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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

FMAT 437 of 2023
with
CAN 1 of 2023

Sriranjan Bhattacharya
Vs.
Shibram Bhattacharya & Ors.

Mr. Soumik Ganguly, Advocate
Mr. Sanat Kumar Das, Advocate
Mr. Sujan Chatterjee, Advocate
Mr. Souparna Sinha, Advocate
Mr. Rohan Babishi, Advocate

.....for the Appellant

Mr. Avishek Prasad, Advocate
Mr. Souradeep Singha, Advocate

.....for the Respondent Nos. 1 & 2

1. It is a sordid state of affair that an application for temporary injunction is dismissed by the Trial Court solely on a technical ground in a suit for partition and separation of shares.
2. The plaintiff filed an application for temporary injunction and pressed the same before the Court for passing an *ex parte ad interim* order of injunction. It is undeniable that the *ad interim* order of injunction was passed by this Court and ultimately after the notices have been served upon the parties to the said suit, the application for temporary injunction was taken up for final hearing.
3. It is a specific stand of the contesting defendants who are represented before us that the suit is not only bad for non-joinder of necessary parties but is also for partial partition. According to the contesting defendants, several co-sharers who have

acquired the right, title and interest in respect of a joint property, have not been impleaded and/or arraigned as defendant in the said suit and several other properties which are owned and possessed by the heirs of the admitted owner is also not included in the hotchpot of the Schedule.

4. Such being the technical issue and available to the contesting defendants, the suit which not only appears to be defective in form but contains a fatal defect as neither the preliminary decree nor the final decree can be passed in absence of a co-sharer or in respect of some of the properties. Such defect is amenable to be cured by bringing the co-sharers in the category of parties to the proceeding and the left-out properties can also be brought within the hotchpot.
5. In fact, an application seeking addition of party was taken out. But we find that the parties are at variance so far as the person sought to be added as a party do not represent the entire estate for which we feel that the Trial Court will take care of the same as and when such issues are raised.
6. We do not find any fetter in law upon the Court to exercise the *suo motu* power in striking out the name of any of the parties or adding any party in a proceeding provided such parties are necessary and proper parties or unnecessarily have been impleaded therein.
7. Undeniably an application for addition of party and an application for appointment of a guardian to represent the minor are filed by the appellant which are still pending before the Court. The moment the Trial Court found that all the co-sharers are not

made party or all the joint properties have not been included to the schedule appended to the plaint, it is the first and foremost duty of the Court to decide such application before it embarks its journey on the peripheral of an application for temporary injunction.

8. There is no fetter on the part of the Court to give precedence to the application for addition of party so that all the co-sharers are brought in the suit and, thereafter, proceed to decide the application for temporary injunction. The application for temporary injunction may be suspended or kept in suspended animation for the time being until the aforesaid applications pending in the suit is decided.
9. Even if the suit is dismissed on such technical ground, there is no fetter in the law in bringing a fresh suit as the cause of action for partition is a recurring one. It will only encourage the new number and new year when all the averments made in the pleadings would remain the same. It will only encourage the delayed justice and, therefore, the Court must bear in mind that timely justice is the hallmark of dispensation in an adversarial adjudicatory system prevalent in the country.
10. We do not find that the Trial Court was justified in dismissing an application for temporary injunction keeping an application for addition pending.
11. We, therefore, **set aside** the impugned order and direct the Trial Court to fix a date for hearing of an application for addition of party as well as an application for appointment of guardian to represent the minor and in the event, it is found

that some of the co-sharers are not made party, there is no embargo in exercising the *suo motu* power enshrined under Order 1 Rule 10(2) of the Code of Civil Procedure.

12. In the event, the objection taken by the contesting defendants is taken care of and the suit is otherwise brought in form as all the infirmities are cured, the Trial Court shall proceed to decide the application for injunction on merit.
13. With these observations, the appeal being **FMAT 437 of 2023** and the connected application being **CAN 1 of 2023** are **disposed of**.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)