

31.07.2025
Item No. 14.
Court No.37.
AB

(Bench ID 266311)

**F.M.A. 570 of 2025
With
CAN 1 of 2025**

**Nirmala Malhotra & Anr.
Vs
Indira Khanna & Ors.**

Mr. Abhratosh Majumdar, Sr. Adv,
Mr. Dhiraj Trivedi, Sr. Adv,
Mr. P. P. Roy,
Mr. R. K. Dubey,
Mr. Samrat Chakrabortyfor the Appellants.

Mr. Subhankar Nag,
Ms. Priyanka Tibrewal,
Ms. Rashhmi Singhee
.....for the Respondent No.1 & 2.

Dictated by Arijit Banerjee, J.

1. Affidavit of service filed in Court today, be kept with the records.
2. By consent of the parties, the appeal and the connected application are taken up for hearing together.
3. This appeal is directed against an order dated December 7, 2024, passed by the learned 4th Civil Judge (Sr. Division) at Alipore in Title Suit No.416 of 2008. The present appellants are defendant nos.2 and 3 in the suit.
4. The suit is one for partition of joint properties. It was instituted in 2008. An order of status quo was passed which was affirmed sometime in the year 2017.

5. The defendant nos.2 and 3, in or about December, 2024, made an application before the learned Trial Court for variation or modification of the order of status quo to permit the said defendants to install a home elevator from the ground floor to the top floor of the building without any provisions of any pit on the ground floor, but with emergency exit points on the other floors of the said building.
6. The plaintiff opposed such application.
7. By the order impugned, the learned Trial Court rejected the application made by the defendant nos.2 and 3 under Order 39 Rule 4 of the Code of Civil Procedure. The operative portion of the impugned order reads as follows:

“Defendant no.3 files the instant application on 18.08.2023 and praying for installation of a home a elevator by modifying the order of injunction dated 14.07.2017 by invoking the provision as laid down under Rule 4 to Order 39 CPC read with Section 151 CPC.

The scope of an application of Rule 4 to Order 39 CPC is regarding discharge, variation of an injunction order which has been passed ex parte and if the injunction order has been obtained by making a false or misleading statement in relation to a material particular.

From the instant application of defendant no.3, there is no such allegation leveled regarding any misleading statement by plaintiff in obtaining the order of the temporary injunction till disposal of the suit and therefore, no question to invoke the provision as contained in Rule 4 to Order 39 CPC will arise.

Secondly, the instant application of defendant no.3 do not contain any description of property on which the

installation of a home elevator has been sought for and thirdly, the question of installation of a home elevator from the ground floor to the top floor of the building is not the subject matter of this suit and therefore, no question to allow the prayer of defendant no.3 is arising and the instant application is thus not maintainable.

At the time of hearing Ld. Advocate representing defendant nos.2 and 3 has pointed out about submission of Engineer Commission report pertaining to this suit but the said report has no relevancy in view of aforesaid findings of the Court.

Therefore, the instant application of defendant no.3 is devoid of any merit and is not maintainable and is liable to be rejected.”

8. We have heard learned Counsel for the parties.
9. Mr. Majumdar, learned senior advocate representing the appellants, says that the learned Trial Judge completely misdirected himself in not considering the provisos to Order 39 Rule 4 CPC. It is not that only if an order is obtained by misrepresentation of fact or fraudulently that the same can be discharged or varied. Change of circumstances may also justify or necessitate variation or modification of an interim order. He further says that the defendant nos.2 and 3 are both octogenarians and have serious difficulty in moving around or climbing floors. Installation of a home elevator is absolutely essential and has also been medically prescribed. In this connection, we may note Order 39 Rule 4 CPC, which reads as follows:

“Order for injunction may be discharged, varied or set aside – Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

[Provided that if in an application for temporary injunction or in any affidavit support such application a part has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused under hardship to that party]

10. Learned Advocate appearing for the plaintiffs says that the appellants did not bother to appear in the suit for the first ten years. There is no material to show that without installation of a home elevator, the appellants will suffer any appreciable prejudice. In any event, such a prayer is beyond the scope of a partition suit.
11. We do not wish to enter into the merits of the case at all. We are not expressing any opinion on whether or not the prayer of the defendant nos. 2 and 3 for installation of a home elevator

should be allowed or is justified. We see, however, that the learned Trial Court has not considered the provisos to Order 39 Rule 4 CPC which are very relevant. Hence, on that ground alone, we set aside the order under appeal and remand the matter back to the learned Trial Court for fresh adjudication of the application filed by the defendant nos.2 and 3 praying for variation/modification of the interim order dated July 14, 2017.

12. The appeal and the connected application, accordingly, stand disposed of.
13. We have not addressed the merits of the case at all. The learned Trial Court shall decide the application of the defendant nos.2 and 3 afresh, in accordance with law, without being influenced by any observation made in this order.
14. Since the defendant nos.2 and 3 are both more than 80 years old, we request the learned Trial Court to dispose of the application of the defendant nos.2 and 3 as soon as possible and preferably within three months from the date of communication of this order.
15. All parties shall act in terms of server copy of the order downloaded from the official website of this Court.

(Om Narayan Rai, J.)

(Arijit Banerjee, J.)

