

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. 1094 of 2024
+
CAN 1 of 2024

Sm. Sunanda Sen
-vs-
Sm. Shibani Guha and others

For the appellant : Mr. Arijit Bardhan,
Mr. Jay Shankar Mukherjee,
Mr. Rishabh Dutta Gupta

For the respondents : Mr. Surajit Samanta,
Mr. Biswajit Samanta,
Ms. Sohini Samanta,
Ms. Aparajit Bhowmick

Heard on : March 4, 2025.

Judgment on : March 4, 2025.

Sabyasachi Bhattacharyya, J.:

1. On consent of the parties, the appeal itself is taken up for hearing along with the connected application.

2. The present challenge has been preferred against an order whereby an application of the defendant no. 2/appellant under Order XXXIX Rule 4 of the Code of Civil Procedure (in short “the Code”) for vacating an *ex parte* ad interim order of injunction dated February 22, 2023 passed in a declaratory suit was dismissed.
3. It is contended by learned counsel for the appellant that it will be evident from the *ex parte* ad interim order dated February 22, 2023 as well as the plaint of the plaintiff/respondent no. 1 that the plaintiff was well aware of the filing of a previous suit by the defendant no. 2/appellant, bearing Title Suit No. 256 of 2008, which was filed on the strength of a deed of gift. It is submitted that the Schedule – A property mentioned in the plaint of the present partition suit is not joint in its entirety inasmuch as the original exclusive owner, being the mother of the appellant, gifted eight cottahs of demarcated portion out of the Schedule – A property in the present partition suit in favour of the defendant no. 2/appellant and as such, the same could not could not form part of the hotchpot of the present suit.
4. It is submitted further that in the written objection to the vacating application of the appellant, the plaintiff/respondent

no. 1 took a plea that the plaintiff is not acquainted with such deed of gift executed by their mother Kalyani Dutta but in the same breath stated that such gift deed is invalid and illegal. It is contended that since a copy of the deed of gift was annexed to the plaint of the previous suit, the acquaintance of which has been categorically admitted by the plaintiff/respondent herein, that there was a material suppression of relevant fact while obtaining the ex parte order of injunction, inasmuch as the plaintiff herein feigned ignorance of the gift deed.

5. Hence, the learned Trial Judge, it is argued, ought to have vacated the ex parte ad interim order of injunction on the ground of suppression of material facts as contemplated under Order XXXIX Rule 4 of the Code.
6. Learned counsel appearing for the respondent opposes such contentions and points out that the fact of filing of the previous suit on the strength of the purported deed of gift was disclosed at the time of obtaining the injunction order. However, since the plaintiff/respondent no. 1 has never seen the original of such purported gift deed and opposes the validity and legality of the same, acquaintance with the purported deed has been denied.

7. Upon hearing learned counsel for the parties, we find that the statement of the plaintiff/respondent no. 1 to the effect that the plaintiff is not acquainted with any deed of gift executed by their mother was made only in the written objection to the vacating application filed post facto, much after the *ex parte* ad interim injunction order was obtained and as such, the said statement could not have been germane in ascertaining whether there was a material suppression at the point when the *ex parte* ad interim order was passed on February 22, 2023.
8. For ascertaining the suppression or non-suppression of material facts, we have to relate back to the date of passing of the said *ex parte* ad interim order when it was only the plaint and the injunction application of the plaintiff which were before the Trial Court.
9. It is reflected in the *ex parte* ad interim order dated February 22, 2023 itself that the plaintiff categorically disclosed the filing of a previous suit on the strength of the deed of gift allegedly executed in favour of the defendant no. 2/appellant.
10. As such, we do not find the suppression of any material fact at that juncture.

11. In fact, we also do not find any mutually exclusive patent contradiction between the statement that a previous suit was filed on the strength of the purported deed of gift and the allegation that the plaintiff is not acquainted with such deed of gift and claims that such purported deed is invalid and illegal. It may very well be that the defendant no. 2 had filed a suit on the strength of a purported deed of gift which was within the knowledge of the plaintiff. Even if the plaintiff was acquainted with such suit and a copy of such purported deed of gift was annexed to the plaint of the previous suit, it does not necessarily mean that the plaintiff would be acquainted with the actual deed of gift or would admit the validity or legality of the same.
12. Hence, we do not find any suppression worth the name which would hit the root of the matter and be considered material suppression for the purpose of Order XXIX Rule 4 of the Code.
13. Insofar as the other question raised by the defendant no. 2/appellant, that the present partition suit is not maintainable in its present form in the absence of any challenge to the validity or the binding effect of the gift deed by which a demarcated

portion of Schedule- A property of the present suit was donated to the defendant no. 2, such question, at best, would hit at the maintainability of the suit and would comprise a part of the *prima facie* consideration for grant of injunction.

14. In any event, it would be open to the defendant no. 2 to raise such issue at the time of final disposal of the temporary injunction application as well as at further stages of the suit.
15. However, such issue, pertaining to the *prima facie* case and maintainability is not a valid consideration within the four corners of Order XXXIX Rule 4 of the Code and as such we cannot enter into such question while deciding an appeal against an order passed under Order XXXIX Rule 4 of the Code.
16. It is well-settled that three remedies are open to a defendant who is aggrieved by an ex parte ad interim order: first, preferring an appeal against such order, secondly, to file an application under Order XXXIX Rule 4 of the Code and thirdly, to contest the injunction application on merits by filing a written objection to the same.
17. Having purposefully chosen the second remedy and having given a go-bye to the first (preferring an appeal), the defendant

no. 2 has to be confined within the parameters of the said remedy under Order XXXIX Rule 4, which does not include the questioning of the *prima facie* case made out at the time of grant of *ex parte* ad interim order, although the same might have been a relevant consideration in an appeal against the *ex parte* ad interim order which has not been filed, and also at the final hearing of the injunction application.

18. In such view of the matter, we are not inclined to interfere with the impugned order rejecting the vacating application of the appellant and are of the opinion that the same is not tainted by any illegality in any manner whatsoever.
19. Hence, FMA No. 1094 of 2024 is dismissed on contest without any order as to costs, thereby affirming Order No. 12 dated May 17, 2024 passed by the learned Civil Judge (Senior Division, Third Court at Barasat, District: North 24 Parganas in Title Suit No. 182 of 2023, with liberty to the appellant to raise the issues of maintainability of the suit as well as *prima facie* case for grant of injunction at the final hearing of the injunction application as well as at further stages of the suit.
20. In view of the pendency of the appeal for some time now, we request the learned Trial Judge to dispose of the

application for temporary injunction, upon giving adequate opportunity of hearing to all parties but without granting any unnecessary adjournment to either side, as expeditiously as possible, positively within two months from the date of communication of this order to the learned Trial Judge.

21. Needless to say, we have not entered into the merits of the contentions of either of the parties and it will be open for both sides to agitate the same at further stages of the injunction application and the suit.

22. Urgent photostat certified copy of the order, if applied for, be supplied to the parties at an early date.

I agree.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)