

08 **27.02.**
2024

Ct. No. 04

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FMAT 522 of 2023
IA No. CAN 1 of 2023

Prem Kumar
Vs.
Sikha Rani Das and others.

Mr. Partha Pratim Roy,
Mr. Dyutiman Banerjee.
... for the appellant.

Mr. Tanmoy Mukherjee,
Mr. Souvik Das,
Mr. K. Raihan Ahmed,
Mr. Rudranil Das,
Mr. Tapas Chatterjee.
... for the respondent no. 1.

The instant appeal arises from an order whereby and whereunder an application under Order XXXIX Rule 4 of the Code of Civil Procedure filed by the respondent no. 1 herein is allowed on contest with a permission to complete the construction at the suit plot no. 2157 without claiming any equity. Simultaneously, the trial court also modified the order of injunction granted on 12th July 2022 to the extent that both the parties shall maintain the *status quo* in respect of the possession of the 'ka' scheduled property.

Admittedly, the plaintiff/appellant filed a suit for partition and separation of shares alleging that the property described in the schedule is a joint property and the parties are the co-sharers and co-owners thereof. The right, title and interest is claimed by the appellant on the strength of a deed of gift executed by his father, which, according to the respondent no. 1, is restricted to 2 decimals of land whereas the said respondent no. 1 has a 16 decimals of land in respect of a larger property.

Interestingly, the father of the appellant instituted an earlier suit for partition and separation of shares

being Title Suit No. 41 of 2012 and sought for a temporary injunction in the similar fashion as has been sought in the instant suit. In the earlier suit filed by the father of the appellant, an ad interim order of injunction was granted in respect of 'ka' scheduled property, which, according to the respondent no. 1, does not include the portion of the land enjoyed, occupied and possessed by the respondent no. 1. However, at the time of disposal of the application for temporary injunction, the said ad interim order of injunction was extended to the entire property.

Subsequently, an application for vacation/variation and/or modification of the said order was taken out by the respondent no. 1 therein and the Court thereafter allowed the said application meaning thereby the order of temporary injunction was not extended to the portion of the land claimed by the respondent no. 1.

Amidst the pendency of the said suit, the father of the appellant executed a deed of gift in favour of the appellant and on the strength of the right, title and interest acquired as donee, the present suit is filed for partition and separation of shares.

Obviously, the application for temporary injunction was disposed of directing the parties to maintain *status quo* in respect of the entire property, which includes the portion occupied, possessed and enjoyed by the respondent no. 1. Subsequently, an application for variation/vacation and/or modification of the order of temporary injunction was taken out taking the multiple grounds including that the construction, which has been ensued by the respondent no. 1, is on taking benefit of the scheme floated by the Central Government known as "Pradhan Mantri Awas Yojana". It was contended in the said application for modification and variation of the said

order that if the order of *status quo* is not varied and/or modified, the benefit under the said Scheme shall be lost.

The trial Court after taking note of all the antecedents in respect of the scheduled property modified the interim order to the extent as indicated herein above and permitted the respondent no. 1 to complete the construction.

Though the instant appeal was admitted but there was no order of stay granted by this Court and it is undeniable that the construction has seen a substantial progress and according to the respondent no. 1 is virtually at the fag end of its completion.

Without going into the nuances of the provisions contained under Order XXXIX Rule 4 of the Code whether the respondent no. 1 has been able to make out a case envisaged therein, we feel that the conduct of the parties in relation to the litigation should also be taken into account and there is no fetter on the part of the Court exercising the equitable jurisdiction to take such aspect into consideration. The father of the appellant, who had the right, title and interest in respect of the shares held in the undivided property could not succeed in getting the injunction in respect of the portion claimed by the respondent no. 1 and clandestinely gifted the said property to the present appellant being the son, which augments the institution of the instant suit claiming the similar and identical relief and more comprehensive injunction against the respondents.

At the very outset, we must record that the Court should be slow and circumspect in granting the order of *status quo*, more particularly, when the possession is highly disputed. The Court while embarking its journey in passing the order of *status quo* to be maintained in respect of a property must specify the respective

possession of the parties as such order being ambiguous in nature is susceptible to be misused in the hands of an unscrupulous litigant. Furthermore, a co-sharer has every right in respect of every part, be it miniscule or otherwise, of the entire undivided property and the respective possession is deemed to be a possession on the strength of such undivided shares as well as on behalf of the other co-owners/co-sharers unless any of the co-sharers claimed exclusion of the others.

Undeniably, the present appellant derived title on the strength of the deed of gift executed by his father, who is still pursuing his remedy of partition and separation of sharers in an earlier instituted suit. The multiplicity of the suit is evident and the motive is laudable. The Court exercises the equitable jurisdiction in considering the application for temporary injunction as an order pending the final adjudication in the suit is to protect the interest of the parties and the property being the subject matter thereof.

The fact remains that the father through whom the present appellant derived title on the strength of a deed of gift could not succeed in securing the order of injunction in respect of a portion occupied and enjoyed by the respondent no. 1. It is an apparent attempt on the part of the present appellant to thwart the order of injunction passed in a suit filed by his father and an attempt to unjust enrichment upon the rights of the co-sharers.

Though it is sought to be contended before us that the aforesaid Scheme contemplates certain eligibility criteria and the extent of construction to be made thereunder, but we do not find that there is any absolute embargo created therein. Even apart, it is open to the appellant to take appropriate steps before the authorities

concerned and ventilate his grievance, as we feel that the same cannot be a ground to set aside the impugned order passed in exercise of the discretion vested upon the Court and on the sound principles of law.

We, thus, do not find any infirmity and/or illegality in the impugned order.

The appeal is dismissed.

In view of the dismissal of the appeal itself, the connected application being CAN 1 of 2023 has become infructuous and the same is also dismissed.

There shall, however, be no order as to costs.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)