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**(2019) 07 CAL CK 0065**

**In the Calcutta High Court**

**Case No :** Civil Order/Misc.Cas (CO) No. 1432 Of 2019

Aminul Islam And Another

APPELLANT

Vs

Jannatun Nisha And Others

RESPONDENT

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**Date of Decision :** 17-07-2019

**Acts Referred:**

**Citation :** (2019) 07 CAL CK 0065

**Hon'ble Judges :** Sabyasachi Bhattacharyya, J

**Bench :** Single Bench

**Advocate :** Dhiraj Trivedi, Amit Sharma, Sailendra Kumar Tiwari, Bhupendra Gupta, Probal Kumar Mukherjee, Shaoni Dey

**Final Decision :** Dismissed

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## **Judgement**

Sabyasachi Bhattacharyya, J

1. The present revision arises from a suit for declaration and permanent injunction. The petitioners are the defendant nos. 1 and 2 in the said suit. In

the suit, the plaintiffs/opposite party nos. 1 to 7 filed an application for temporary and ad interim injunction, which was allowed on contest by the trial

court vide order dated June 12, 2018, thereby directing status quo to be maintained with respect to the possession as on that date. The defendants

were further directed not to make any construction or act of demolition in the suit property till disposal of the suit, without leave of the court. The

plaintiffs were directed to take steps for impleading the debuttar estate, Sri Sri Radha Kanto Thakur by the next date. Being aggrieved by such

injunction, the petitioners preferred a miscellaneous appeal bearing Miscellaneous Appeal No.31 of 2018, which was ultimately dismissed on contest

by the impugned order, thereby affirming the order of the trial court.

2. The petitioners argue at the outset that the plaintiffs have made contradictory claims of ownership on the one hand, and leasehold right on the other,

in respect of the suit property. It is argued that in the year 1917, the superior landlords/owners of the property gave a lease to Gaffar, the

predecessor-in-interest of the plaintiffs/opposite parties, for 51 years, which expired in the year 1968.

3. During pendency of such lease, in the year 1945, the lessee Gaffar sub-let the property to the predecessor-in-interest of the petitioners (namely one

Nabi).

4. Upon expiry of the parent lease in 1968, the superior landlords renewed such lease in favour of Gaffar for a further period of 20 years.

Correspondingly, a fresh sub-lease was granted by Gaffar to the predecessor-in-interest of the petitioners.

5. Upon the parent lease having expired in 1988, a direct lease was now granted by the superior landlords/owners in favour of Nabi, the

predecessor-in-interest of the petitioners. Such direct lease was executed on October 22, 1987 and became operative from July 1, 1988, upon expiry

of the previous parent lease in favour of Gaffar.

6. It is argued that the lease deeds-in-question indicate that the lease given was in respect of the lands comprised in the suit property only and not the

structures thereon.

7. The lease deeds on record would indicate that Nabi was given permission to raise structures and he made such construction, in particular extensions

to the cinema hall, pursuant to such permission.

8. It is argued that Gaffar's right to the structures ceased with the expiry of his lease in 1988. By subsequent deeds, the petitioners were allowed

to demolish the existing structures and raise new ones.

9. It is submitted on behalf of the petitioners that a dispute exists as regards the ownership of the structures on the suit property, both sides having rival

claims as to ownership thereof. A movie theatre, namely, 'Taswir Mahal', was being run from the suit property by the predecessor-in-interest

of the defendants/petitioners.

10. It is argued on behalf of the petitioners that not only were the plaint pleadings contradictory, the debuttar estate itself was not impleaded, thereby

rendering the suit not maintainable and liable to be dismissed for non-joinder of a necessary party.

11. Moreover, it is submitted that the suit property was the subject-matter of another suit between the owners of the property, pending in this court, in which the official receiver was appointed to supervise the suit property. It is submitted that the receiver has been entering into several transactions, including all of the relevant transactions mentioned above, on behalf of the estate. Such appointment still subsists according to the petitioners, thereby rendering the present suit bad in absence of leave to sue being obtained from the receiver, nor impleading the receiver as a party. Even the owners/superior landlords, it is submitted, were not impleaded, rendering the suit bad for non-joinder of necessary parties.

12. Learned counsel for the petitioners further argues that the orders of injunction of both the courts below are devoid of any consideration of the necessary yardsticks governing the grant of injunction â?" being prima facie case, balance of convenience and inconvenience and irreparable injury as well as urgency.

13. Learned counsel for the petitioners cites a judgment reported at (2018) 11 SCC 1 [Mandali Ranganna and others vs. T. Ramachandra and others], wherein it was held that the court, while granting injunction, will not only take into consideration the basic elements in relation thereto, namely, existence of a prima facie case, balance of convenience and irreparable injury; it must also take into consideration the conduct of the parties. It was held that the grant of injunction was an equitable relief and a person who had kept quiet for a long time and allowed another to deal with the property exclusively, ordinarily would not be entitled to an order of injunction. The court will not interfere only because the property is a very valuable one.

Grant or refusal of injunction has a serious consequence depending upon the nature thereof and the courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, it was held, application of mind on the part of the courts was imperative.

Contentions raised by the parties must be determined objectively.

14. Learned counsel next cites a judgment reported at (2014) 12 SCC 190 [Ramesh Vajabhai Rabari vs. Pratiksha Real Estate Private Limited and others], in support of the proposition that if the petitioner has neither any

semblance of title nor possession on the property, nor prima facie case, nor balance of convenience in his favour, as he is yet to take possession and develop the property, injunction ought not to be granted.

15. Learned counsel for the petitioners next cites a judgment reported at AIR 1993 SC 276 [Dalpat Kumar and another vs. Prahlad Singh and others,]

wherein the tests for grant of injunction were stipulated. It was held, inter alia, that the court, while granting or refusing injunction, should exercise

sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused, and

compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of

likelihood of injury the court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. The

phrases "prima facie case", "balance of convenience", and "irreparable loss" are not rhetoric phrases for incantation but words of width

and elasticity, to meet myriad situations presented by man's ingenuity in given facts and circumstances but always is hedged with sound exercise

of judicial discretion to meet the ends of justice. The possibilities of adequately compensating the parties seeking injunction by awarding damages for

use and occupation from the date of dispossession till restitution, ought also to be considered while deciding prayers for injunction.

16. Learned counsel for the petitioners next cites a judgment of a co-ordinate bench reported at (2016) 2 WBLR (Cal) 87 [Sk. Khursed & Ors. Vs.

Sk. Mantajuddin & Ors.], wherein the tests for grant of injunction were reiterated.

17. Learned counsel lastly cites a judgment of a division bench of this court, reported at 2010 (1) CHN (Cal) 597 [Unity Realty & Developers Ltd. vs.

Shri Amit Kumar Mitra & Ors.]. The tests of prima facie case, balance of convenience and irreparable loss and injury were set out in the said

judgment and it was held that, while the first condition is sine qua non, the plaintiff is also to establish the two other conditions conjunctively. It was

held that, mere proof of any of the three conditions does not entitle a petitioner to get an order of temporary injunction.

18. Learned senior counsel for the plaintiffs/opposite party nos. 1 to 7, on the other hand, argues, by placing reliance on the plaint schedule, that the

suit property is comprised of both land and structure, including the theater " "

Taswir Mahal Talkiesâ?. As per the plaint case, one Jumman Sawdagar, the father of Gaffar Ahmed (since deceased) took lease of the suit land and constructed a cinema hall known as â??Taswir Mahal Talkiesâ? on the land. Upon his death on May 6, 1933, Jummanâ??s son Gaffar inherited his right, title and interest in the suit property.

19. Subsequently one Satya Bikash Banerjee instituted a money suit against Gaffar Ahmed, which was decreed in Satyaâ??s favour. In execution,

Gaffarâ??s interest in the suit property was auction sold on April 16, 1936 and was purchased by the landlord Satya Bikash himself. Satya took

symbolic possession of the suit premises on February 14, 1937 through court.

20. Thereafter the suit property was transferred back by Satya to Gaffar through a registered sale deed in the year 1940.

21. Gaffar then granted lease of the cinema hall, as per the plaint case, to one Nabi Mohammed, who was the grandfather of the defendant nos. 1 to

5, by a registered lease deed dated April 9, 1945, along with two talkie machines, seats, canteen and many other articles associated with the cinema.

22. It is argued by the plaintiffs/opposite parties that Gaffarâ??s title was admitted by Nabi, the predecessor-in-interest of the defendant nos. 1 to 5,

by accepting the lease from Gaffar.

23. Placing portions of the lease deed dated September 16, 1968, executed by the owners/superior landlords in favour of Gaffar Ahmed, learned senior

counsel submits that the said transaction pertained to a demise of the land only, and not the structure standing thereon. However, it is also pointed out

that the existence of structures on the said land was also recorded therein.

24. In the lease deed executed on the very next day, that is, September 17, 1968, however, Gaffar let out to Nabi the structures standing on the suit

land, other than the movie theatre, as is evident from the schedule thereof, which mentions structures on the land, butted and bounded on the South by

the cinema house known as â??Taswir Mahal Talkiesâ? which, though, was stated to be of the lessee Nabi.

25. However, on September 17, 1968 itself, Gaffar Ahmed executed a second lease deed, letting out to Nabi Mohammad the structure housing the

cinema hall â??Taswir Mahal Talkie Houseâ? and all fixtures and appurtenances thereto, including the apparatus for running movie shows therein.

Nabi was mentioned to be a â??tenantâ? of Taswir Mahal in the body of the said

deed as well.

26. Again, by virtue of the twenty one-yearsâ?? lease deed dated October 22, 1987, which became operative on July 1, 1988, the superior

landlords/owners let out to Nabi Mohammad only the suit land and not the structure. In clauses 13 and 14 of the said deed, the lessee was permitted to

remove the old structure standing on the said land and submit suitable plan before the municipal and other authorities for new construction of pucca

building/structure out of his own fund and to carry out necessary construction. Thus, it is submitted, the said clauses prove the pre- existence of

structures on the suit land even before Nabi was permitted or started to construct.

27. The lease was extended by the owners in favour of Nabiâ??s heirs on June 3, 2002. In the schedule of the said deed, structures, along with land,

were let out for the first time to Nabiâ??s lineage.

28. Learned senior counsel for opposite parties no. 1 to 7 argues that the sanction plan produced by the petitioners was obtained by the petitioners as

long back as in 1986 and it lapsed after five years, that is, in 1991.

29. In reply, learned counsel for the petitioners submits that the lease deed dated September 17, 1968, executed by Gaffar Ahmed to Nabi

Mohammad, mentioned the cinema house known as â??Taswir Mahal Talkiesâ? as the demised premises. The schedule thereof also described the

demised property as the said movie hall and appurtenances. Clause 3 of the said document provides that the lessee, namely Nabi, would pay â??both

sharesâ?? of taxes to the Calcutta Corporation in respect of the demised premises, which learned counsel for the petitioner seeks to interpret as the

taxes for both the land and the structure.

30. It is further submitted on behalf of the petitioners that it was for the opposite party nos. 1 to 7 to establish irreparable injury in case of refusal of

injunction and the petitioners, being defendants, had no liability to controvert such averment specifically.

31. It would appear from the sanction plan of 1981 that the structures standing on the suit property had been demolished long back and there was no

question of the opposite parties suffering irreparable injury in case of new construction being made thereon, enhancing the valuation of the property.

Rather, it was the petitioners who would suffer from the injunction in view of

having heavily invested resources in the suit property over a long period of time. The balance of convenience and inconvenience also lay in favour of refusal of injunction. Taking the extreme case, compensation would be adequate to redress the grievance of the opposite party nos. 1 to 7 and an injunction order would serve no purpose.

32. While considering the relevant transactions chronologically, the first impression is that of a careless series of transfers and re-transfers of the suit property on both sides, without any application of mind to the question as to whether the transferor had the title to transfer in the first place.

33. After the initial lease of 1917 in favour of Gaffar, the lessee gave a sub-lease to Nabi in 1945. While the lease to Gaffar was renewed in 1968 up to 1988, a corresponding sub-lease was executed afresh in 1967 by Gaffar to Nabi for roughly the same tenure.

34. Apparently, one Satya Bikash Banerjee purchased the suit property through an auction sale, pursuant to a money decree obtained by Satya Bikash Banerjee against Gaffar. The anomaly which arises is, how could Satya Bikash Banerjee purchase the property, albeit through a court sale, from Gaffar, who merely had leasehold right in the property. A court sale, in execution of a decree, although an established mode of transfer, cannot enhance the title of the transferor in the property merely because it has the sanction of the court. Like all other transfers, a transferee through a court sale only acquires the title of the transferor in the property and not more.

35. The next anomaly which crops up is Satya Bikash Banerjee transferring the suit property back to Gaffar by a registered sale deed. Thus Gaffar, who was a lessee in respect of the suit property under the superior landlords, became an absolute owner of the property by a couple of transfers.

36. Subsequently Gaffar granted lease of the cinema hall to Nabi Mohammad, the predecessor-in-interest of the petitioners in the year 1968.

37. The defendants/petitioners were subsequently vested with a direct lease by the superior landlords, operative from 1988, subsequent to the expiry of the previous lease in favour of Gaffar.

38. However, there emerges a method in the above madness if the transfer of the land-component in the suit property is segregated from that of the structure- component thereof. What Gaffar purchased in 1940 was the land including structure. Nabi, the predecessor-in-interest of the

defendants/petitioners, admitted the title of Gaffar in such structure by taking a lease of the cinema hall, machines and other appurtenances from

Gaffar on April 9, 1945.

39. Thereafter, the superior landlords let out the land to Gaffar on September 16, 1968, wherein the existence of structure was mentioned.

40. On September 17, 1968, by two separate lease deeds, Gaffar let out the cinema hall and other structures respectively to Nabi, which was the

second such occasion of Nabi admitting title of Gaffar in the structures on the suit property, although the superior landlords went on granting lease in

respect of the land comprised in the property to Gaffar, thereby restricting Gaffar's rights to that of a lessee in respect of the land.

41. Even the lease deed executed on October 22, 1987, operative from July 1, 1988, by the superior landlords in favour of Nabi, which is the plinth of

the petitioners' claim, was executed in respect of the land.

42. However, a crucial provision was made in clauses 13 and 14 of the said lease deed dated October 22, 1987, conferring right on Nabi to demolish

the existing structure and raise new construction thereon.

43. When the subsequent lease deed by the superior landlords/owners in favour of Nabi was executed on June 3, 2002, the schedule of the deed

included both land and structure on the suit property.

44. The turning point of the case hinges around the apparent illegality in the superior landlords empowering Nabi to demolish the existing structure and

raise new constructions, despite the previous documents evidencing the owners' right only in the land and Gaffar's title in the structures

thereon. The string of documents from 1940 onwards never deviated from the position that Gaffar apparently raised the construction and was the

owner thereof. All the deeds, whereby Gaffar granted lease of the structure to Nabi, had the common manager and/or receiver appointed in the suit

by this court as signatories.

45. As such, the owners/superior landlords had no title in the structures to transfer to Nabi by the lease deed dated June 3, 2002 and/or to grant Nabi

the right to demolish the existing construction or raise new construction thereon, since Gaffar was the owner of the structures, and not the superior

landlords, as evident from all the previous documents, which were executed within the knowledge of all concerned.

46. Hence, although Nabi and his successor-in-interest, that is, the present petitioners, claimed to have obtained a direct lease from the superior

landlords, coupled with the right to demolish the existing construction and raise new ones, such title was never vested in the superior landlords, in so

far as the structures are concerned, which belonged to Gaffar.

47. In such a scenario, the plaintiffs/opposite party nos. 1 to 7, claiming through Gaffar, were the owners of the structures on the suit land and the

lease and/or right to demolish and construct conferred on the petitioners (heirs of Nabi) by the superior landlords were paper transactions and had no

teeth.

48. As regards the provision in the lease deed dated September 17, 1968 for Nabi to pay â??both sharesâ?? of taxes, the same was more likely to

refer to the lessorâ??s as well as the lesseeâ??s shares, and not the shares of the taxes for land and structure.

49. As such, the plaintiffs/opposite party nos.1 to 7 made out a strong prima facie case to go for trial, sufficient to entitle them to the injunction granted

by the courts below.

50. As far as the balance of convenience and inconvenience is concerned, although the judgment of Mandali Ranganna and others (supra) is relevant,

the principle of preventing a plaintiff from coming up for a prayer of injunction late, is not applicable to the present case. Mere production of a

sanctioned plan of the year 1986, which ex facie lapsed in 1991, could not lend validity to the claim of the petitioners that they were intending to make

construction on the suit property. Nothing has been produced in support of the contentions of the petitioners that they have invested huge amounts and

were on the verge of starting construction on the suit property long before the institution of the suit.

51. As such, the balance of convenience and inconvenience was obviously in favour of grant of injunction.

52. As far as irreparable injury is concerned, the suit property admittedly houses a cinema hall, defunct or active, and several appurtenances thereof

which were only let out to the petitionersâ?? predecessor-in-interest Nabi at one point of time, obviously belonging to Gaffar, the

predecessor-in-interest of the plaintiffs/opposite party nos. 1 to 7, and the petitioners had no right to change the nature and character of the said

structures in any manner. The rights of demolish and construction, given to the petitionersâ?? predecessor-in-interest by the superior landlords, were not vested in the said transferors at all, to clothe the petitioners with a valid right to so demolish/construct. Thus, the plaintiffs would be at obvious inconvenience and would suffer irreparable injury in the event the long-standing structures were permitted to be demolished by the petitioners, in the process altering the character of the suit property beyond recognition, in a manner which could be unacceptable to the plaintiffs and had every chance to be irreversible for all practical purposes. Damages would not suffice to sufficiently compensate such a fate of the property.

53. As far as the non-impleadment of the receiver and/or common manager appointed by this court is concerned, they were not necessary parties to the suit, in its present format. Both the parties claimed through documents, to which the said receiver and/or common manager were signatories and they acted as instruments in such transfer. Beyond that, the receiver and/or common manager had nothing to do as far as the dispute inter se the present parties was concerned. Thus, non-impleadment of such parties could not be fatal to the maintainability of the suit, sufficient to rob the plaintiffs of a prima facie case.

54. Although the orders of both the courts below were stingy as far as reasons were concerned, a semblance of judicial consideration is evident from the orders of both the courts below and the conclusion arrived at in granting injunction indicate the application of correct yardsticks governing the grant of injunction.

55. It is well-settled that mere insufficiency of reasons cannot vitiate an order as a whole and affect the beneficiary of the order without any fault of such beneficiary.

56. Hence, in the circumstances aforesaid, the courts below were justified in granting injunction. Accordingly, C.O. No.1432 of 2019 is dismissed, affirming the orders impugned therein.

57. There will be no order as to costs.

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