

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

And

The Hon'ble Justice Subhendu Samanta

FMA 719 of 2023

With

CAN 1 of 2023

Smt. Pratima Dinda and Ors.

Vs.

Sri Ashok Dinda and Ors.

For the appellant : Mr. Subrata Santra.

For the respondent Nos. 1
& 2 : Mr. Partha Pratim Roy,
Mr. Dyutiman Banerjee.

Hearing concluded on : 09.01.2025

Judgment on : 09.01.2025

Sabyasachi Bhattacharyya, J.:-

1. The present appeal has been preferred against an order whereby the application filed by the defendants/appellants under Order XXXIX Rule 4 of the Code of Civil Procedure for modification of an injunction order was dismissed on contest.
2. Learned Counsel for the appellants argues that although the defendants/appellants had started construction much prior to the

institution of the partition suit, by virtue of the injunction order, the said construction has been stopped, thereby resulting in the building materials and the construction partially made decaying.

3. It is argued that the plaintiffs/respondent Nos. 1 and 2, who are the owners of a minuscule share in the property, are holding the interests of over 40 co-sharers at ransom. It is argued that the injunction order restraining all the defendants from making any further construction is not commensurate with the minimal shares claimed by the plaintiffs.
4. Learned Counsel for the respondent Nos. 1 and 2, who are the plaintiffs in the court below and the primary contesting respondents, argues that the points now sought to be raised before this court were substantially urged before the learned Trial Court at the time of disposal of the injunction application. That apart, it is pointed out that the sanction plan pleaded to have been obtained by the appellants was not produced before the Trial Court. Moreover, it is argued that even as per the appellants, the sanction plan was obtained in the month of March, 2023 i.e. after the injunction order was passed on contest and at such, ought not to be looked into as a change of circumstance.
5. Upon hearing learned Counsel for the parties, we find that the scope of Order XXXIX Rule 4 of the Code of Civil Procedure insofar as it pertains to vacating and/or modifying an injunction order passed on contest, is limited by the second proviso to the said provision. The said proviso stipulates that when an order of 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 undue hardship to that party.

6. The hardship now complained of by the appellants was available even at the juncture when the injunction order was passed on contested hearing on March 11, 2022. In the garb of entertaining arguments of the defendants/appellants to the effect that the plaintiffs own a small share in the property but are holding the majority co-sharers at ransom, the same would tantamount to sitting in appeal over the contested injunction application passed on March 11, 2022. The scope of Order XXXIX Rule 4 of the Code cannot be equated with that of an appeal under Order 43 of the Code against an injunction order and as such, we are unable to entertain such arguments on the merits of the injunction application. Insofar as change of circumstance is concerned, the defendants/appellants cannot take advantage of their own wrong. At the juncture when the impugned order was passed, no sanction plan was produced. Even if we construe such omission to be a bonafide error on the part of the appellants, the sanction plan was obtained only on March 15, 2023, not only during pendency of the suit but about a year after the injunction application of the plaintiffs was disposed of on contest, thereby granting injunction restraining the present appellants from making any construction. Hence, the subsequent sanction plan

obtained by the defendants/appellants after the passing of the contested injunction order cannot be used as a handle to give an additional premium to the defendants/appellants, nor be construed to a change of circumstance.

7. As such, we are of the opinion that the parameters of Order XXXIX Rule 4 were not satisfied in the present case. That apart, we find from a perusal of the impugned order that sufficient reasons have been provided by the learned Trial Judge while passing the same. The learned Trial Judge have observed that the instant suit has been filed by the plaintiffs praying for partition of the joint property and the plaintiffs have established a prima facie case to go for trial. It was further observed that if the defendant No. 1 is permitted to raise construction whimsically on the joint property without the permission of any appropriate authority and without the sanction plan of the local panchayat authority, the plaintiff will be prejudiced and the object of the temporary injunction will be frustrated. Even if we take into consideration the sanction plan subsequently obtained, as discussed above, fact remains that if the defendants/appellants are permitted to make a construction over their chosen portion of the suit property, the same might create indefeasible rights which would enure to the benefit of the constructing party at the final hearing of the suit, thereby putting the plaintiffs to an unwarranted disadvantage.
8. Thus, on the premise of obtaining a sanction plan subsequent to a contested injunction order being passed, we cannot give such premium to the defendants/appellants. That apart, the impugned

order is otherwise sound in law and takes a view which is plausible in the eye of law and in the facts of the case and it is well settled that an appellate court does not upset such findings merely because an alternative view might be possible in its opinion. Hence, we do not find any reason or occasion to interfere with the impugned order. Accordingly, FMA 719 of 2023 is dismissed on contest, thereby affirming Order No. 33 dated June 7, 2023 passed by the learned Civil Judge (Senior Division), 2nd Court at Tamluk, District – Purba Medinipur in Title Suit No. 23 of 2021. CAN 1 of 2023 stands disposed of accordingly. There will be no order as to costs. It is expected that the learned Trial Judge shall make all endeavour to dispose of the suit as expeditiously as possible, preferably within one year from the date of communication of this order to the learned Trial Judge and without granting any unnecessary adjournment to either party. The parties, including the plaintiffs/respondent Nos. 1 and 2 shall extend their full cooperation with the learned Trial Judge to such end.

(Sabyasachi Bhattacharyya, J.)

I agree

(Subhendu Samanta, J.)