

Ct. No. 10.07
3 2024
66
akb

IN THE CIRCUIT BENCH OF CALCUTTA
HIGH COURT AT JALPAIGURI
Civil Revisional Jurisdiction

C.O. 98 of 2024
Achintya Paul
-Versus-
M/s. Kanchanjangha Nursing
Home Pvt. Ltd. & Anr.

Mr. Kunaljit Bhattacharjee
Mr. Dipankar Sen
Ms. Payel Choudhury ...For the Petitioner

Mr. Amritam Mandal
Mr. Partha Chaudhury
Mr. Anirban Banerjee
Mr. Subrata Sarkar
Mr. Saumyajit Laskar ...For the Opposite Party No. 2

Affidavit-of-service filed on behalf of the
petitioner is taken on record.

Both the parties are represented.

Petitioner submits that he filed Title Suit, being
No. 149 of 2024 against the defendant and in the said
suit he has also prayed for interim injunction against the
defendant Nos. 1 and 2. Learned Court below by an
order dated 1st March, 2024 was pleased to grant ad
interim injunction restraining the defendants from
causing interference in the peaceful possession of the
plaintiff and also restrained them from encroaching any
portion of the suit property forcibly and this ad interim
order was passed for a limited period till 4th April, 2024.

In the meantime, defendant opposite party No.
2 appeared on 11th March, 2024 and also filed an

application under Order XXXIX, Rule 4 of the Code of Civil Procedure with a prayer for vacating the aforesaid injunction order contending that the defendant is going on construction on his own land and said land is not even adjacent to the plaintiff's land and as such plaintiff has no cause to enjoy any injunction order in respect of the suit property.

The main grievance ventilated in the present application is that learned Court below without informing the plaintiff suddenly fixed the defendants said application under Order XXXIX, Rule 4 for hearing on 13th March, 2024. Learned Counsel appearing on behalf of the petitioner submits that they were informed that the next date will be on 4th April, 2024 but the Court below fixed next date on 13th March, 2024 and without giving any opportunity to the plaintiff, hear out defendants prayer ex parte and vacated the ad interim order of injunction with observation that record reveals that plaintiff's land and defendants' land is different and as such he held that the plaintiff would not be prejudiced, if defendant No. 2 will be allowed to go on raising construction as per sanctioned plan.

Being aggrieved by that order, learned Counsel appearing for the petitioner submits that from the order

impugned, being order No. 3 dated 11th March, 2024 it reveals that initially the date was fixed on 4th April, 2024 in terms of order No. 2 dated 1st March, 2024 but subsequently the said date was struck off and the next date was fixed on 13th March, 2024 for hearing and for which they were not aware about fixing next date on 13th March, 2024 and this is the reason why the plaintiff remained unrepresented on the date of hearing of the application under Order XXXIX, Rule 4 of the Code on 13th March, 2024, and accordingly it is submitted that they may be given an opportunity to contest the said application before the Court below so that the matter may be disposed of on merit, after hearing both the parties.

Mr. Amritam Mandal, earned Counsel appearing on behalf of the opposite party No. 2 raised strong objection contending that this is an application preferred against an order passed in connection with an application under Order XXXIX, Rule 4 of the Code. He further submits that order XLIII, Rule 1(r) of the Code clearly prescribes that if a person is aggrieved by an order passed in connection with an application under Order XXXIX, Rule 4 of the Code, his remedy is to prefer an appeal before the Appellate Forum. Since, in the present context, the petitioner has equal efficacious

remedy before the Appellate Forum, the present application before this Court is not maintainable and is liable to be rejected in limine.

He further submits that the submission made by the plaintiff/petitioner that the next date i.e. 13th March, 2024 was fixed behind their back, is an incorrect submission and the truth is said next date was fixed in their presence.

I have considered the submissions made on behalf of the parties. There is no quarrel with the proposition of law that the power under Article 227 of the Constitution of India cannot be taken as right of another appeal to the aggrieved party but that does not mean, since there is provision for preferring Appeal against order impugned, High Court's supervisory jurisdiction under Article 227 cannot be exercised in appropriate cases when apparently it is seen that failure of justice had occasioned. In the present context what I find from submissions is that whether plaintiff was informed or not about the next date of hearing, fact remains that when the application filed by defendant No. 2 under Order XXXIX, Rule 4 was heard and disposed of on 13th March, 2024, the plaintiff was not represented and most importantly impugned order was passed with a preconceived notion that plaintiff will not be prejudiced

if defendant No. 2 is allowed to raise construction as per sanctioned plan.

Having considered the facts and circumstances of the case I find that justice would be subserved if the Court below is directed to hear and dispose of plaintiff's injunction application along with defendant's application under Order XXXIX, Rule 4 afresh, after giving opportunity to both the parties to contest.

Thus the present Application, being C.O. 98 of 2024 is hereby disposed of with a direction upon the Court below to hear and dispose of the plaintiff's injunction application and defendants application filed under Order XXXIX, Rule 4 of the Code afresh preferably within a period of six weeks from the date of communication of the order after giving opportunity of hearing to both the parties to contest.

The impugned order No. 4 dated 13th March, 2024 is accordingly set aside. I also made it clear that I have not gone into the merits of the injunction application or the prayer made in the application under Order XXXIX, Rule 4 and the Court below will dispose of both the application without being influenced by any observations made herein.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis,

upon compliance of all formalities.

(Ajoy Kumar Mukherjee, J.)