

AD-25
Ct No.16
06.02.2025
TN

FMAT 37 of 2025
IA No: CAN 1 of 2025

Sri Dipak Samanta
Vs.
Sri Biswajit Ray

Mr. Susenjit Banik,
Mr. Pappu Adhikari

....for the appellant

Ms. Malyasree Maity

....for the respondent

1. The learned Advocate-on-record for the appellant shall carry out the necessary correction to the preamble of the Memorandum of Appeal, by inserting the name of the learned Trial Judge, in order to cure the defect as pointed out by the Additional Stamp Reporter, during the course of the day.
2. Affidavit-of-service filed today be kept on record.
3. The appeal is taken up for hearing under Order XLI Rule 11 of the Code of Civil Procedure.
4. One of the defendants in a partition suit has preferred the present appeal against an order whereby the appellant's application under Order XXXIX Rule 4 of the Code of Civil Procedure for variation/vacating of an order of temporary injunction has been dismissed.
5. Learned counsel for the appellant argues that the appellant has substantially constructed on a demarcated portion of the suit property which was

transferred to the appellant by one of the co-owners of the property, for which a sanction plan was obtained as long back as in the month of September, 2022. Construction was started since October, 2022 but the plaintiff sat tight over the matter and filed the suit only on January 16, 2023. Even thereafter, the plaintiff did not make any application for injunction before February 01, 2023.

6. Thus, having permitted the defendant/appellant to carry on with his construction upon obtaining due sanction plan, the plaintiff ought not to have been granted an injunction order.
7. That apart, it is argued that undue hardship of the plaintiff arises from the fact that the plaintiff has invested much in getting the sanction plan and having accumulated building materials on the plot of land, which would also deteriorate in the event the *status quo* is permitted to continue.
8. Learned counsel further submits that the learned Trial Judge based his order on irrelevant circumstances to the effect that the plaintiff has other alternative properties, which does not have any bearing on the present matter.
9. Learned counsel cites two coordinate Bench judgments of this court, reported respectively at *2011 SCC OnLine Cal 5445 (Sri Sailendra Nath Patra vs. Smt. Geetanjali Manna & Ors.)* and *2018 SCC OnLine*

Cal 4029 (Ashraf Jamil vs. Nishat Anjum & Ors.), as well as a judgment of the Hon'ble Supreme Court reported at *(2008) 11 SCC 1 (Mandali Ranganna and others vs. T. Ramachandra and others)*, in support of his contentions.

10. It is argued that in similar circumstances, the court, in the said cases, had permitted construction to be completed.
11. We find from the impugned order that the learned Trial Judge has adverted to several facets of the matter.
12. In the present case, after having suffered an order of temporary injunction, which was passed on contest as long back as on February 01, 2023, the present application under Order XXXIX Rule 4 of the Code of Civil Procedure has been filed by the appellant more than one year thereafter, that is, on February 15, 2024, claiming undue hardship.
13. The learned Trial Judge also considered the aspect that in view of the pendency of an application under Order XXXIX Rule 2A of the Code of Civil Procedure alleging violation of the temporary injunction order granted against the appellant, an order vacating the injunction order might create complications.
14. We, in fact, cannot rule out the possibility of the vacating application having been filed only upon the appellant being subjected to the risk of contempt

under Order XXXIX Rule 2A, which is also evident from the fact that the vacating application was filed more than one year after the injunction order being passed.

15. More importantly, the “undue hardship” which is now pleaded by the appellant was also available to the appellant at the juncture when the parent order of temporary injunction was passed. The appellant, having not challenged the said injunction order by way of an appeal and having let the same attain finality, cannot now re-agitate the self-same ground of undue hardship which was available to the appellant at that juncture itself, to seek a variation of the contested temporary injunction order.
16. Also, in the same tune, we find that there is no change of circumstance, as rightly observed by the learned Trial Judge, to justify varying or vacating the contested order of injunction.
17. Insofar as the Division Bench judgment of this court in the matter of *Sri Sailendra Nath Patra* (supra) is concerned, with utmost respect, although the Division Bench held that even otherwise than the parameters set out in Order XXXIX Rule 4 of the Code of Civil Procedure, the court can vacate or vary an order of injunction if satisfied that it requires variation for the interest of justice, in order to satisfy such test, which would otherwise be patently

contrary to the specific provisions of Order XXXIX Rule 4, within the limited conspectus of which a vacating order can be passed, the person seeking such variation has to satisfy a very high ground. We do not find any such case having been made out in the present context.

18. Moreover, in the said case, not only had construction been made substantially, the concerned portion of the property had been demarcated by boundary wall.
19. In the present case, we do not find any such circumstance to necessitate a vacating of the temporary injunction order passed on contest.
20. In the case of *Ashraf Jamil* (supra), the Division Bench, as a general proposition, held that the right of a co-owner to develop a joint property is well established. However, the context in which the said order was passed was that a super structure of a G+3 storied building was almost complete and stopping the construction at such final stage would cause more hardship than it would alleviate.
21. In the present case, however, we find from the report of the Advocate Commissioner, which is also part of the records, that only certain pillars have been installed on the property and certain iron tie rods have been put thereon. Hence, the proposed construction is still at an inchoate stage, although

the appellant alleges that the sanction plan was obtained more than two years back, in the year 2022.

22. Thus, we do not find as to why the appellant suddenly woke up from his slumber after having suffered the injunction order for a period of one year, despite having not made substantial progress in the construction, by filing the vacating application. We do not find any other reason for such filing than to avoid the imminent consequences of the Order XXXIX Rule 2A application.
23. Insofar as the judgment of the Supreme Court in the matter of *Mandali Ranganna* (supra), cited by the appellant, is concerned, in the said case, the Supreme Court was dealing with grant of injunction under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure which stands on a completely different footing than an order being passed under Order XXXIX Rule 4 of the Code.
24. In the former case, it is for the first time that the court is considering the balance of conveniences between the parties and other yardsticks such as irreparable injury whereas in the case of the latter, an injunction order (here, contested) having already been passed, the scope of scrutiny of the court is extremely limited. Only in the case of change of circumstances and undue hardship can an

injunction order granted on contest be varied or modified or set aside.

25. Thus, the tests applied in the said judgment by the Supreme Court are not at all germane in the present context.
26. Moreover, in the said case, at the injunction stage itself, it was observed by the Supreme Court that since a construction has come up it would be detrimental and costly to direct demolition of the same at that stage since three crores of rupees had been spent by the person who had constructed the same.
27. We do not find any such materials before us; more so, since the temporary injunction order has survived a year without any challenge thereto at the behest of the appellant.
28. Furthermore, although a sanction plan was obtained as long back as in the year 2022, no substantial progress in construction has yet been made by the defendant/appellant to justify his plea of undue hardship.
29. As such, this court is of the opinion that the impugned order of the learned Trial Judge is justified on every count and, as such, there is no scope of interference with the same.

30. Accordingly, FMAT 37 of 2025 is dismissed under Order XLI Rule 11 of the Code of Civil Procedure. CAN 1 of 2025 is consequentially dismissed as well.
31. There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)