

Form No. J(2)

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present: The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar

F.M.A. 848 of 2024
IA No: CAN 1 of 2024

Sri Prabhat Jhawar
Vs.
Akash Bhargav and others

For the appellant : Mr. Shiv Shankar Banerjee
Mr. Abhishek Chakraborty
Mr. Soumon Nanda

For the respondent nos.1 & 2 : Mr. Kaushik Dey
Mr. Debdipto Banerjee
Mr. Soumen Banerjee

Heard on : 21.05.2025 & 11.06.2025

Judgment on : 11.06.2025

Sabyasachi Bhattacharyya, J.:-

1. We take up the appeal itself for hearing along with the application in view of the conspectus of the hearing of the application being co-equal with the issues involved in the appeal itself.

2. Heard learned counsel for the parties.
3. We find from the impugned order that by virtue of the same, the application of the defendant/appellant under Order XXXIX Rule 4 of the Code of Civil Procedure was rejected and in the same breath, the application for temporary injunction filed by the plaintiffs/respondents was allowed.
4. It is pointed out by learned counsel for the respondents that a single appeal has been preferred, although two applications were disposed of by the impugned order.
5. If we construe the appeal to have been filed against the rejection of the application under Order XXXIX Rule 4 of the Code of Civil Procedure, in any event, the appeal would be futile *ab initio* since even if the Order XXXIX Rule 4 application were to be allowed by setting aside such portion of the impugned order and the *ad interim* order vacated, fact remains that the temporary injunction application itself has been allowed, granting injunction till disposal of the suit, thus rendering the relief in respect of the Order XXXIX Rule 4 application futile.
6. On the contrary, if we construe the appeal to be one against allowing the Order XXXIX Rules 1 and 2 application of the plaintiffs/respondents, in that event, we have to take into consideration that no written objection was filed by the

defendant/appellant to the temporary injunction application and as such, the trial court was entitled to proceed on the doctrine of non-traverse.

- 7.** We do not find from the records anything to show that application under Order XXXIX Rule 4 of the Code of Civil Procedure was treated or directed to be treated as the objection to the injunction application, as is sometimes done.
- 8.** Thus, seen from such perspective as well, no arguable case can be made out by virtue of the documents annexed with the supplementary affidavit filed by the appellant in the present appeal, beyond the pleadings of the appellant in the trial court, since the appellant chose not to file any written objection at all to the injunction application.
- 9.** What cannot be achieved directly by the defendant/appellant cannot be indirectly permitted in an appeal, since in the absence of any written objection to the temporary injunction application in the court of first instance, we cannot permit new documents to be brought in by the appellants which were not even produced before the trial court.
- 10.** Even taking the case of the appellant to its highest, the appellant argues that one of the alleged co-landlords had met her demise in the year 2007 whereas rent receipts purportedly

signed by her have been produced by the plaintiffs/respondents in the trial court to substantiate alleged payment of fifty per cent of the rent for the suit property.

- 11.** We find from the *ad interim* order dated May 6, 2022 which was ultimately made absolute by the present impugned order, that the learned trial Judge categorically held that although the defendant's Advocate had verbally stated that proforma defendant no.4-Smt. Shanti Devi Bagree had died but he had not filed any written application or document to that effect.
- 12.** In the event the appellant is permitted to file the purported death certificate or any document in support of the alleged death of the said Shanti Devi Bagree at this stage, the same should be subject to appropriate scrutiny, which scope is always there for the appellant in the trial of the suit itself.
- 13.** Proceeding on the basis of the documents which were produced in the trial court, we find that the plaintiffs/respondents have made out a sufficiently strong *prima facie* case to go for trial by producing rent receipts in Hindi vernacular allegedly issued by some of the co-landlords, at least for fifty per cent rent of the tenancy in respect of the suit property.
- 14.** That apart, the plaintiffs/respondents have also produced documents to show that they are in occupation of the property,

by way of certificate of enlistment and other relevant documents, which were considered by the learned trial Judge at the time of granting *ad interim* injunction as well as in the final hearing of the temporary injunction application.

- 15.** Thus, we find that the learned trial Judge was justified in granting temporary injunction to protect the possession of the plaintiffs/respondents till the disposal of the suit, since an arguable case has been made out by the respondents.
- 16.** It is trite law that while hearing an injunction application, the court cannot convert such hearing to a mini trial of the suit itself.
- 17.** In the event the documents sought to be furnished at this belated stage by the appellant are permitted to be brought on record in the present appeal, it would be unfair, since those were not before the learned trial Judge at the juncture when the impugned order was passed nor at the stage of passing of the *ad interim* order and unless those documents are formally proved as evidence in the suit, it would be inappropriate at the injunction stage to permit those to be produced for the first time in an appeal against an order whereby an application under Order XXXIX Rule 4 has been rejected and a temporary injunction application has been allowed.

- 18.** In such view of the matter, we do not find any infirmity in the impugned order.
- 19.** Accordingly, FMA 848 of 2024 is dismissed on contest without any order as to costs.
- 20.** CAN 1 of 2024 is dismissed consequentially as well.
- 21.** It is, however, made clear that the merits of the contentions of the parties in the suit have not been gone into by this court and the learned trial Judge is at liberty to decide the suit by trial on evidence independently without being influenced in any manner by any of the observations made in our order as well as in the order impugned before this court or passed by the learned trial Judge at the *ad interim* stage.
- 22.** There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)