

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

Appellate Side

Present:

The Hon'ble Justice Harish Tandon

And

The Hon'ble Justice Madhuresh Prasad.

MAT 2518 of 2023

With

IA No. CAN 1 of 2023

IA No. CAN 2 of 2024

IA No. CAN 3 of 2024

Rabindra Nath Dolai and others

Vs.

State of West Bengal and others.

For the Appellants

**: Mr. Uday Narayan Betal,
Mr. Bhaskar Hutait,
Mr. Dilip Kumar Shyamal.**

For the State

**: Mr. Arindam Chattopadhyay,
Ms. Lipika Chatterjee.**

For the Respondent No. 7

**: Mr. Lakshmi Nath Bhattacharya
Mr. Rajib Kumar Acharyya,
Mr. Banshi Badan Maity,
Mr. Goutam Malik.**

Heard on :

Judgment on : 2nd April 2024.

The Court:

Re: CAN 1 of 2023.

This is an application for condonation of delay in preferring the instant appeal beyond the period of limitation provided therefor.

After perusing the averments made in the instant application and upon hearing the respective Counsels, we are satisfied that the appellants were prevented by sufficient cause in not preferring the instant appeal within the statutory period of limitation.

Accordingly, the application for condonation of delay being CAN 1 of 2023 is allowed. The delay in preferring the instant appeal is hereby condoned.

The office is directed to formally register the appeal.

By the consent of the parties, the appeal is taken up for hearing.

It is really a sordid state of affairs that the dispute, which is purely of civil nature, is sought to be entertained exercising the jurisdiction under Article 226 of the Constitution of India and activating the Police Administration in achieving something, which can only be perceived in a civil proceeding.

Indubitably, the property is conjointly owned by the appellants as well as the writ petitioner/respondent. There appears a dissent on the possession as the writ petitioner/respondent claimed an exclusive possession in respect of a portion occupied by her, whereas the appellants contend that the larger property has not been partitioned by metes and bounds and, therefore, the possession of a co-sharer in respect of a joint property is the possession not only in commensurate with the share held by either of the parties but on behalf of the other co-sharers.

We do not find any quarrel to such fundamental principles relating to the rights of the co-sharers in respect of a joint property. We are also not unmindful of the fact that a co-sharer can claim an exclusive right and the possession provided he pleads an ouster. We do not find that any civil proceeding has been lodged relating to a

claim by the writ petitioner/respondent for an exclusive right in respect of a portion occupied by her.

A writ petition came to be filed for issuance of the Mandamus upon the respondent authorities to take suitable and appropriate measures on the basis of the complaint lodged by the writ petitioner/respondent.

In course of hearing, it appears from the stand of the writ petitioner/respondent that the building materials stacked at the property for the purpose of construction have been damaged and/or diminished by the act of the appellants for which the complaint was lodged, which was subsequently registered as First Information Report and the Police has also submitted the charge-sheet.

So far as the prayer (a) is concerned, we do not find that the learned Single Judge has passed any direction in this regard in the impugned order, which it could have been passed provided the Court is satisfied that the respondent authorities have failed to discharge their duties and/or reluctant to take further steps in this regard.

The order impugned relates to a direction upon the Police Authorities to render all necessary assistance to ensure that the writ petitioner/respondent is able to effect construction on her property. What could be perceived from the ultimate direction passed in the impugned order that the Single Bench was apprised of the fact that a civil proceeding filed by the appellants ended in dismissal and an appeal therefrom was also dismissed. There is no reflection in the impugned order on the nature of the civil proceeding initiated by the appellants in respect of the said property.

However, in course of the arguments, both the Counsels are *ad idem* on the fact that the expression “civil proceeding” connotes a proceeding initiated under Section 8 of the West Bengal Land Reforms Act, 1955 (hereinafter referred to as ‘said Act’), which was

dismissed by the Trial Court. The provisions contained under Section 8 of the said Act postulate that in the event a co-sharer transfers the portion or share in respect of a plot of land to a third party, the right of the co-sharer to apply for preemption is well recognized. Since it is a case of a co-sharer, the rights of Bargadar or the adjoining owner need not be considered. It further appears in course of hearing that the said proceeding was dismissed for non-compliance of a mandatory provision of depositing the consideration price together with 10 percent over and above the same. The Appellate Court also dismissed the said proceeding and it is a stand of the appellants that the revisional application before this Court is pending.

Be that as it may, we are concerned with the finding of the Trial Court whether the dismissal of the civil proceeding and the appeal can have any bearing in relation to the relief granted in favour of the writ petitioner/respondent to continue or making a construction with the assistance and help of the Police Authorities.

The right of preemption enshrined in the statute, though a weak right, does not have any impact on the right, title and interest of a co-sharer in respect of a joint property. Dismissal of an application under Section 8 of the said Act co-relates to a right of preemption but does not extinguish the right, title and interest as a co-sharer. Therefore, dismissal of the civil proceeding cannot be operated against the appellants as elevation of the right as a co-sharer in respect of a joint property.

We have no hesitation in our mind that the appellants being the co-sharers have a right, title and interest conjointly with the other co-owners in respect of a joint property to the extent of the shares, which they held therein.

A plea is sought to be taken that a co-owner/co-sharer has a right to make construction over the joint property and, therefore, any

obstruction, which is created by the other co-sharers, there is no fetter on the part of the Writ Court to issue a Mandamus upon the authorities to render Police assistance.

We have no quarrel to the first proposition that the co-sharer can make construction in respect of a joint property but subject to certain conditions that if it is found by the Court that the best portion of the property is sought to be constructed, we do not find any impediment on the part of the Court to pass an injunction against such co-sharer.

So far as the right of making construction under a Scheme of the Government is concerned, we cannot accept that the beneficiary of such Scheme shall elevate its status over the other co-sharers. All the co-sharers having shares in common remained in same position and any benefit of the Scheme floated by the Government is availed of, it is subject to the scrutiny of the invasion of the rights of the other co-sharers.

The question of granting a permission to construct depends upon the various factors and the facts to be pleaded, more particularly, the facts relating to a claim of ouster of the other co-sharers to the exclusion of the applicant. In absence thereof, the blanket order of granting Police assistance has a cascading effect and to overshadow the rights of the other co-shares to object.

Since the dispute relating to a joint property is purely civil in nature and we have given to understand that the appellants have approached the Civil Court by filing a suit for partition and separation of shares, we do not find that the Writ Court should transgress the well defined self-restriction in exercising the powers and directing the construction to be undertaken under the assistance and help of the Police Administration. Furthermore, without adjudicating the right, which, in fact, is required to be

adjudicated in the civil proceeding, the Court cannot convert itself into an Executing Court in absence of any separation of right, title and interest in the property.

We are not unmindful of the proposition of law that there cannot be any absolute bar in exercising the power enshrined under Article 226 of the Constitution of India even if there is an alternative remedy provided therefor. However, the Courts have imposed self-restriction in exercising such powers and in a given case may refuse to exercise such discretion. It is not a rule of compulsion but of discretion and if the discretion is found to have been exercised not in judicial manner, there is no fetter on the part of the Appellate Court to interfere with the said order.

The order impugned is, therefore, cannot be sustained and the same is hereby set aside. As a consequence whereof, the writ petition filed by the respondents is dismissed.

However, dismissal of the writ petition shall not stand in the way of ventilating the grievance before the appropriate forum and none of the observations shall have any persuasive impact therein.

With these observations, the appeal and the connected applications are disposed of.

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

(Harish Tandon, J.)

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(Madhuresh Prasad, J.)

