
(2015) 02 CAL CK 0076
In the Calcutta High Court
Case No : C.O. No. 3656 of 2011

East Coast Fisheries Put. Ltd.

APPELLANT

Vs

Manjuri Bhattacharya and Others

RESPONDENT

Date of Decision : 04-02-2015

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2015) 1 CALLT 426 : (2015) 4 CHN 196 : (2015) 2 WBLR 495

Hon'ble Judges : Subrata Talukdar, J.

Bench : Single Bench

Advocate : Asoke Kr. Banerjee, Sabyasachi Bhattacharya and M.S. Yadav, for the Appellant

Judgement

Subrata Talukdar, J.—In this application under Article 227 of the Constitution of India the impugned judgment and order dated 26th September, 2011 passed by the Ld. 9th Additional District Court at Alipore in Misc. Appeal No. 366 of 2002 is under challenge. The said Misc. Appeal was preferred against order No. 63 dated 22nd July, 2002 passed by the Ld. 3rd Civil Court (Junior Division) at Alipore in an application for injunction filed by the plaintiff in connection with Title Suit No. 368 of 1996. The plaintiff is the petitioner before this Court in CO 3656 of 2011 and the opposite parties (for short OPs) are the defendants. By the said order dated 22nd July, 2002 the Ld. Trial Court, inter alia, held as follows:-

"Plaintiff has prayed for an order of temporary mandatory injunction of defdt. Nos. 1 and 2 to remove the alleged newly constructed gate in the southern passage of the demised premises.

According to the defdt No. 1 the alleged gates is that since 1973.

Without taking evidence of both sides it cannot be ascertained at this stage where is the alleged gated is a newly constructed or is the same is that since 1973. So, plaintiffs prayer for mandatory injunction cannot be considered at this stage.

The plaintiff has also prayed for an order of temporary injunction restraining defdt Nos. 1 to 5 their men, agents, masons and miseries from constructing the threatens wall in the suit property and further from obstructing the plaintiff in use and enjoyment of the suit property till disposal of the suit.

According to the plaintiff, they have unfettered right to use the passages in suit property in common with defdt. Nos. 1 and 2 and the defdt Nos. 1 and 2 has no right to obstruct the plaintiffs in such, which defdt. No. 1 has denied.

In my opinion, only on the basis of Deed of Lease Dt. 9.8.1989 in Annexure "A" of the injunction petition and Deed of Assignment dt. 8.10.91 in Annexure "B" of injunction petn. It can not be ascertained at this stage whether plttf has/have unfettered right to use the passages in suit property or not? Without taking evidence of both sides the above mentioned point can not be ascertained properly. But on a meaningful reading of the injunction petition it appears to me that the plff has a strong prima facie case to go for trial.

Considering facts and circumstances of the suit and documents on record, I think that both the plaintiff and defdt Nos. 1 to 5 should be directed to maintain status quo in respect of the suit property till disposal of the suit.

Hence, it is,

ORDERED

that both the plaintiff and defendant Nos. 1 to 5 are hereby directed to maintain status quo in respect of the suit property as mentioned in the schedule of the injunction petition till disposal of the suit.

Thus the temporary injunction petition dt. 11.10.96 is disposed of on contest without costs as against defendant No. 1 and ex parte as against defendant Nos. 2 to 5 without costs.

Fix 12.9.02 for hearing petition u/or. 26 R-9 C.P.C. filed by defdt No. 1."

2. The order of status quo being carried in appeal by the present OP Nos. 1 and 2 as appellants and arraying the plaintiff No. 1 as a respondent, the Ld. Appellate Court took note of the contention of the defendants that taking advantage of the order of status quo the plaintiff has totally blocked the gate of the passage marked as schedule "C and using the total passage space from the side of the plaintiff and preventing the defendants, their men and agents from using the said passage at all in common. Further noticing that both the parties to the suit are claiming easement rights over the said disputed passage the Ld. Appellate Court upon consideration of the claim of the plaintiff, as contended at paragraphs 22 and 23 of its applications or injunction in the suit, thought it fit to modify the order of status quo passed by the Ld. Trial Court by holding as follows:-

"A gate for any on the southern passage of the demised premises should be made accessible so that the 20 ft. passage of the southern side of the demised property can be used by the appellants/defendants, his men, agents and

customers as well as respondents-plaintiff, his men and agents till the disposal of the suit." 3. Principally aggrieved by such direction of the Ld. Appellate Court the plaintiff has approached this Court by way of the present Civil Revisional Application.

4. From a bare perusal of the plaint in Title Suit No. 386 of 1996 it is noticed that the plaintiff has asserted its right with regard to the southern passage marked Schedule "C" at paragraphs 4, 7, 10, 13, 14 and 15 as follows:-

"4. Under the Lease dated 9th August, 1989 a right was created on the passage to the southern side of the demised premises in favour of the defendant No. 6 which was devolved unto the plaintiff as a result of the said Deed of Assignment hereinbefore mentioned.

7. It is being claimed by the defendant No. 1 and 2 that the plaintiff does not have any right in either the 20" wide passage on the southern side. A dispute has been sought to be raised by the defendant Nos. 1 and 2 restricting the plaintiffs right of access on all the three passages which are particularly mentioned separately as Schedule C, C1 and C2 in the Plaint.

10. The plaintiff protested in such obstruction stating that the suit property i.e. the passages was and is still in common use and the defendant No. 1 and 2 or anybody through them have no right to obstruct the plaintiff in use thereof and called upon to remove the fixed gate upon such protest the representative of defendant Nos. 1 and 2 one Sri Bansi Bandopadhyya threatened that he will not remove the gate and would not allow the plaintiff to use the southern passage and also threatened with dire consequence if any attempt is made by the plaintiff in using the same.

13. That the plaintiff has further come to know that the defendant No. 1 and 2 intends to construct pucca wall covering the southern passage so that the plaintiff may not have any access to the said southern passage and the defendant No. 1 and 2 is also creating troubles of and on in the use of the remaining passage.

14. That in the circumstances as aforesaid it is necessary that a declaration be made declaring the plaintiffs has unfettered right to use side passages and the defendant No. 1 and 2 has no right to obstruct the plaintiffs in such use.

15. That by reason of the facts as stated hereinabove the defendant No. 1 and 2 by constructing the said gate and locking the same and threatening to construct pucca wall over the southern passage had invaded upon the plaintiff rights of use of the said southern passage which he has been enjoying and as such it is necessary that the defendant No. 1 and 2 be directed by an order of mandatory injunction of this Court to remove the said newly fixed gate so that the plaintiff may use the southern passage as usual without any obstruction."

5. On the other hand in their written statement the defendant Nos. 1 and 2 at paragraph 17(c) with regard to the said southern passage have pleaded as

follows:-

"17. (c) That the 20" ft. wide space 3 at the south absolutely belong to the defendant Nos. 1 and 2 and the plaintiff has no easement right upon it. The plaintiff have their independent and exclusive gate for entry into and egress from their possession situated at the west of their plot which is just by the side of the old existing gate of this defendant and the defendant No. 2." 6. Shri Ashok Banerjee, Ld. Senior Counsel has vehemently argued that the Ld. Appellate Court could not have modified the order of status quo by directing that the gate, if any, on the southern passage of the demised premises should be made accessible so that the right of user of the southern passage remains both with the plaintiff and with the defendants. Shri Banerjee submits that the Ld. Appellate Court while dismissing the appeal irregularly exercised jurisdiction by modifying the order of status quo which was the subject matter of the appeal.

7. Ld. Senior Counsel further submits that the Ld. Appellate Court erred by dismissing the application for local investigation. Ld. Counsel points out that it was incumbent on the Ld. Appellate Court to apply its judicious mind on the points of local investigation urged by the plaintiff and merely on the basis of rival submissions without any report of local investigation the Ld. Appellate Court ought not to have modified the order of status quo.

8. Drawing the attention of this Court to the order of the Ld. Trial Court dated 22nd July, 2002 Shri Banerjee submits that the Ld. Trial Court found a strong prima facie case in favour of the plaintiff to go for trial on a meaningful reading of the injunction petition. The Ld. Appellate Court on examination of the pleadings in the injunction application found that the right of easement of the plaintiff has been asserted in respect of the passage, including the southern passage and therefore, the Ld. Appellate Court did not find it fit to disturb the order of status quo and dismissed the appeal. However, the value of the dismissal of the appeal accruing in favour of the plaintiff has been nullified by the direction to make accessible the gate of the southern passage for use by both the plaintiff and defendants.

9. Shri Saptangshu Basu, Ld. Senior Counsel arguing on behalf of the OP7-defendant submits that from the plaint and injunction application it will be evident that the right of user of the passages for both the plaintiff and defendants has not been denied. Shri Basu points out that the plaintiff has at best, claimed its easement rights over the passage in question, including the southern passage. He submits that it is not the case of the plaintiff that the right of its easement over the passage is to the exclusion of the defendants.

10. In the above view of the matter, according to Shri Basu, the Ld. Appellate Court committed no mistake in directing access to the gate so that both the contesting parties can exercise their respective rights of easement till the suit is finally decided. Therefore, Shri Basu argues that the order of the Ld. Appellate Court does not warrant any interference.

11. Having heard the parties and considering the materials on record this Court is sufficiently persuaded to take the view that the averments in the plaint as well as the contentions in the injunction application noticed by the Ld. Appellate Court only point to the assertion of the easement rights of the plaintiff over the passage in question, including the southern passage. From the pleadings, relevant portions of which have been referred to above in this judgment, it does not transpire that the plaintiff has sought exclusive rights of easement ousting the easement rights of the defendants. As referred to above at paragraph 14 of the plaint the plaintiff has pleaded that a declaration be made that the defendant Nos. 1 and 2 do not have a right to disturb the plaintiff in their right of user of such passage.

12. This Court finds it also useful to reproduce the prayers in the plaint which are as follow:-

"a) declaring the plaintiff has unfettered right to use the passages mentioned in schedule C, C1 and C2 i.e. suit property in common (emphasis supplied) with defendant No. 1 and 2 and the defendant No. 1 and 2 has no right to obstruct the plaintiffs in such use.

b) The defendant No. 1 and 2 be directed by an order of mandatory injunction of this Court to remove the said newly fixed gate so that the plaintiff may use the southern passage as usual without any obstruction.

c) The defendant be constrained by an order of permanent injunction of this Court from constructing any threatened wall in the southern passage and creating obstruction and harassment to the plaintiff in use of the four side passage i.e. suit property of the demised premises.

d) Ad-interim order of Injunction interim of prayer (b) and (c).

e) Costs.

f) Such further or other relief as the Learned Court feels deem fit and proper."

13. This Court also finds that the report of the Ld. Special Officer appointed by order of this Court dated 24th November, 2011 has echoed the position of the property including the southern passage. In the light of the above noted relevant materials on record this Court cannot be in agreement with Shri Banerjee that the plaintiff can prima facie claim an exclusive right to the passage in question, including the southern passage denying the easement rights of the defendants. The grounds of submission made by Shri Basu in Court do not stand to be corroborated from the averments in the plaint and in the injunction application. It strikes the mind of this Court that the plaintiff has attempted to make out a case claiming conjoint right of user of the passage in question and removal of any obstruction by the defendants to such user. The prayers in the plaint (supra) also point to such a stand.

14. A preliminary point of objection was sought to be raised by the Ld. Counsel

for the OP7 who argued that the present Civil Revisional Application is not maintainable. Relying upon the judgment of the Hon"ble Apex Court reported in Sneh Gupta Vs. Devi Sarup and Others, and in Jai Singh and Others Vs. Municipal Corporation of Delhi and Another, Ld. Counsel for the OP7 has argued that when both the Courts have returned concurrent findings of fact surrounding the order of status quo, there does not appear to be any perversity in the order of the Ld. Appellate Court. Only in the event of perversity can the order of the Appellate Court be looked into by this Court exercising jurisdiction under Article 227 of the Constitution of India. For the above reasons Ld. Counsel has further argued that the present application is liable to be dismissed in limini.

15. Opposing such prayer Shri Banerjee has argued that the Hon"ble Apex Court did not lay down any blanket bar to exercise of jurisdiction by this Court under Article 227 of the Constitution of India in all cases.

16. Shri Banerjee points out that in appropriate cases if a case of perverse finding is sought to be made out in the orders impugned, this Court can intervene in exercise of its jurisdiction under Article 227 of the Constitution of India.

17. This Court is in unison with the stand taken by Shri Banerjee and holds that the present application under Article 227 is maintainable.

18. However, this Court does not find that the Ld. Appellate Court committed an error by defining and thus modifying the order of status quo on prima facie appreciation of the materials on record. For the above reasons the order impugned dated 26th September, 2011 is not interfered with.

19. CO 3656 of 2011 stands dismissed. However, there will be, no order as to costs.

Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.