

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:-

THE HON'BLE JUSTICE CHAITALI CHATTERJEE DAS.

C.O. 3258 OF 2024

WITH

**SHAH ALAM SK. & ANR.
VERSUS**

MD. AKBAR SK. & ANR.

For the petitioners : Mr. Pratip Kr. Chatterjee, Sr. Adv.
Mr. Tridip Misra, Adv.
Mr. Maitrayee Chatterjee, Adv.

For the Opposite Party

no 1 & 2 : Mr. Arup Krishna Das, Adv.
Mr. Abdus Salam, Adv.
Mr. Sanjay Ghosh, Adv.
Mr. Badrul Alam, Adv.

Last Heard on : 20.05.2025

Judgement on : 11.06.2025

CHAITALI CHATTERJEE DAS, J:-

1. This revisional application has been filed against the judgement passed in Misc. Appeal no. 28 of 2022 affirming the order passed by the Learned Civil Judge (Junior Division) 2nd Court, Kandi, Murshidabad dated 12th July, 2022.

- 2.** A Title suit was filed by the plaintiffs for a decree of declaration claiming right title and interest over 16 annas share over the suit property along with an Order of temporary injunction restraining the defendants from disturbing their peaceful possession over the suit property. The plaintiff also filed an application under Order 39 Rule 1 and 2 read with Section 151 of the Civil Procedure Code, 1908 disputing the ownership of the principal defendants that is the petitioners herein having no right title over the suit property and they are trying to oust the plaintiff forcibly from the suit property with a threat to transfer the suit property to the third person after changing it's nature and character. Accordingly the plaintiff prayed for an order of temporary injunction against the principal defendants no 1 to 9 restraining them from changing the nature and character of the suit property and ousting the plaintiffs there from.
- 3.** The suit property originally belong to Md. Akram Sk. And Makram Sk to the extent of 4 annas share and Abdul Mannan Sk. to the extent of 8 annas share. Mutual partition was affected between them in respective portions and their names were duly recorded in the RSROR and while possessing the same Makram Sk transferred his share to his son, Md. Jamjul Hoque by a deed of Heb-bil-ewaj being no 7858/1978. After his demise the present plaintiffs inherited his share in the capacity of legal heirs. According to plaintiff /opposite parties, Akram transferred his 4 annas share to the proforma defendant no. 10 and after demise of Abdul Manan his 8 annas share devolved upon proforma defendants no. 11 to 16.
- 4.** It is contended by the Learned Advocate of the present petitioners that it is the plaintiffs who have encroached 5 decimal in plot no. 970 for which the

present petitioners have filed one suit being title no 236 of 2019 and the defendants are possessing the said plot no. 970 for more than 20 years by raising their dwelling house thereon. It is the further case of the petitioner that when they tried to raise the construction of the first floor upon the said dwelling house, the present Opposite Parties /plaintiff protested against the same. Pursuant to an order of the Learned Court an Advocate Commissioner was also appointed who filed the commissioners reports on 30.09.2022 which clearly revealed there is no encroachment to the plaintiff plot of the land by the defendants as alleged.

5. The matter is pending for acceptance of such report before the Learned Trial Court. An objection to such report was filed and The Learned Trial Court by virtue of an order dated 7.12.22 was pleased to allow the prayer of the plaintiffs filed under Order 39 Rule 1 and 2 CPC and fixed the date for framing of issues .The said order was challenged by filing a Misc. Appeal by the present petitioners before the Learned Court, Civil Judge, Senior Division, Kandi, Murshidabad being Misc. Appeal no 28 of 2022. The Learned Court after hearing both the parties was pleased to dismiss the misc. appeal and affirmed the order passed by the Learned Court of Civil Judge , Junior Division against which this revisional application has been filed.

6. The Learned Advocate strenuously argued that both the Learned Court below failed to pass any speaking and reasoned order which has caused serious prejudice to the petitioner herein. The present petitioner is in possession of his dwelling house and the balance of convenience and inconvenience are in his favour more so prima facie the report of Advocate

Commissioner reveals there is no encroachment in respect of the plaintiff's portion as alleged. Accordingly prays for an order to set aside the judgement and order passed by the Learned Appellate Court.

- 7.** The Learned Advocate appearing on behalf of the Opposite Party/ plaintiff submits that the Advocate Commissioner's report cannot be considered as an objection has been filed on behalf of the plaintiff against such report and the same is pending for acceptance, before the Learned trial Court. The plaintiff had to file the suit as the defendants tried to encroach upon the suit property as described in Schedule "K" and "Kha" in the plaint. It is their specific case that the defendants who are the owner of plot no 970 and 971 which are adjacent to the plot no 972 of the present plaintiffs under the garb of repairing and re-construction of their property collected the materials in the plot no 972 of the present plaintiffs at a vacant land which is described as BB in the hand sketch map annexed with the injunction application and tried to encroach the said property forcefully and also started excavating land from there ,when the objection was raised by the present petitioners. It is also submitted that the record of right is in their favour and the defendants have no right title and interest in respect of the suit property and the Learned Trial Court as well as the Appellate Court considering all aspect of the matter rightly passed such order of injunction restraining the defendants no 1 to 9 from changing the nature and character of the suit property and ousting the plaintiff thereon.
- 8.** The dispute pertains to encroachment of suit plot no.970 by the plaintiff and plot no .972 by the defendant. It is the case of the plaintiff, the original owner of the suit property was Akram sk. and Makram Sk. to the extent of 4

annas and Abdul Mannan to the extent of 8 annas , which was mutually partitioned and their names were in the RSROR .

Vide a deed of Heb-bil-ewaj Makram Sk transferred his share to his son Md. Jamjul Hoque after whose demise the plaintiffs inherited his share in the capacity of his legal heirs and the defendants no. 11 to 16 got their share after demise of Abdul Mannan regarding 8 annas share which devolved upon them after his death. The names of proforma defendants are also recorded in the LRROR.

9. There is a claim and counter claim between the parties resulting two suits filed by both the parties praying for declaration of title ,are pending before the Trial Court. The plot nos. 970 ,971 of the defendant/petitioner are situated to the East of the suit plot no 972 .Therefore prima facie there is no dispute regarding the title of the defendants over plot no 970,971 and or in respect of plot no.972 of the plaintiff but the dispute revolves round of an encroachment .Fact remains an Advocate Commissioner was appointed followed by a local investigation commission ,was conducted over the suit property and a report to that effect has already been submitted which is pending for acceptance.

10. Both the Learned Court considered such fact and rightly came to the conclusion that since the report is pending for acceptance it has got no evidentiary value and cannot be the basis for consideration to test the veracity of the claim of the properties by the parties. It is well settled that in order to have an order of injunction the plaintiff must made out a prima facie case and also that whether he will suffer irreparable loss and injury

unless such order of injunction is given and whether the balance of convenience or inconvenience is in favour of the plaintiff or not. In this case the Trial Court did not discuss about this three golden rules governing the grant or refusal of temporary injunction. However the Learned Appellate Court considered and specifically said that the Court did not find the balance of convenience and inconvenience in support of the defendants and also that they will suffer irreparable loss if there is an order of injunction. It is also a settled law while hearing an application under Order 39 Rule 1 and 2 the Court is not going to hold a mini trial and prima facie on the basis of the materials available will pass such order.

- 11.** It is a settled law that a duty is cast upon the Court to see during pendency of a dispute, the property concern or the interest attached with it must be protected in respect of the parties.
- 12.** Where an apprehension of dispossession and or a threat to change the nature and character of the property in question appears the court on the basis of prima facie available materials are to arrive at a conclusion .In this case the Learned Court duly considered relying upon the documents being the certified copy of the deed of Heb-bil-ewaj of Rs Khatian No.972 and information slip filed by the plaintiffs as well as the LR information slip of plot no 970 ,certified copy of the deed of Heb-bol-ewaj ,original sale deed executed in favour of Golam Martuja and certified copy of the deed of Heb-bol-ewaj executed in favour of Margina Bibi. The Learned Appellate Court also on perusal of the documents came to a finding that there is no dispute regarding title of the defendant over plot no 970 and 971 or regarding title of plaintiff over plot no 972, therefore only question left was the encroachment

of the land of respondent and or the petitioner or vise-versa . The declaration of the right title and interest to the extent of 16 annas as claimed by the plaintiff is the subject matter of the suit which is to be considered after taking evidence in course of trial till and such time the interest of the parties and the property must be protected.

13. The application for an order of ad interim injunction was filed by the plaintiff on the basis of the commissioner's report where the area marked as BB has been identified as encroached.

14. The order of injunction was granted by both the Learned Court and this Court with the observation that permission to raise any construction might lead to further complication and certainly that is confined to the prayer made in the application filed by the opposite party where he prayed for restraining the defendants /petitioner to raise any construction on any part of the suit property after ousting the plaintiffs /opposite party from there. Since the petitioner by filing written objection refuting such claim he cannot be said to be prejudiced by any such order of injunction.

15. Therefor this court upon consideration of entire facts and circumstance also find any cogent reason to have a different view at this stage when the commissioners report cannot be relied upon.

16. Hence this Court do not find any merit in interfering with this revisional application and the same stands dismissed.

17. The order passed by the Learned Appellate Court in Misc. Appeal no28 of 202 is hereby affirmed.

- 18.** Urgent certified copy if applied by any of the parties to be supplied subject to observance of all formalities.

(CHAITALI CHATTERJEE DAS, J.)

