

Form No. J(1)
17.01.2024.
Item No.09
Ct. No.18.

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present :

The Hon'ble Justice Biswajit Basu

C.O. 3685 of 2023

Kamal Sardar
-Vs-
Devloke Developers Ltd. & Ors.

For the petitioner:

Mr. Aniruddha Chatterjee,
Mr. Tanmoy Mukherjee,
Mr. Souvik Das,
Mr. K. Raihan Ahmed,
Mr. Rudranil Das,
Mr. Soumava Santra.

For the opposite
party nos.1:

Mr. Saptangshu Basu,
Senior Advocate,
Mr. Prabal Kumar Mukherjee,
Senior Advocate,
Mr. Sounak Bhattacharya,
Mr. Basabraj Chakraborty.

Biswajit Basu, J. :

1. The instant revisional application under Article 227 of the Constitution of India is at the instance of the plaintiff in a suit for partition being Title Suit No. 112 of 2022 pending

before the 2nd Court of learned Civil Judge(Senior Division) at Baruipur, District-24 Parganas (South). The plaintiff in the suit had filed an application under Order XXXIX Rules 1 & 2 read with Section 151 of the Code of Civil Procedure praying an order of temporary injunction against the defendant no.1. The learned Trial Judge by the order dated May 10, 2023 had rejected the said application. The plaintiff's appeal against the said order being Miscellaneous Appeal No. 14 of 2023 was also dismissed by the impugned Judgment and order dated September 06, 2023 passed by the Court of learned Additional District Judge at Baruipur, District-24 Parganas (South).

2. The plaintiff is alleging that one Erfan Sardar had 1/5th share in the suit property, though his other co-sharers by the deed of sale dated December 10, 1953 had transferred the entire suit property in favour of the predecessor-in-title of the defendant no. 1 namely Fakir Chand Naskar but the share of the said Erfan Sardar in the suit property remains since he was not a party to the said deed. It is the further allegation of the plaintiff that the transfer of share of Washed Ali, the minor co-sharer, the predecessor-in-title of the defendants nos. 3 to 9 in favour of the said Fakir Chand Naskar since was not in

accordance with law, the said defendants also have undivided share in the suit property. Therefore, according to the plaintiff, the defendant no. 1, by virtue of purchase vide Sale Deed being no. 12071/08 dated December 05, 2008 has not acquired full title over the suit property. The plaintiff claims that his father, being the heir of said Erfan Sardar had inherited the said 1/5th undivided share in the suit property and by a Deed of gift bearing no. 160801711 of 2022 dated February 28, 2022 has bequeathed the same to the plaintiff, thus the plaintiff has acquired the said 1/5th undivided share in the suit property.

3. The defendant no. 1, on the other hand is alleging that the said Erfan Sardar, not being in possession of his said share in the suit property at the relevant point of time had lost his right, title and interest therein by operation of the West Bengal Estate Acquisition Act, 1953(hereinafter referred to as 'the said Act of 1953' in short) as such his name was not recorded in the R.S.R.O.R of the suit property. The defendant no. 1 claimed that after purchase of the suit property from the recorded owners on December 05, 2008, it not only has recorded its name in the L.R.R.O.R of the suit property but also is paying Municipal taxes upon recording its name in

respect of the purchased property with the records of the Rajpur Sonarpur Municipality. The defendant no. 1, with a view to construct a housing project, has purchased and amalgamated the lands adjacent to the suit property and has obtained permission from the concerned authority of the Government to convert those lands from Shali to commercial Bastu. The said defendant thereafter is executing construction of the said housing project upon obtaining sanctioned building plan from the concerned Municipality.

4. The Learned Trial Judge, considering the aforementioned facts and circumstances of the case in extenso has held that the plaintiff has failed to make out a case of prima facie right, title and interest in respect of the said 1/5th share in the suit property and has also failed to prove the requirements for grant of an order of temporary injunction in his favour. The Appeal Court below by the impugned judgment and order has affirmed the order of the learned Trial Judge on a finding that the plaintiff, in the absence of evidence in support of his claim that at the time the Act of 1953 came into force, his predecessor-in-interest, Erfan Sardar was in joint possession of the suit property and in the absence of any steps taken by

him to rectify the entries in the subsequent record of rights of the suit property at any stage before the filing of the suit, is not entitled to the protection of an order of temporary injunction. The appeal Court below has held that challenge to the transaction between the said minor Washed Ali and said Fakir Chand Naskar is barred by limitation, since the said minor, to get the said sale deed declared void to the extent of his share in the suit property, did not file any suit within the prescribed period of limitation i.e. after attaining majority.

5. Mr. Aniruddha Chatterjee, learned advocate for the petitioner submits that it is undisputed that the name of Erfan Sardar was recorded in the C.S.R.O.R of the suit property, admittedly he was not a party to the deed dated December 10, 1953 by which Fakir Chand Naskar claimed to have purchased the suit property, therefore the defendant no. 1 cannot claim title over the entire suit property on the purchase from the successors-in-title of the said Fakir Chand. He further submits that both the Courts below have failed to appreciate that prima facie case, and not the prima facie title is the consideration while dealing with an application for injunction and in support of his said contention, he places reliance on the decision of the

Hon'ble Supreme Court in the case of **DALPAT KUMAR AND ANOTHER vs. PRAHLAD SINGH AND OTHERS** reported in **(1992) 1 SUPREME COURT CASES 719**. Mr. Chatterjee next cites the decision of the Hon'ble Supreme Court in the case of **GANGUBAI BABLYA CHAUDHARY AND OTHERS vs. SITARAM BHALCHANDRA SUKHTANKAR AND OTHERS** reported in **(1983) 4 SUPREME COURT CASES 31** to contend that if the defendant no. 1 is allowed to complete the construction over the suit property, the situation would become irreversible by the time the rights of the parties would be decided in the suit but both the learned Courts below have failed to appreciate it and thereby have committed jurisdictional error in not allowing the application of the plaintiff for an order of temporary injunction.

6. Mr. Saptangshu Basu, learned senior advocate for the defendants, on the other hand submits that both the Courts below, on facts have concurrently found that none of the conditions for grant of an order temporary injunction is in favour of the plaintiff, such finding cannot be interfered with in revision under Article 227 of the Constitution of India, in support thereof he places reliance on the decision of the

Hon'ble Supreme Court in the case of ***ECE INDUSRIES LIMITED vs. S.P. REAL ESTATE DEVELOPERS PRIVATE LIMITED AND ANOTHER*** reported in **(2009)12 SUPREME COURT CASES 776**. To support the contention that the plaintiff has lost his title over the suit property by operation of the said Act of 1953, he places reliance on the decision of the Hon'ble Division Bench of this Court in the case of ***BENODE BEHARI GHOSAL vs. SHEW KAMAL SINGH AND OTHERS*** reported in **(1983) 2 CHN 98**.

7. Having heard the learned counsel for the parties and on perusal of the materials-on-record, this Court finds that the claim of plaintiff is wholly based on the entry of the name of his predecessor-in-interest, one Erfan Sardar in the C.S.R.O.R. of the suit property, it is settled position of law that record of rights is not a document of title, however, it carries rebuttable presumption regarding the possession of the recorded person over the property recorded therein. It is an equally settled position of law that when there is a conflict between the recording between the earlier record of rights and the latter record of rights, the recording in the latter record of rights will prevail.

It is an admitted position that the defendant no. 1 after purchase of the suit property has recorded its name in the latter record of rights of the suit property i.e. R.S.R.O.R. and L.R.R.O.R., no attempt has been made by the plaintiff to record his name against his alleged share in the suit property in such record of rights, the effect of failure of the plaintiff to bring sufficient material to substantiate his claim of possession over the suit property disentitles him to get an order of temporary injunction to protect his alleged possession over the suit property, as such the learned appeal Court below has not committed any error in refusing the same.

The decision of the Hon'ble Supreme Court cited on behalf of the petitioner in the case of **DALPAT KUMAR AND ANOTHER (supra)** lays down that the 'prima facie case' and not the 'prima facie title' is the relevant consideration in granting or refusing the prayer of injunction but the 'prima facie case' is a substantial question raised bona fide which needs investigation and a decision on merits. The existence of prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction.

The plaintiff has failed to bring any material on record

evidencing his right or possession over the suit property except the C.S.R.O.R. which is not sufficient to establish such 'prima facie right'. It is also an admitted position that the defendant no. 1 after purchase of the suit property in the year 2008, has mutated its name with the concerned Municipality and has obtained sanction plan for construction of housing project on the suit property, on the said score the balance of convenience and inconvenience also does not lie in favour of the plaintiff in granting the order of temporary injunction restraining the defendant no. 1 from changing the nature and character of the suit property.

The argument of Mr. Chatterjee that allowing the defendant no. 1 to continue with execution of the construction work over the suit property would render the situation irreversible alone is no ground to injunct the defendant no. 1 from carrying on with his project. However, the issue whether the predecessor-in-interest of the plaintiff, for not being in possession of the suit property at the relevant point of time has lost his title is a question to be determined in the suit itself as such, is not a relevant issue for the purpose of deciding the application for injunction.

This Court, for the aforesaid reasons, does not find any

illegality and/or irregularity in the concurrent findings of the learned Courts below warranting interference in the order impugned.

C.O. 3685 of 2023 is therefore **dismissed** without any order as to costs.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAJIT BASU, J.)

A.J.