

AD-8
Ct No.16
16.01.2025
(SSS)

FMA 811 of 2022
With
CAN 1 of 2022

Amar Deb alias Nanda
Vs.
Md. Zahirul and Ors.

Mr. Partha Pratim Roy,
Mr. Sarbananda Sanyal,
Ms. Poulami Chakraborty
...For the Appellant.

Mr. Sounak Bhattacharya,
Mr. Sounak Mandal,
Mr. Abhirup Halder
.....For the Respondent Nos.
1 to 6.

1. On consent of parties, we treat the matter to appear under the heading “Order XLI Rule 11 of the Code of Civil Procedure” and take it up for admission hearing.

2. The instant appeal has been preferred against an order, whereby the application of the appellant (defendant No. 11 in the suit) under Order XXXIX Rule 4 of the Code of Civil Procedure, for variation/ modification of an injunction order dated August 19, 2019, was dismissed.

3. The primary ground of dismissal was that the order sought to be modified was itself passed on consent.

4. Learned Counsel for the appellant submits that although it was not specifically mentioned in the Order XXXIX Rule 4 application that no consent had been given, when such omission was discovered, an application was subsequently filed in the trial court denying that any consent was given by the defendant No. 11/appellant on August 19, 2019. However, the said application was rejected merely on the ground that the present appeal is pending in this court.

5. We, as such, proceed on the premise that the subsequent application denying the consent did not succeed. Although the dismissal of the said subsequent application was not on merits, the matter reverts back to square one and we have to look into the application under Order XXXIX Rule 4, which was the subject matter of the present impugned order, to see whether there was any inkling of averment regarding no consent having been given initially.

6. However, on a careful perusal of the said application, we do not find that the factum of consent not being granted was averred in the Order XXXIX Rule 4 application.

7. Moreover, we do not find that any strong ground of variation of the initial injunction order

which was passed in presence of the parties, to the effect that there was any change of circumstances etc., has been made out in the Order XXXIX Rule 4 application.

8. The premise of the argument before this court is that no consent was given by the appellant. However, in the order dated August 19, 2019, which was sought to be vacated, the learned Trial Judge clearly recorded that the said application was allowed on consent, directing the plaintiffs and the defendants to maintain status quo regarding possession, nature and character of the suit property as on that date till disposal of the suit. It was an undisputed position that the defendant No. 11, who is the present appellant, was represented before the trial court on the said date and as such, was a party to the consent order. It is well-settled that a consent order cannot be reopened unless the party aggrieved approaches the trial court itself, which passed the order, specifically denying such consent having been given.

9. At least in the application under Order XXXIX Rule 4 of the Code of Civil Procedure, which is the genesis of the present appeal, no such issue was raised by the defendant No. 11/applicant/ present appellant in that regard. Thus, there was no scope for the learned Trial Judge to vary or vacate the said

order on the ground that no consent was given by the present appellant at the relevant juncture.

10. Accordingly, we do not find any illegality worth interference in the impugned order dated April 11, 2022.

11. Hence, FMA 811 of 2022 (previously FMAT 225 of 2022) is dismissed under Order XLI Rule 11 of the Code of Civil Procedure. Consequentially, CAN 1 of 2022 also stands dismissed. There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)