

(2024) 01 CAL CK 0039

In the Calcutta High Court

Case No : F.M.A.T. No. 452 Of 2023, CAN 1 Of 2023

Mahadeb Ghosh & Ors.

APPELLANT

Vs

Pijush Kanti Ghosh @ Mangala Charan Ghosh.

RESPONDENT

Date of Decision : 10-01-2024

Acts Referred:

Citation : (2024) 01 CAL CK 0039

Hon'ble Judges : Harish Tandon, J; Madhuresh Prasad, J

Bench : Division Bench

Advocate : Partha Pratim Roy, Hare Krishna Halder, Debasis Sur, Anindita Chatterjee, Uttiya Ray, Arnab Mondal

Final Decision : Disposed Of

Judgement

At the very outset we must record the incongruity in the impugned order passed by the Trial Court while disposing of an application for temporary injunction. It has been recorded in the penultimate paragraph of the said order that the interim order granted earlier is made absolute, which appears to be inconsistent with the record of the case.

Admittedly the ex parte ad interim order of injunction was passed by the Trial Court, which was assailed by the defendants/appellants before this Court in F.M.A.T. 109 of 2023. The said appeal was disposed of on 17th August, 2023 setting aside the order of injunction passed on 11th August, 2022 and directing the application for temporary injunction to be disposed of in presence of both the parties.

The moment the ad interim order of injunction is set aside by the Appellate Court, the question of making the said interim order absolute is a farcical approach and reflection of non-application of mind. Be that as it may, we have ventured to go into the merits of the case made out in an application for temporary injunction and do not find that the findings returned by the Trial Court in directing the parties to maintain status quo in respect of the nature, character,

possession and position of the suit property without recording a specific finding of possession, can be sustained in view of the judgement of the Apex Court in case of Kishore Kumar Khaitan & Anr. vs. Praveen Kumar Singh reported in (2006) 3 SCC 312. Though the case involved in the above noted Report pertains to granting of temporary mandatory injunction, yet the principles laid down therein cannot be overlooked, even at the time of disposal of an application for temporary injunction.

We are not unmindful of the proposition of law that the injunction applications are decided on an equitable principle, more particularly on three golden parameters, namely existence of prima facie, balance of convenience and inconvenience and irreparable loss and injury. The Court must record an express finding, which is obviously a prima facie finding, relatable to an application for temporary injunction on the probable case to be decided on full fledged trial, i.e. existence of prima facie case. The "prima facie case" is an important facet of dispensation of justice at the interlocutory stage and the order cannot receive blessings of the higher Court if bereft of such finding.

The Trial Court has proceeded to decide the application for temporary injunction by surreptitiously jumping to the conclusion that the prima facie case has been made out.

It is a suit for partition and separation of shares at the behest of the plaintiff/respondent. Several properties have been included in the schedule of the plaint and the injunction is sought not only to protect the nature and character of the schedule property, but also the possession of a co-sharer against the other co-sharers. The appellants have restricted their right in respect of plot no. 2309, which is claimed by the plaintiff/respondent exclusively, meaning thereby to the exclusion of other co-sharers. It is averred in the plaint as well as the injunction application that they are in possession of the said plot as an absolute owner thereof and the appellants/defendants are claiming title in respect thereof and also disturbing the possession by creating an obstruction at the time of harvesting the paddy.

The appellants have disclosed in the written objection that in the year 2015 the plaintiff/respondent executed two separate deeds of gift in their favour giving out 3/4th share in respect of the said plot. It is a specific stand of the appellants that after execution and registration of the deed of gift and acceptance thereof by the appellants, the plaintiff/respondent cannot claim absolute right, title and interest in respect of the said plot. One of the ingredients to constitute a valid gift deed is that the donor voluntarily gifted the property to the donee and such gift shall be completed upon acceptance by the donee themselves. The moment the gift is accepted, it logically implies that such acceptance is valid by giving up the possession to the extent of the deed of gift in favour of the donee.

The appellants have not denied the undivided right, title and interest of the plaintiff/respondent in respect of the said plot number and further asserted that

they are in ejmali possession (joint possession) in respect of the said plot. Even the Record of Rights indicates the names of the appellants having claim to the extent of 3/4th share in the said suit plot, which has not been challenged in the suit. It is pertinent to record that the plaintiff/respondent has not challenged the deeds of gift seeking declaration in this regard nor claimed any relief in relation to erroneous recording in the Record of Rights.

We are conscious of the proposition of law that the entry in the Record of Rights neither creates title into a person nor extinguishes title, but it is no longer res-integra that such entry creates presumption of possession, which is obviously rebuttable in nature. The order of status quo in relation to possession has a cascading effect for the simple reason that an unscrupulous litigant may misuse such order and take extraneous steps to deny the right of the party. While granting an order of status quo with regard to possession, the Court must be cautious and vigilant as it is susceptible to be misused at the behest of an unscrupulous litigant and, therefore, it is imperative to record a specific finding on the possession before the Court embarks its journey on the terrain of granting injunction in the form of status quo. The Court must vividly and explicitly record the findings on the possession of either parties on the date of passing an order of status quo and any order which bereft of such finding may not be allowed to stand on the legal parameters being ambiguous in nature.

In the impugned order after recording the respective stand of the parties, the learned Judge in the Trial Court arrived at the conclusion that the plaintiff/respondent had made out a prima facie case and consequently passed an order of status quo with regard to nature, character, possession and position of the suit premises in absence of any independent finding on each and every aspect thereof.

Indubitably, the deeds of gift have not been challenged or assailed in the said partition suit and the necessary implication would indicate that the said deed has been accepted and the moment the acceptance is impliedly done, it follows that the possession is given to the donee, which is further corroborated by the entry made in the Record of Rights. Though feebly it is sought to be contended that there was a family arrangements by virtue of which the parties were enjoying their right, title and interest as well as the possession, but we do not find the aforesaid documents to be on record nor the Counsels appearing for the parties are able to apprise the Court on the recital or the terms and conditions of the said family arrangements.

The stand of the appellants appears to be sound on the logic that the injunction in respect of plot no. 2309 cannot be sustained after disclosure of the deeds of gift as well as the Record of Rights before the Trial Court.

It is fairly submitted by the learned Counsel appearing for the appellants that they do not have any grievance against the order of status quo with regard to any other plot included in the suit except the plot no. 2309.

Since the possession appears to be joint on the basis of the findings made

hereinabove, the order of status quo in such blanket form should not have been passed by the Trial Court; more particularly when the plaintiff/respondent has asserted that he is in exclusive possession of the said plot. There is no averment made in relation to an act of changing the nature, character or possession of the suit plot in the application for temporary injunction. In absence of any such pleading the Trial Court of its own cannot pass an order in this regard simply because it is a suit for partition and the protection and preservation of the property is the hallmark of dispensation of justice between the parties pending the said suit.

We thus modify the impugned order to the extent that the said order of status quo with regard to nature, character, possession and position in respect of the suit property shall not operate in respect of plot no. 2309. In view of the findings made hereinabove, the appeal and connected application are disposed of.