

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present : The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
&
The Hon'ble Mr. Justice Uday Kumar

FMA No. 1283 of 2024
+
CAN No. 1 of 2024

Sri Chandi Charan Maity
-vs-
Sri Nakul Chandra Maity and another

For the defendant no. 1/appellant : Mr. Raghunath Das,
Ms. Monalisa Das.

For the plaintiff/respondent no. 1 : Mr. Sounak Bhattacharya,
Mr. Anirban Saha Ray,
Mr. Abhirup Halder.

Heard on : February 24, 2025.

Judgment on : February 24, 2025.

Sabyasachi Bhattacharyya, J.:

1. The affidavits-in-opposition and reply filed in Court today be kept on record.

2. On consent of the parties, the appeal itself is taken up for hearing along with the stay application, in view of the subject matter and conspectus of the application and appeal being collateral.
3. The present appellant, being the defendant no. 1 in a suit for partition, took out an application under Order XXXIX Rule 4 of the Code of Civil Procedure (in short "the Code") for vacating/modification of an order of *ex parte* ad interim *status quo* granted in favour of the plaintiff/respondent no. 1 by the learned Trial Judge.
4. Learned counsel for the appellant contends that, as admitted in the plaint, the plaintiff is in occupation of the Southern portion of Plot No. 1065, which is a part of the suit property, and has made construction of a dwelling house thereon in terms of mutual arrangement between the parties.
5. It is further pointed out that subsequently a dispute cropped up and there was an amicable settlement with the intervention of the local villagers to the effect that the defendant no. 1/appellant would make construction on the Northern part of Plot No. 1065 by leaving five feet wide passage to the plaintiff.

6. However, subsequently, when such construction was sought to be made by the defendant no. 1/appellant upon demolishing the previous structure standing thereon, the present suit was filed and an ad interim order of *status quo* obtained.
7. Learned counsel for the appellant places reliance on the averments made by the appellant in paragraph no. 5 of the application under Order XXXIX Rule 4 of the Code, where it was categorically averred that the appellant has been residing in the said dwelling house at the suit property with 12/13 of his family members and has no suitable alternative accommodation and as such, would be in great difficulty in the event the construction, which has already been started, is stopped midway.
8. It is further submitted that in paragraph no. 7 of the application under Order XXXIX Rule 4 of the Code, the defendant no.1/appellant has undertaken to restore the property to its original position in the event the plaintiff succeeds in the suit and appropriate directions are passed by the learned Trial Court.
9. It is submitted that the learned Trial Judge failed to advert to such components of the matter and acted without jurisdiction

and erred in law in dismissing the petitioner's application under Order XXXIX Rule 4 of the Code and allowing the temporary injunction application, making the ad interim order absolute till disposal of the suit.

10. Learned counsel appearing for the plaintiff / respondent no.

1 opposes the contention of the appellant and submits that the suit was filed, *inter alia*, on the allegation that the appellant is constructing beyond his portion. More importantly, it is pointed out that the sanction plan annexed to the application filed in connection with the appeal shows that it was granted subsequent to the admitted commencement of the construction by the appellant. Hence, if any order is passed in favour of the appellant in connection with his vacating application, the same would tantamount to ratifying and regularizing an illegal construction, made without any valid sanction plan by the concerned Authorities.

11. Learned counsel appearing for the plaintiff/respondent no. 1

places reliance on an unreported judgment of this Division Bench in *FMAT 37 of 2025 (Sri Dipak Samanta Vs. Sri Biswajit Ray)*, where, it is alleged, the court refused to grant relief in connection with a vacating application and sustained the

injunction order granted by the court below under similar circumstances.

12. Thus, it is argued that the present appeal be dismissed along with the connected application.

13. Upon hearing learned counsel for the parties and going through the pleadings, we are of the opinion that the impugned order, being erroneous in law and perverse, cannot be sustained.

14. What immediately catches the eye is that the plaintiff / respondent no. 1, in his plaint itself, categorically admitted in paragraph no. 6 that the plaintiff, my mutual arrangement with the defendants, has already made construction of his dwelling house on the Southern portion of the concerned plot, that is, Plot No. 1065, which is a part of the suit property.

15. It is also admitted that subsequently there was an amicable settlement between the parties at the intervention of the local villagers, in terms of which the defendant nos. 1 and 2 were permitted to make construction by leaving apart five feet wide passage for the user of the plaintiff. It is also admitted in paragraph no. 7 of the plaint that both parties agreed to such

terms of settlement and signed a document in writing where the terms were recorded.

16. It has further been admitted in paragraph no. 7 of the plaint that in terms of the compromise, a wall has been constructed on the suit plot.

17. Again, we find from the report of the Advocate Commissioner who was appointed by the learned Trial Court, which is annexed to the application in connection with the present appeal, that there is existence on the concerned plot of a two-storied broken *pucca* house without any roof of the first floor, which was demolished for the purpose of repairing.

18. During inspection, the Advocate Commissioner also found, as reflected in his report, that there is no plinth digging work but there are complete plinths up to the ground level on the suit plot no. 1065.

19. We also find that a sanction plan for such construction has been annexed to the present application.

20. Thus, the stand of the plaintiff was all along, as per the plaint case itself, that the parties have agreed to the effect that the defendant nos. 1 and 2 are permitted to make construction

on the Northern side of the concerned suit plot, bearing No. 1065, by leaving five feet.

21. The defendant no. 1 / appellant submits that he wants to make construction only upon the portion which was previously occupied by his old dilapidated dwelling house, which was demolished for the new construction, and that he would leave five feet passage as agreed between the parties before the local villagers and reduced to writing.
22. Learned counsel for the appellant has also reiterated the undertaking given at paragraph no. 7 of the vacating application filed in the Trial court, whereby the appellant agrees to demolish the construction, if made, and restore the property to its original condition in the event the plaintiff succeeds in the suit and appropriate directions in that regard are given by the learned Trial Court.
23. Accordingly, we find that it would be completely unjust and inequitable in the event the defendant no. 1 is restrained from making construction of his dwelling house after he has already undertaken demolition work of the previous structure, which was standing thereon and used to be the dwelling house of the defendant no. 1 and his family. It is all the more so since the

plaintiff has already been enjoying, on the basis of a mutual arrangement between the parties, a full-fledged construction of a dwelling house on the Southern side of the concerned plot. Thus, it would be most unfair if the plaintiff is allowed to continue to enjoy his dwelling house on the Southern side of the plot on the basis of admitted mutual arrangement between the parties, whereas the defendant no.1/appellant is restricted from making a fresh construction of a dwelling house at the self-same position where he had a previous dilapidated dwelling house which was demolished for the specific purpose of renovation and reconstruction, also in terms of the admitted mutual arrangement.

24. The argument of the plaintiff/respondent no. 1 as regards the sanction plan being issued subsequent to the commencement of the construction is not the business of the civil court to look into. At least, till this juncture there is nothing on record to show that there is any complaint pending before the concerned Panchayat regarding the construction work or the sanction plan being invalid or illegal.

25. That apart, in the absence of any cogent rebuttal, a presumption of correctness should be attached to all official

acts and, as such, the validity of the sanction plan issued in favour of the defendant no.1 should be presumed, unless otherwise rebutted, as the Panchayat itself granted the same upon being satisfied of the legality of the proposed construction.

26. Thus, there is no scope of the court looking beyond the sanction plan and finding faults therewith.

27. Insofar as the alleged ratification of such sanction plan by this court is concerned, it is not a tenable argument, since the grant or non-grant of an injunction by a civil court in a litigation for partition does not in any manner touch upon the validity or otherwise of a sanction plan, regarding which the concerned law prevails and it would always be open to anybody aggrieved by any illegal work to approach the appropriate authorities in that regard and nothing in this order either ratifies or invalidates the said sanction plan.

28. Insofar as the cited judgment is concerned, we find from the same that this court proceeded on the premise (as recorded in paragraph no. 15 thereof) that the 'undue hardship' pleaded by the appellants therein was available to the appellant even at the juncture when the parent order of temporary injunction was

passed. In the cited case, the appellant was a party to the temporary injunction order, which was passed on contest, and did not prefer any appeal against the same. In such perspective, the court held that the appellant would not then be permitted to re-agitate the self-same ground of undue hardship, which was available at the time of passing of the temporary order of injunction.

29. As opposed to the same, in the present case, the appellant, immediately upon coming to know of the *ex parte* ad interim *status quo* order obtained by the plaintiff/respondent no. 1, which was passed behind his back, filed an application under Order XXXIX Rule 4 of the Code, which was initially rejected on technical ground as not maintainable; however, granting leave to the defendant no.1/ appellant to file a fresh application under Order XXXIX Rule 4 of the Code.
30. Upon such leave being granted, the appellant availed of the same and filed a fresh application for vacating which has been adjudicated now along with the main injunction application. Thus, no laches on the part of the appellant is found by this court and lack of diligence cannot at all be attributed to the

appellant in the case at hand. Hence, the ratio laid down in the cited judgment is not applicable in the present context.

31. We find from the impugned order that the above aspects were not considered by the learned Trial Judge while passing the impugned order. The learned Trial Judge proceeded merely on the basis that there is already a subsisting *status quo* order and allowing the application under Order XXXIX Rule 4 of the Code for further construction would contradict and result in “chalk and cheese”, apparently meaning that any favourable order in the vacating application would operate contrary to the injunction order.

32. However, such logic cannot be appreciated by this court, since the very purpose of Order XXXIX Rule 4 is to operate as a “cheese” to the “chalk” of the injunction order by vacating the same and/or modifying or varying the same. Thus, we fail to understand the reasoning of the trial court in holding that a vacating application cannot be allowed because it would operate contrary to the initial injunction order.

33. In the present case, a cardinal parameter of Order XXXIX Rule 4, that is, undue hardship of the defendant no.1 / appellant, has been fully satisfied and, thus, the appellant is

definitely entitled to a vacating of the *status quo* order and/or at least modification of the same to the extent that the defendant no.1 / appellant would be permitted to complete the construction of his dwelling house at the same location where the previous dilapidated dwelling house of the defendant no.1/appellant which demolished, stood, by leaving five feet wide passage in terms of the amicable settlement between the parties.

34. Thus, FMA No. 1283 of 2024 is allowed on contest, thereby setting aside the impugned order, bearing Order No. 48 dated June 26, 2024, and modifying the impugned order to the effect that the application filed by the defendant no.1 / appellant in the court below under Order XXXIX Rule 4 of the Code is partially allowed, thereby modifying the *status quo* order dated July 17, 2023 to the extent that the defendant no.1 / appellant is permitted to complete the construction of his dwelling house on the Northern side of plot no.1065, strictly in accordance with the sanction plan granted by the concerned Panchayat and in terms of the amicable settlement between the parties by leaving five feet wide passage. It is further made clear that no

special equity shall be created in favour of the appellant merely by dint of such construction.

35. In the event the plaintiff/respondent no.1 succeeds in the suit and allocations are ultimately made contrary to the present possession of the parties, it will be open to the learned Trial Judge to pass appropriate directions on the defendant no.1 / appellant for demolition of the construction made by virtue of this order and restoring the suit property to its original condition as it stood before such construction.

36. It is further clarified that this court has not entered into the merits of the suit and it will be open to both parties to urge their respective contentions at further stages of the suit and if so done, the learned Trial Judge shall decide the suit independently in accordance with law without being prejudiced in any manner by any of the observations made above

37. CAN 1 of 2024 is accordingly disposed of as well.

38. There will be no order as to costs.

39. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

I agree.

(Uday Kumar, J.)

(Sabyasachi Bhattacharyya, J.)