been mentioned that the gifted property is in the extreme southern portion of plot no. 232 measuring $22 \frac{1}{4}$ Satak.

18. It further appears that plaintiff's vendor Santap Mondal also sold a portion of his aforesaid property in favour one Patit Paban Nandy where also he has declared that there is no unity of title or interest with others in the sold property. Not only that said Santap also sold another portion of land in favour of one Jogesh Sharma from suit plot no. 232 measuring 1 cootah 12 chittack on 8th Baishakh, 1396 B.S, wherein also Santap declared that he is in absolute possession of the property proposed to be sold and there is no unity of title or interest with others. Santap also sold another portion of property to Smt. Archana Saha on 2nd March, 1988, wherein also Santap claimed his absolute possession in the allotted land, declaring that there is no unity of title or interest with others in the suit

property. It also appears from an information dated 19.11.2014 supplied by Rajpur Sonarpur Municipality that Santap's holding no. is 319 which situates over plot no. 232.

19. It further appears from the plaintiffs purchase deed which was executed by Santap Mondal that the plaintiff/petitioner before purchase had inspected the location and legal papers and after being satisfied plaintiff approached his vendor Santap to purchase the said schedule land and the vendor had also given his free consent to the said sale. Accordingly from the recital of his purchase deed it is clear that the plaintiff/petitioner was fully aware about the location of his purchased 1 cottah 8 chittack of land.

20. Not only that plaintiffs vendor Santap being defendant filed written statement in another Title suit no. 247 of 2008 and in the said written statement Santap claimed that by the registered deed of gift dated 16.02.1981 Srikanta and Bechulal jointly transferred demarcated 22 $\frac{1}{4}$ decimal of land in favour of Santap and delivered possession of the said demarcated land to him and since then Santap has been in exclusive possession of the demarcated 22 $\frac{1}{4}$ decimal of land by paying tax to the government and the said property has also been recorded in his name in the finally published Record of right. In the said written statement it has also been averred by the defendant Santap Mondal that Santap had no unity of interest and or unity of title in respect of the suit property with the plaintiff as well as with any other defendant and Santap is the absolute owner to the extent of demarcated 22 $\frac{1}{4}$ decimal of the land in the suit plot.

21. In this context the plaintiff petitioner heavily relied upon the *preemption* case filed by opposite party claiming himself as non-notified co-sharer which was subsequently withdrawn. First of all title or co-sharership upon a property cannot be created by admission. Moreover even if there is any such assertion in the preemption application such assertion is contrary to the documents as above and on the contrary it is all along the specific case of plaintiffs' vendor that the property obtained by plaintiffs vendor is demarcated and there is no unity of title and plaintiff also on inspection and after confirming about the location of the property had purchased the same and as such plaintiff failed to make out any prima facie case in his favour for granting an order of injunction nor the balance of convenience and inconvenience leans in his favour. Moreover, plaintiff failed to bring out any case that if the injunction be not granted in favour of the plaintiff, the loss likely to be suffered by the plaintiff cannot be compensated by money.

22. Learned court below while passed the order impugned had made following observation

"In the instant case, the plaintiff cannot claim his existence of prima facie right upon the entire plot of land and he cannot claim enjoyment in the entire plot of land. It is not the law that if a person admits the other as a co-sharer, that person would be a co-sharer in that land.

So, if in the pre-emption application, the plaintiff is said to be a co-sharer in a plot of land, that does not mean that the plaintiff has become a co-sharer in that land.

The principle of res-judicata is applicable where a point of issue has been determined on merit. Whether the partition suit is maintainable or not cannot be decided in dealing the petition under order 7 rule 11 of C.P.C.

So, the rejection of that petition does not mean that the issue whether the instant partition suit is maintainable has been determined on merit.

It is averred in the plaint by the plaintiff that Santap Mondal becoming the owner of undivided 1/4th share in the suit property, due to his urgent need of money, sold the plaintiff undivided 1 cottah 8 chhtak land i.e. 1/36th share in the suit dag.

On careful perusal of the deed in favour of the plaintiff, it appears therefrom that his predecessor became absolute owner of 22.25 dec. out of 89 dec. in the

suit dag and out of that property, he transferred him 1 cottah 8 chattacks. It is noted therein that the plaintiff inspected the location and legal papers and being satisfied, he purchased the said property.'

23. The scope and ambit of exercise of power and jurisdiction by High Court under Article 227 of the constitution of India is examined and explained in number of decision by the Apex Court. It is well settled that High Court while exercising power under Article 227 cannot act as a court of appeal and High Court can interfere with the decision of the court below only to keep the courts below within their bounds and in the cases where it results into manifest miscarriage of justice and not in all other cases to correct mere errors. The power under Article 227 is a discretionary in nature and can be exercised in the cases where the court below ignores material piece of evidence or considers some evidence which it ought not to have considered resulting into injustice and not in cases where there are two views possible and the view adopted by the court below is reasonable and plausible. However, finding of fact may be entered when there is no evidence at all in support of his finding or where the finding of fact has been arrived at by ignoring important and relevant evidence having considerable bearing on the issue or by taking into consideration, completely irrelevant fact.

24. In the present case as I have stated above that the recitals in the deeds executed by plaintiff's vendor Santap as well as written statement filed by Santap in T.S 247 of 2008 and other documents and also the very recital of the plaintiffs own deed, do not lead me to conclude that the order impugned suffers from material irregularity or perversity or the order impugned is not based on any material. Since the order impugned does not

involve a case of serious dereliction of duty or flagrant violation of fundamental principle of law and justice, I am not in favour of substituting my own judgment in place of that of the court below to correct any error which is not apparent on the face of the record.

25. In view of aforesaid discussion I find nothing to interfere with the order impugned.

26. CO 3335 of 2023 thus stands dismissed.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(DR. AJOY KUMAR MUKHERJEE, J.)