

Item no. 11

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

Present:

The Hon'ble Justice Hiranmay Bhattacharyya

CO 3392 of 2023

Md. Safiullah Ansari

Vs.

Iqbal Ansari & ors.

Appearance:

For the Petitioner : Mr. Anirban Bose
Mr. Chandrachur Biswas
Mr. Satyajit Senapati

For the opposite party no. 10 : Mr. Sanjay Saha

For the opposite party no. 15 : Mrs. Baishali Ghoshal

Heard on : 04.04.2024

Judgment on : 04.04.2024

Hiranmay Bhattacharyya, J.:

The defendants in a suit for partition has filed this application under Article 227 of the Constitution of India challenging an order being No. 16 dated 01.08.2023 passed by the learned Additional District Judge, Fast Track Court No. 1, Howrah in Misc. Appeal No. 63 of 2022 arising out of Title Suit No. 304 of 2021.

By the impugned order, the application under Order XXXIX Rule 7 of the Civil Procedure Code filed by the plaintiffs stood allowed. In the later part of the said order, the learned Judge of the Court below extended the interim order of injunction passed on 22.06.2022.

Mr. Bose, learned counsel appearing for the petitioner submits that a suit being Title Suit No. 347 of 2021 was filed by the present plaintiffs. On an application for temporary injunction, the learned trial Judge directed the parties to maintain status quo with regard to the joint possession in respect of the suit property and alienation of any part to any third party with the liberty to the parties to raise construction of a residential house without prejudice to the interest of the other co-sharers till disposal of the said suit.

One Kamal Ansari filed an appeal being FMAT 215 of 2023 challenging the said order dated 18.03.2023 passed by the learned trial judge in Title Suit No. 347 of 2021 and the Hon'ble Division Bench of this Court by an order dated 12.07.2023 disposed of the appeal by observing that there is no fetter on the part of the co-sharer in improving value of the property by making construction when the plaintiff/appellant has been enjoying the constructed area situated in the alleged joint property. Mr. Bose further submitted that since the petitioners herein were not allowed to make construction by the Hon'ble Division Bench of this Court in FMAT 215 of 2023, the learned Judge of the Court below ought not to have restrained the petitioners from making any construction on the suit property. He further submits that

the learned trial Judge was not justified in allowing the prayer for local inspection which was with a view to fish out the evidence.

Mr. Saha, learned counsel appearing for the opposite party no. 10 submits that the learned Judge of the Court of appeal below passed an order of injunction on 22.06.2022 and such order not having been challenged by the petitioner, this Court should not interfere with the order extending the said interim order of injunction. He further submits that since the petitioners were making illegal and unauthorized construction in the suit premises in violation of the order of injunction, the application for local inspection was filed and the same was accordingly allowed by the learned Judge of the Court below. He further submits that the Hon'ble Division Bench while allowing the petitioners to raise construction observed that such construction has to be in accordance with sanctioned plan.

Mrs. Ghoshal, learned counsel appearing for the opposite party no. 15 adopted the argument of Mr. Saha, learned counsel appearing for the opposite party no. 10.

Heard learned counsel appearing for the respective parties and perused the materials on record placed.

The Title Suit No. 304 of 2021 is a suit for partition wherein the plaintiffs have prayed for a preliminary decree for partition claiming 1/5 share in the suit property. In the said suit, an ex parte ad interim order of injunction was passed on 22.06.2021. The defendant no. 2 in the said suit filed an application under Order XXXIX Rule 4 of the Civil

Procedure Code alleging that prior to the institution of this Court, the predecessors-in-interest of the present plaintiff viz. Tasavur Ali already filed another suit being Title Suit No. 333 of 2019 together with some others against the present defendant no. 2 before the self-same Court praying for partition in respect of the self-same subject matter and said suit is still pending before that Court.

The learned trial judge while deciding the application under Order XXXIX Rule 4 of the Civil Procedure Code specifically recorded that even before Title Suit No. 333 of 2019 another suit being Title Suit No. 64 of 2019 was filed before the Court by the predecessors-in-interest of the present plaintiff viz. Tasavur Ali and some others in respect of the self-same suit property and some other properties which was ultimately dismissed by the judgment and decree dated 06.08.2010. The learned Judge further noted that the fact of dismissal of the Title Suit No. 64 of 2019 was suppressed in the subsequent suit being Title Suit No. 333 of 2019 brought at the instance of the self-same parties in which initially there was an ex parte interim order of injunction but the said interim order of injunction was vacated vide order No. 8 dated 27.09.2019 in Title Suit No. 333 of 2019 on the ground of suppression of the fact of dismissal of Title Suit No. 64 of 2019. The learned Judge observed that had the plaintiffs disclosed the fact of initiation of the earlier suit or the fact of vacating the order of injunction passed in Title Suit No. 333 of 2019, the Court would not have passed the ex parte interim order of injunction.

In the backdrop of such finding of fact, the learned Civil Judge (Senior Division), 2nd Court, Howrah by an elaborate order dated 21.03.2022, allowed the application filed by the defendants under Order XXXIX Rule 4 of the Civil Procedure Code thereby vacating the ex parte ad interim order of injunction dated 22.06.2021.

Challenging the said order dated 21.03.2022, the plaintiffs filed an Misc. Appeal being No. 63 of 2022 before the learned Additional District Judge, Fast Track Court No. 1, Howrah and an ex parte order of injunction was passed on 22.06.2021.

After the defendants/petitioners herein entered appearance in the said Misc. Appeal, it was pointed out by the defendants by placing materials before the Court that the said Kalam Ansari claiming himself to be the co-sharer of the suit property filed another suit being Title Suit No. 347 of 2021 involving the suit property seeking decree of declaration partition and an injunction and in the said suit, the application for temporary injunction was allowed on contest and an order directing the parties to maintain status quo with regard to joint possession alienating any part to the third parties was passed with liberty being given to the parties to raise construction of the residential house without prejudice to the interest of the other co-sharers. The petitioners also herein brought to the notice of the learned Judge of the Court below that the said order of temporary injunction was challenged before the Hon'ble High Court in FMAT 215 of 2023. The order of the Hon'ble Division

Bench was also brought to the notice of the learned Judge of the Court of appeal below.

Learned Judge of the Court below inspite of being made aware of the order passed by the Hon'ble Division Bench extended the interim order of injunction which was passed earlier on 22.06.2022 only on the ground that the order of temporary injunction has not been challenged as yet by the respondents.

It was the duty of the learned Judge of the Court below ought to have considered the effect of the order passed by this Hon'ble Court with regard to the right of the petitioner to raise construction before extending the interim order of injunction. The learned trial judge mechanically extended the order of injunction inspite of the fact that the petitioners being the respondents in the said Misc. Appeal brought to the notice of the Court the order of the Hon'ble Division Bench passed in an appeal arising out of another suit between the parties concerning the self-same property. This Misc. Appeal is against an order allowing an application under Order XXXIX Rule 4 of the Civil Procedure Code. In such an appeal, the appellate court has to consider only whether the learned trial judge was justified in vacating the interim order in exercise of powers conferred under Section XXXIX Rule 4 of the Civil Procedure Code.

It is no doubt true that the ad interim order of injunction was passed by the learned Court of appeal below prior to the order passed by this Hon'ble Court in FMAT 215 of 2023. However, when the

respondents in Miscellaneous Appeal have specifically made out a case of suppression of previously instituted suits concerning the self-same suit property and materials in support thereof were also produced and also that the order passed in FMAT 215 of 2023 was also brought to the notice of the Court below, the minimum that was expected was that the learned Judge would consider the effect of the said order of the Hon'ble Division Bench rather than mechanically extending the interim order of injunction on the ground that the initial order of injunction was not challenged.

An aggrieved party has two fold remedies against an ad interim order of injunction. The aggrieved party could have challenged such order before the higher forum or can approach the Court which passed the ad interim order and pray for vacating such order on the ground of suppression. The petitioners herein have adopted the second course and produced materials in support of this claim that the appellants in Misc. Appeal suppressed material facts.

The Hon'ble Division Bench after noting that every co-sharer has a right in every part of the property provided the said property is a joint property observed that there is no fetter on the part of the co-sharer in improving the value of the property by making construction. The Hon'ble Division Bench after noting that a substantial constitution had already come up held that it would not be proper to pass an order of temporary injunction restraining the defendants/respondents therein from completing construction to make it habitable.

It is not the case of the opposite parties herein that the suit property in T.S. No. 304 of 2021 was not the subject matter of T.S. No. 347 of 2021 out of which FMAT 215 of 2023 arose. This Court is, therefore, of the considered view that the ad interim order of injunction ought not to have been extended mechanically by the learned Judge of the Court of appeal below when the Hon'ble Division Bench permitted the petitioner to complete the construction.

The approach of the learned Judge of the Court below while extending the order of injunction is not acceptable to this Court and for such reason, this Court is inclined to interfere with the order impugned insofar as the extension of the interim order dated 22.06.2022 is concerned. The later portion of the impugned order dated 01.08.2023 extending the interim order of injunction passed on 22.06.2022 stands set aside.

At this stage, it would be relevant to take into consideration the submissions made by the learned counsel appearing for the opposite party no. 10 that the petitioner is making unauthorized and illegal construction in the said property. It does not appear from the impugned order that such allegation was made by the said opposite party or any of the opposite parties in the said Misc. Appeal. The order impugned is also silent in that regard.

Insofar as the order allowing the application for local inspection is concerned, this Court is of the considered view that the learned Judge of the Court below was right in allowing the said application as the same

is necessary to decide as to whether construction was made in violation of order of injunction. This Court is not inclined to interfere with the portion of the order impugned allowing the application for local inspection.

It has been uniformly submitted by the learned counsel for the parties that pursuant to the order impugned, local inspection has already been held and the report has already been submitted before the learned court below. It is observed that the report of the Commissioner is only the piece of evidence which will be considered by the learned court below alongwith the other evidences.

This order shall not prevent any of the parties from taking appropriate steps in that regard before the appropriate forum.

With the above observations and directions, this civil revisional application stands **disposed of**.

There will be no order as to costs.

Urgent certified photostat copy of this order, if applied for, shall be given to the parties as expeditiously as possible on compliance of all necessary formalities.

(Hiranmay Bhattacharyya, J.)