

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

C.O. No. 3566 of 2007

With

IA No. CAN 1 of 2008 (Old No. CAN 1466 of 2008)

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CAN 7 of 2022

Mukti Pal & Another

-Versus-

Chhayabithi Sur & Others

For the Petitioners : **Mr. Pinaki Dhole,
Mr. Rabindra Kumar Pathak.**

For the Opposite parties : **Mr. Tanisk Ganeriwala,
Mr. Yubaraj Bhattacharyya.**

Hearing concluded on : **10.01.2024**

BEFORE

HON'BLE JUSTICE PRASENJIT BISWAS

Date:- 18.01.2024

Prasenjit Biswas, J:-

1. Feeling aggrieved and dissatisfied with the impugned order dated 27.08.2007 passed by the Learned Civil Judge (Senior Division), 8th Court Alipore, in Misc. Appeal No. 151 of 2006 the present petitioner has filed this application under Article 227 of the Constitution of India.

2. By passing the impugned order the learned Court set aside the order dated 14.02.2006 in Title Suit No. 356 of 1997 passed by the Learned Civil Judge (Junior Division), 3rd Court Alipore. Being aggrieved and dissatisfied with the impugned order dated 27.08.2007 the present petitioners have preferred this instant application.

3. It is undisputed that one Tara Kumar Sur (since deceased) was the original owner of premises No. 69, Rash Behari Avenue, 71A and 71B of Rash Behari Avenue, Kolkata. During his life time Tara Kumar Sur executed three deeds of gifts in respect of the property of premises no. 69, Rash Behari Avenue in favour of his two sons and his only son-in-law and thereby divided the entire premises no. 69 in three plots of lots i.e. lot 'C', lot 'D' and lot 'E'. which have been shown in the annexed maps of those deeds of gifts. It is stated by the plaintiff that the said deeds of gift made in his favour has been duly executed and acted upon and the plaintiff no. 2 has been enjoying the said property so gifted peacefully without any interpretation since the date of execution of such deed of gift. After allotment/transfer of the premises no. 69, Rash Behari Avenue and after separation of the same it has become known as 69/A, 69/B and 69/C, Rash Behari Avenue and as such the plaintiff becomes the absolute owner of 69A, Rash Behari Avenue.

4. It is the specific case of the plaintiffs that at the time of execution of the said deeds of gift said Tara Kumar Sur specifically mentioned about the common passage in the said deed of gift. There is 8 ft wide common passage from Rash Behari Avenue and the said passage is contiguous to the Western side of premises nos. 71A and 71B, Rash Behari Avenue leading from South to North. The said 8 ft wide common passage then turns towards the East having 12 ft wide common

passage and having 6 ft wide common passage leading to the plaintiff's house on the West. It is stated by the plaintiffs that since premises nos. 71A and 71B, Rash Behari Avenue were constructed long ago and there was no provision of garage for keeping the cars, said Tara Kumar Sur granted vacant space of 71B Rash Behari Avenue to his sons and daughter as well as to his son-in-law for parking of cars and they are enjoying the same since more than 30 years. Thereafter, Tara Kumar Sur in his will and testament bequeathed the building structures situated on premises nos. 71A and 71B, Rash Behari Avenue to his grant sons and daughter-in-law without making any provision regarding the said vacant space in lot "B" of 71B, Rash Behari Avenue and thus the plaintiff no. 1 acquired an undivided 1/3rd share in the said vacant space of 71B, Rash Behari Avenue. It is stated by the plaintiffs that they and their visitors having using and enjoying the said vacant space for parking their cars since long past. As the defendants are creating disturbance in peaceful enjoyment of the passage and vacant land, the plaintiffs/petitioners have filed the suit being T.S No. 356 of 1997 for declaration that they have right of egress and ingress from the main gate through 8 ft wide and thereafter 12ft wide and 6ft wide common passage and have right of keeping of their cars in the open space in 71B Rash Behari Avenue and 12 ft wide common passage as shown and described in the schedule of the plaint. By filing the suit, the plaintiffs/petitioners also prayed for permanent injunction restraining the defendants/opposite parties and their men and agents from creating obstruction to the plaintiffs/petitioners and/or their visitors in using the said common passage and/or in keeping their cars in open space of the properties in dispute.

5. An application under Order 39 Rule 1 of CPC was taken out by the plaintiffs/ petitioners with a prayer for getting temporary injunction in respect of

the suit properties. The defendants entered their appearance in the suit and contested the said temporary injunction application by filing written objection wherein it was specifically contended that the plaintiffs have got no right with the 12 ft wide common passage. It is specifically stated by the defendants that the defendants no. 2 and 5 got the property of lots 'C' and 'D' vide deeds of gift executed by Tara Kumar Sur and premises no. 71A and 71B i.e. lots A and B as shown in the plaint was begotten by the defendants from Tara Kumar Sur by virtue of the will. It is denied by the defendants that the plaintiffs have got any manner of right, title and interest in the vacant space of premises no.71B and the 12 ft wide common passage are being used exclusively by the defendants as of their own right.

6. After hearing of both sides Learned Civil Judge (Junior Division) directed both the parties to maintain status quo in respect of the suit property till disposal of the suit.

7. Against the order dated 14.02.2006 passed by the Learned Civil Judge (Junior Division), defendants have preferred an appeal being Misc. Appeal No. 151/2006 before the First Appellate Court. The learned First Appellate Court elaborately discussed the case of the parties and set aside the order passed by the Learned Civil Judge (Junior Division) with observation that the balance of convenience and inconvenience do not lie in favour of the plaintiffs since the plaintiffs have got their own passage for egress and ingress and the plaintiffs would not suffer any prejudice if the injunction is not granted to them.

8. Learned Counsel appearing on behalf of the petitioners assailed that the deed of gift executed by Tara Kumar Sur in favour of plaintiff no. 2 (since deceased) was duly acted upon and the plaintiffs have been enjoying the said

property peacefully without any interruption since the date of execution of such deed. It is further submitted on his behalf that after allotment of premises no. 69, Rash Behari Avenue on separation it has been renumbered as 69A, 69B, 69C Rash Behari Avenue and the plaintiff no. 2 (since deceased) became the absolute owner of premises no 69A which was allotted to him. The attention of the Court is drawn by the learned Counsel at the time of hearing that at the time of execution of deeds of gifts said Tara Kumar Sur specifically mentioned about the common passage in the said deed. Petitioners state that there is 8 ft wide common passage from Rash Behari Avenue and the said passage is contiguous to the Western Side of premises no(s) 71 A and 71B Rash Behari Avenue, leading from South to North. The 8 ft wide common passage runs from South to North which meets the 12 ft wide common passage running from East to West and 6 ft wide long common passage runs from East to West leading to the plaintiff's/petitioner's house situated at premises no. 69A Rash Behari Avenue on the extreme West. It is submitted on behalf of the petitioners that Tara Kumar Sur in his will and testament bequeathed the undivided share of the building structure of 71A and 71B Rash Behari Avenue to his grant sons and daughters-in-law without making any statement and/ or any provision regarding the said vacant space situated at 71B Rash Behari Avenue and as such the plaintiff/petitioner no. 1 acquired 1/3rd undivided share in the said vacant space of 71B, Rash Behari Avenue.

9. Learned Counsel appearing on behalf of the defendants/ (opposite parties herein) submitted *inter-alia* that the plaintiffs have got no connection with the 12ft wide common passage. The defendant nos. 1 and 5 got the property of lots 'C' and 'D' vide deeds of gift executed by Tara Kumar Sur and the premises nos. 71A and 71B i.e. lots A and B were begotten by the defendants from Tara Kumar Sur by

virtue of the will. It is the specific case of the defendants that the present plaintiffs have got no right title and interest in the vacant space of premises no. 71B and the 12 ft wide common passage which are being used by the defendants exclusively as of their own right. In the impugned order under challenge the learned First Appellate Court held that the plaintiffs *primafacie* do not have any right, title and interest in respect of lots nos. 'A' and 'B' i.e. premises nos. 71A and 71B. Learned Court further held that the plaintiffs have got no right of use over the 12 ft wide common passage as it appears from the title deed of the plaintiff no. 2 that lot 'E' has been gifted to him with the right of passage with or without vehicle and also right of taking electric, telephone cables, water pipes and sewer drains over and under the common passage as shown in the schedule as well as annexed map of the deed. After going into the merits of the case the learned Trial Court held that the plaintiffs have got their own passage i.e. 6 ft wide and then 8 ft wide for their ingress and egress and therefore, plaintiff's claim or right of user over the 12 ft wide passage does not appear to be reasonable because that 12 ft wide passage cannot be said to be common with the plaintiffs who are the occupants of lot 'E' and it is far away from the 12 ft wide common passage. In fact, learned Trial Court decided all the issues at the time of passing of the impugned order dated 27.08.2007 which are the subject matter of the Trial Court.

10. It has been argued by the learned Counsel that the petitioners are invoking the power of superintendence under Article 227 of the Constitution of India only because the trial court has exceeded its jurisdiction and has made observation on the merits of the case by holding a mini trial. Reference has been made to the schedule of the deeds executed by Tara Kumar Sur and detailed arguments have

been made regarding sustainability of the impugned order passed by the first appellate court

11. Learned Counsel appearing on behalf of the opposite parties submits that the present application filed under Article 227 of the Constitution of India is not maintainable. It is further submitted by the learned Counsel that no easementary right has ever been claimed by the plaintiffs over the passage in dispute in the plaint filed by them. It is submitted by the learned Counsel on behalf of the opposite parties that the power under Article 227 of the Constitution of India being one of judicial superintendence cannot be exercised to upset the conclusion, however erroneous they may be unless there was something grossly wrong or unjust in the impugned order shocking the Court's conscience or the conclusions were so perverse that it becomes absolutely necessary in the interest of justice for the Court to interfere. In support of his contention learned Advocate cited a decision rendered by Hon'ble High Court of Delhi in case of ***Black Diamond Trackparts Private Limited And Others Vs. Black Diamond Motors Private Limited*** reported in **2022 SCC OnLine Del 545**

12. There is a difference and distinction between the entertainability and maintainability of the application. The remedy under Article 227 of the Constitution of India available is a constitutional remedy under the Constitution of India which cannot be taken away. In a given case the Court may not exercise the power under Article 227 of the Constitution of India if the Court is of the opinion that the aggrieved party has another efficacious remedy available under the CPC. It is apparent from the Code of Civil Procedure, an order passed in Misc. Appeal by the appellate court against an order of grant or refusal of the injunction by the trial court will not be revisable, therefore, the aggrieved party will have no

remedy except to file a writ petition under the superintending jurisdiction of the High Court under Article 227 of the Constitution of India.

13. It is profitable quote the observation of the Hon'ble Apex Court in **Jai Singh & Ors. v. Municipal Corporation of Delhi & Anr.** reported in **(2010) 9 Supreme Court Cases 385**, wherein the Hon'ble Apex Court has adjudicated the matter with regard to exercising power under Art. 227 of the Constitution of India and the relevant paragraph is extracted hereunder:-

"15. The High Court, under Art. 227 of the Constitution of India, has the jurisdiction to ensure that all subordinate Courts as well as statutory or quasi-judicial tribunals, exercise the powers vested in them, within the bounds of their authority the High Court has the power and the jurisdiction to ensure that they act in accordance with the well-established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this article is, in some ways, wider than the power and jurisdiction under Art. 226 of the Constitution of India. It is, however, well to remember the well-known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well-recognised constraints. It cannot be exercised like a "bull in a china shop", to correct all errors of judgment of a Court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice."

I am of the opinion that the preliminary objection taken by the opposite parties regarding maintainability of the writ petition under Article 227 of the Constitution of India shall not be maintainable at all is not tenable.

14. In case of **Gujarat Bottling Co. Ltd And Others Vs. Coca Cola Co. And Others** reported in **(1995) 5 Supreme Court Cases 545** the Apex Court observed the factors to be considered in exercise of discretion under Order 39 of CPC.

In the above referred case Hon'ble Apex Court observed *interalia* at paragraph 43 that:-

“The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the discretion the court applies the following tests - (i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injection is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against

injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the “balance of convenience” lies. In order to protect the defendant while granting an interlocutory injunction in his favour the Court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial.” (para 43)

15. Order 39 Rule 1 CPC indicates that wherein any suit, it is proved by affidavit or otherwise (i) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens, or intends, to remove or dispose of the property with a view to defrauding the creditors; (c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit; the court may grant an order of temporary injunction to restrain such acts. It has now been well settled that before a court grants a temporary injunction, it needs to be satisfied that a person seeking an injunction has a *prima facie* case in his favour and that the balance of convenience and possibility of irreparable injury being caused also lies in his favour. The word “*prima facie* case” apparently indicates something which at the first impression makes out a triable case. The term “*prima facie* case” should not be confused with the term “*prima facie* title” which has to be established at the trial upon permitting the parties to lead evidence. Thus, it

means a substantial question has been raised, which upon first sight needs to be investigated and decided on merits.

16. In view of the observations of the Hon'ble Apex Court I find that the dispute between the parties is a triable issue and it should not be decided at the time of disposal of injunction application. The First Appellate Court holds a mini trial as to whether the plaintiff has a *prima facie* case to hold the trial and almost decided the issue involved in the suit. By setting aside the order of status quo passed by the Civil Judge (Junior Division) the First Appellate Court has virtually decided the original suit which is not sustainable in the eye of law. The First Appellate Court in deciding the appeal in connection with Injunction application has *prima facie* decided that the plaintiffs have got no right, title, interest and possession over the suit property without following the tests as enumerated by the Apex court in the above referred case. In other word, the court should not examine the merits of the case closely at that stage because it is not expected to decide the suit finally.

17. I find that order to maintain status quo does not in any way affect any of the parties during pendency of the suit. As such without entering into merits of the disputes and further without discussing the three golden principles of granting temporary injunction this Court considering the pleading of the sides finds sufficient reasons to preserve the suit property till disposal of the Title Suit No. 356 of 1997 from any aggressive acts of the either side by way of passing an order of status-quo.

18. It appears that the First Appellate Court acted illegally and with material irregularity by reversing the finding of the Trial Court. The impugned order passed

by the First Appellate Court dated 27.08.2007 in connection with Misc. Appeal No. 151 of 2006 does not stand and it is set aside.

19. Accordingly, an order of status-quo with regard to the right of user of the petitioners over the suit property is passed till disposal of the suit pending before the trial court.

20. Accordingly, CO being no. 3566 of 2007 is hereby allowed and disposed of. Connecting application being no. CAN 1 of 2008 (Old No. CAN 1466 of 2008) and CAN 7 of 2022 fled by the opposite parties are hereby dismissed accordingly.

21. Since this is a very old case of 1997, the learned Civil Judge (Junior Division), 8th Court, Alipore is directed to expedite the hearing of the said case and to dispose of the same at the earliest without granting any undue adjournment to either of the parties preferably within six months from the date of communication of this order.

22. Let a copy of the order be sent down to the learned Court below for information and taking necessary action.

23. There will be no order as to costs.

Urgent Photostat certified copy of this order, if applied for be given to the parties on payment of requisite fees.

(Prasenjit Biswas, J.)