

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

FMAT No. 542 of 2023

Karnani Properties Limited
-vs-
Harrow Hall, a Registered Society and others

For the appellant : Mr. Aniruddha Chatterjee,
Mr. Tanmoy Mukherjee,
Mr. Neelesh Choubey,
Ms. Anuradha Poddar,
Mr. Abir Lal Chakraborty

For the respondents : Mr. Partha Pratim Roy,
Mr. Dyutiman Banerjee.
Mr. Vishal Mallick

Heard on : December 24, 2024 and February 20, 2025.
Judgment on : February 20, 2025.

Sabyasachi Bhattacharyya, J.:

1. The present appeal has been preferred against an order dated September 19, 2023, whereby the application of the defendant

no.1/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 September 13, 2021 was dismissed and the ad interim injunction was extended.

2. Learned senior counsel appearing for the appellant argues that the initial order of ad interim injunction was obtained *ex parte* by suppression of material facts. Prior to the filing of the present suit, another suit had been filed by the plaintiffs/respondents for similar reliefs.
3. The filing of the said suit and the refusal of the prayer for injunction made by the plaintiffs/respondents in the said suit has been completely suppressed while obtaining the *ex parte* ad interim order, thereby bringing the case within the fold of Order XXXIX Rule 4 of the Code.
4. Learned senior counsel points out that in the previous suit filed between the same parties and on the same subject property, the plaintiffs/respondents took a plea that it had a right of easement because the suit property (a lawn) was being used as a playground and for other purposes by the students and teachers of the plaintiff/school. However, in the same breath,

a mutually destructive plea of irrevocable licence was also taken.

5. It is argued that the contradiction between the simultaneous claims of easementary right and licence has been sought to be mitigated by filing the present suit during pendency of the previous suit by suppressing the fact of the subsistence of the previous suit and seeking now a declaration that the plaintiffs have easementary right to enjoy free flow of air and light “through and from” the suit lawn.
6. It is contended that the learned trial Judge completely overlooked the said facts while observing that the defendant no. 1/appellant has failed to lay particulars of alleged suppression of material facts. It was further held erroneously by the learned trial Judge that the petition under Order XXXIX Rule 4 of the Code falls short of its requirement.
7. In the cryptic reasoning portion of the impugned order, the learned trial Judge also observed that “admittedly” the plaintiffs/respondents are in permissive possession of the plaintiffs’ property, which is completely contrary to the records, since at no point of time did the defendant admit any such permissive possession.

8. Learned senior counsel takes the Court through the previous order of rejection of injunction by the learned trial Judge in the prior suit, which was affirmed by a Division Bench of this Court. While so affirming, the Division Bench observed that the plaintiffs/respondents had claimed its permissive possessory right to use the said lawn as a playground for the students and teachers of the plaintiff school. Though certain documents regarding grant of such permission allegedly issued by the defendant no. 1 were annexed to the injunction application, it was observed by the said Division Bench, no document was annexed to the injunction application showing that the plaintiffs in fact were in possession of the disputed lawn as on the date of filing of the suit.
9. Accordingly, leave was granted to the plaintiffs, on the prayer of the learned Advocate appearing for the plaintiffs, to file a supplementary affidavit before the trial court bringing on record the documents to show the plaintiffs' possession of the suit lawn. However, an affidavit was subsequently filed by the plaintiffs before the learned trial Judge in connection with the earlier suit, which was diametrically opposite to the leave obtained before the Division Bench, by reiterating that there

was no document to show permissive possession of the plaintiffs in respect of the property.

10. Learned senior counsel places reliance on a judgment reported at *(2010) 14 Supreme Court Cases 38 (Ramjas Foundation and another Vs. Union of India and others)* where it was *inter alia* observed that a person who does not come to the court with clean hands is not entitled to be heard on the merits of the grievance.
11. Accordingly, it is submitted that the impugned order be set aside and the ad interim injunction granted earlier by the trial court be vacated.
12. Learned counsel appearing for the plaintiffs/respondents submits that the present appeal is not maintainable in the absence of any challenge to the subsequent extensions of the ad interim injunction order originally granted by the learned trial Judge. It is argued that unless the original ad interim order as well as all subsequent extensions are challenged, fact remains that even if the application under Order XXXIX Rule 4 of the Code is allowed, the subsequent extensions remain and, as such, the judgment setting aside the impugned order would be futile and toothless.

13. Learned counsel appearing for the plaintiffs/respondents further places reliance on a judgment of a learned Single Judge of this Court in the matter of *State of West Bengal and another Vs. Enkon Pvt. Ltd.*, reported at 2020 SCC OnLine Cal 2277.
14. In the said judgment, it came up for consideration before the learned Single Judge as to whether in the absence of any challenge to the subsequent orders extending the initial ad interim order of injunction, an appeal against the initial order was sustainable.
15. The learned Single Judge expressed doubt in view of conflicting judgments on the issue and referred the matter to a larger Bench. It is contended that a larger Bench has accordingly been constituted and is in seisin of the reference. However, the said reference has not yet been answered.
16. Learned counsel next argues that the cause of action for filing the previous suit is different from the present and as such, there was no material suppression of facts.
17. It is argued, by placing reliance on the averments made in both the plaints, that initially the plaintiffs had claimed an easement right over the property since it was being used as a

playground by the students of the plaintiff-school. However, subsequently, a signboard was put up on the property to the effect that it was in possession of joint receivers appointed by this Court. Subsequently, in the present suit, it has been alleged that the defendants have started digging up the suit property, thereby creating an apprehension that constructions would come up on the property, which would prevent the free flow of air and light to the school run by the plaintiff no. 1.

18. Thus, it is argued that the learned trial Judge was perfectly justified in passing the impugned order.
19. In any event, it is submitted that the right to free flow of air and light pleaded by the plaintiffs in the present suit has been substantiated at the ad interim stage by the averments made in the injunction application and as such, there arose no occasion of vacating the ad interim order.
20. Upon hearing learned counsel, we arrive at the following conclusions:
21. There are several aspects of suppression in the present matter.
22. The first aspect of the matter which catches the eyes is that in the previous suit filed by the plaintiffs/respondents, bearing

Title Suit No. 414 of 2015, before the same Bench of the City Civil Court, mutually destructive pleas were raised by claiming reliefs both in respect of alleged easementary rights of the plaintiffs for being allowed to use the suit lawn as a playground on the one hand and on the other that the plaintiff no.1-school is a licensee, which is an irrevocable licence.

23. An easementary right presupposes that there is a dominant heritage and a servient heritage. The person claiming the easementary right has title over the dominant heritage whereas he does not have any such title or possession over the servient heritage, over which easementary right of user is claimed.
24. Thus, the moment the plaintiffs plead an irrevocable possessory licence on the property that is the servient heritage, the same destroys the easementary character of the right.
25. That apart, more fatal to the plaintiffs' case is the suppression of the previous refusal of injunction. We find from the records that previously the plaintiffs' prayer for ad interim injunction was refused in the earlier suit on the ground that the plaintiff no. 1 is not an owner of the property. The plaintiffs

preferred a challenge by way of a appeal before this Court. A co-ordinate Bench of this Court, by a judgment and order dated July 6, 2015 passed in the appeal, bearing FMA No. 1906 of 2015, categorically observed that the plaintiff/appellant had claimed permissive possessory right and though certain documents regarding grant of permission allegedly issued by the defendant no. 1 were annexed to the injunction application, no document was annexed showing that the plaintiffs in fact were in possession of the disputed lawn on the date of filing of the suit. On such premise, the learned Advocate representing the plaintiffs/respondents sought leave to file a supplementary affidavit for the sole purpose of bringing documents on record to show that the plaintiffs were in possession of the suit lawn.

26. On such premise, the Division Bench of this Court granted the plaintiff a week's time to file such supplementary affidavit before the learned trial Judge and disposed of the appeal accordingly.

27. However, in the trial Court, the plaintiff went back and, instead of filing a supplementary affidavit showing its possession of the suit lawn, filed an affidavit where it admitted that the right of the plaintiffs is not a right based on possession

of the lawn but it had a right based on “permissive possessory right” (whatever that means).

28. The possession of the plaintiffs, as per the said affidavit, was not exclusive possession but a possession limited to the extent which the plaintiffs would require to allow its students and teachers to use the lawn (which would at best be a right of easementary user). Such pleading, in the opinion of this Court, is akin to a Schrodinger’s cat. In the same breath, the plaintiffs claimed that they were in possession of the property for the limited purpose to allow its students and teachers to use the lawn and on the other hand claiming that its right is not based on possession of the lawn.

29. Even the permissive *possessory* right relates to possession and as such does not pertain to an easementary right, which only consists of a right of user of the property.

30. That apart, the conduct of the plaintiff is deplorable inasmuch as it sought leave from this court on the specific plea that it would file a supplementary affidavit to furnish documents to show that it was in possession of the property, whereas it returned to the Trial Court with a contrary affidavit.

31. The premise of the cause of action for a suit arises first from the entitlement of the plaintiffs to the suit premises. The entitlement forms an integral part of the bundle of facts which comprise of the cause of action. As such, the plaintiffs retained its contentions in the previous suit to the effect that it has a permissive right to use the lawn physically but added a cosmetic superfluity in the second suit by pleading that it also had a right to free flow of air and light “from and through” the suit lawn.
32. It is clear from the different paragraphs, in particular paragraphs 15 and 16, of the plaint of the current suit that the plaintiffs stuck to their guns insofar as the pleadings in the previous suit are concerned to the effect that the lawn is being used as a playground since the year 1974 and that the defendant granted permission to the plaintiffs to use the lawn as an easement attached to the school premises.
33. However, there is incongruity between such pleadings and the relief sought in the current suit, the latter being only confined to declaration that the plaintiffs have easementary right to enjoy the free air and light “through and form” the said lawn (and not possessory right).

34. Thus, in the garb of easementary right to enjoy the free flow of air and light, the plaintiffs have reiterated all their claims of the previous suit in the current suit.
35. In fact, we do not find any reason as to why the learned trial Judge, despite coming to know of the pendency of the previous suit from the pleadings of the defendant's application under Order XXXIX Rule 4 of the Code, pleaded ignorance of the same. It would be more appropriate if the learned trial judge stayed the proceedings of the second suit, that is, the current suit by following the principle of Section 10 of the Code of Civil Procedure, since the issues involved in both the suits are directly and substantially the same.
36. That apart, we are of the opinion that in view of the above facts and circumstances, the suppression of the rejection of the plaintiffs' prayer for injunction in the previous suit and that it could not produce any document relating to its physical possession of the property despite having sought leave before the co-ordinate Bench of this Court to file a supplementary affidavit to that effect, as well as the pendency of the previous suit itself, tantamount to deliberate suppression of material and germane facts and must have been disclosed before obtaining

the ad interim order of injunction in the present suit. Having deliberately suppressed those facts, the plaintiffs are grossly guilty of suppression of material facts, which entitles the present defendant no. 1/appellant to have an order vacating the original ad interim order of injunction.

37. Insofar as the maintainability of the appeal is concerned, mere pendency of a reference to a larger Bench on an issue is by itself not a deterrent for all courts, for all time to come till the reference is answered, to stay their hands on similar issues if they crop up in other litigations as in such case none of the pending litigations on the said issue would come to an end, which would unnecessarily increase multiplicity of proceedings.

38. Insofar as the pleading of non-maintainability on merits is concerned, the said contention of the plaintiffs/respondents, in our opinion, is also not tenable in the eye of law.

39. It is the initial parent ad interim order of injunction which is extended from time to time. The very expression “extension” presupposes that there is a subsisting something which is being sought to be extended. In the absence of a parent order, there would not arise any question of “extension”, but on

every subsequent occasion it would be a fresh grant of injunction, upon the court being independently satisfied on each and every occasion, by hearing the parties afresh on the maintainability and merits of the application. It is common knowledge that while granting extensions, the Courts do not enter into such exercise.

40. In the present *lis*, it is the case of neither party that the ad interim order initially granted has ever spent its force or has been vacated. In such event, it might have been argued that there is a re-imposition of the interim order.
41. However, since no such circumstance attends the present case and the initial ad interim injunction order has been continuously extended, we are unable to accept that a challenge to the principal, parent and first ad interim order of injunction would not suffice. In the event the initial parent order is vacated, all subsequent extensions, which are but mere offshoots of the first order and mirages of the same, automatically spend their force and evaporate.
42. Moreover, it would be an absurd proposition that although a challenge has been preferred against the initial and foremost ad interim order, appeals have to be preferred against each

and every subsequent extension order, which would create unnecessary and unwarranted multiplicity and would saturate the dockets of courts without any reason.

43. Hence, the challenge to the parent order would suffice in our opinion to render all subsequent extensions of such order nugatory. Viewed from such perspective, we are of the opinion that the present appeal against the refusal to vacate the initial ex parte ad interim order is sufficient and maintainable, even in the absence of any challenge to each of the subsequent extensions of the parent ad interim order of injunction.

44. In view of the above discussions, we are of the opinion that the learned Trial Judge acted with patent illegality in dismissing the application under Order XXXIX Rule 4 of the Code filed by the defendant/appellant in the court below.

45. Accordingly, FMAT 542 of 2023 is allowed on contest, thereby setting aside the impugned order, bearing No. 28 dated September 19, 2023 passed by the learned Judge Fifth Bench, City Civil Court at Calcutta in Title Suit No. 972 of 2021, and vacating Order No. 4 dated September 13, 2021 passed in the said suit.

46. It is deemed as a consequence that all subsequent orders of extension of the initial ex parte ad interim order dated September 13, 2021, if granted and or subsisting, are hereby automatically vacated.
47. Insofar as as the main temporary injunction application pending in connection with the suit is concerned, the learned trial Judge shall decide the same as expeditiously as the business of the said court permits, without being influenced unnecessarily on the merits of the case by the observations made above.
48. There will be no order as to costs.

I agree.

(Uday Kumar, J.)

(Sabyasachi Bhattacharyya, J.)