
(2010) 08 CAL CK 0125
In the Calcutta High Court
Case No : C.O. No. 174 of 2010

Mira Pal and Another

APPELLANT

Vs

Swapan Kr. Roy and Others

RESPONDENT

Date of Decision : 17-08-2010

Acts Referred:

Citation : (2010) 08 CAL CK 0125

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : Amitava Ghosh and Navojit Mukherjee, for the Appellant; S.N. Arefin, for the Respondent

Final Decision : Dismissed

Judgement

Prasenjit Mandal, J.—This application is at the instance of the defendants and is directed against the order dated November 18, 2009 passed by the learned Additional District Judge, Fast Track Court No. V, Barrackpore, District - North 24 Parganas in Misc. Appeal No. 07 of 2009 thereby dismissing the said misc. appeal and confirming the order dated January 12, 2009 passed by the learned Civil Judge (Junior Division), Third Court, Sealdah in Title Suit No. 102 of 2006.

2. The short fact of the case is that the plaintiffs/opposite parties became the owner of the two flats situated on the ground floor and the second floor of the premises No. 47, Kali Charan Ghosh Road under P.S. Baranagar, Calcutta - 700 050 by purchase. Previously, they along with other two tenants were the tenants under the defendant No. 3/respondent in respect of the said premises. The tenants of the ground floor and the second floor of the said premises purchased their respective tenanted flats. But the appellants residing on the top floor, could not purchase their tenanted portion after death of the original tenant, i.e., late Bimalendu Pal. As per sale deed, the flat owners are entitled to use the top floor for the purpose of checking the water system, water reservoir, fixing antennas, etc. But the defendants/petitioners created obstruction to go to the top floor of the premises. For that reason, the plaintiffs/opposite parties filed a suit praying

for declaration that the plaintiffs have got their right of user of the roof of the building and for permanent injunction restraining the defendants, their men and agents from obstructing the plaintiffs in any manner from getting access for free enjoyment of the roof of the building and other reliefs. In that suit, the plaintiffs prayed for temporary injunction and also prayed for local inspection of the premises. The learned Trial Judge rejected the application for appointment of commissioner and the petitioners preferred a civil revision and in that revision, the Lordship was pleased to hold that the dispute with regard to water was no more an issue and as such there was no requirement for appointment of a commissioner to ascertain the state of affairs of the supply of water. The learned Civil Judge allowed the application for temporary injunction. Being aggrieved by the said order of temporary injunction, the defendants/petitioners preferred a misc. appeal which was dismissed by the impugned order. Being aggrieved, the defendants/petitioners have preferred this application.

3. Mr. Ghosh, learned Advocate appearing on behalf of the petitioners, submits that the predecessor in interest of the petitioners was a tenant in respect of the entire top floor of the building and the rent receipt as made "Annexure A" is the proof that he was a tenant in respect of the entire top floor. The present petitioners could not purchase the said property because of their difficulties; but if the order of injunction as passed by the learned Trial Judge is allowed to be continued, there would be no privacy in the family of the petitioners and the opposite parties have to make access through their premises for the purpose of checking pipeline, water reservoir, fixing antennas, etc. He has also contended that by the order of injunction, the learned Trial Judge has practically granted the entire relief and so the entire relief, as granted in the petition for temporary injunction, cannot be supported at all. Similarly, the lower appellate court has committed an error in affirming the said order. He submits that the order impugned should be set aside.

4. Mr. Ghosh has filed a number of decisions in respect of the principles of granting injunction such as Chintapatla Arvind Babu and another Vs. Smt. K. Balakristamma alias Bhargavi and another, , Shakuntia Vs. Hira Nand Sharma and Others, , Mulji Umershi Shah and etc. Vs. Paradise Builders Pvt. Ltd. and Others, Smt. Sarladevi Bandawar Vs. Shailesh Namdeo,

5. On the other hand, Mr. Arefin, learned Advocate appearing on behalf of the opposite parties, submits that the petitioners are not tenants in respect of the entire top floor but in respect of one room and as per deed of sale, the plaintiffs/opposite parties are entitled to have the roof right and for that reason they cannot be debarred from going to the roof for the purpose indicated earlier. In fact, the learned Court has allowed the application for injunction on the basis of the materials placed before him and deeds of sale in favour of the opposite parties, supports the materials for granting the order of injunction. He has also contended that the learned Trial Judge did not grant the entire relief but only to restrain the defendants from disturbing or obstructing the free access of the

plaintiffs to the roof of the suit building at any time as and when required till disposal of the suit. So the application should be dismissed.

6. Therefore, the point to be decided in this application is:

Whether the order impugned can be sustained?

7. Upon hearing the learned Advocate of both the sides and on perusal of the materials on record and also the general principles as laid down in the decisions referred to above for granting of injunction, I find that admittedly the predecessor of the petitioners was a tenant in respect of the room as available on the top floor of the premises at 47, Kali Charan Ghosh Road. Now, the extent of tenancy is very much disputed. Save "Annexure A" to the application, the petitioners could not file any other document to show that they are the tenants covering the whole space on the roof of the said building. It is the specific case of the opposite parties that the petitioners are possessing one room only situated on the top floor of the said building. An agreement was held for sale of the entire building to the tenants in respect of the premises occupied by them. From the deeds of sale in favour of opposite parties, it appears that they got the flats by purchase and this is in conformity with the law of the land. The petitioners could not show by any other rent receipt that they are in occupation of the entire top floor premises though their claim is that they are the tenants in respect of the said portion of the top floor since, 1965. The petitioners have not become the owner by purchase as yet in respect of the premises they are occupying. In the circumstances, I am of the view that the learned appellate court was justified in holding that the plaintiffs/opposite parties herein were given the roof right and there is no restriction for the user of the existing roof.

8. The plaintiffs/opposite parties have prayed for the following relief in the suit:

- a) a decree or declaration that the plaintiffs have got the right of user of the roof of the building.
- b) a decree of permanent injunction restraining the defendants and their men and agents from obstructing the plaintiffs in any manner whatsoever from getting an access and/or free enjoyment of the roof of the building;
- c) for all costs;
- d) any other relief or reliefs.

9. The learned Trial Judge has granted injunction in the following manner:

that the defendants are restrained from disturbing or obstructing the free access of the plaintiffs, in the roof of the suit building, at any time as and when required till the disposal of the suit. The injunction petition is, thus, disposed of on contest without cost. Fix 30.1.2009 for framing of issues.

10. Thus, the contention of Mr. Ghosh that the entire relief, as sought for in the plaint, has been granted by the learned Trial Judge, cannot be accepted. The

learned Trial Judge has passed such reasoned order as is expected on the basis of the prayer of the flat owners of the premises. The flat owners being the rightful occupant of their respective premises as per deed have shown prima facie case to go for trial of the suit. Water is essential for daily use and so if there is any problem in the supply of water, the flat owners must exercise their right to go to the roof in case of necessity and if it is not allowed there is chance of suffering irreparable loss and injury. Therefore, the balance of convenience in granting injunction is also in favour of the plaintiffs and if it is not granted it is the plaintiffs who are to suffer irreparable loss. Therefore, I am of the view that the learned Trial Judge has passed a justified order in allowing the application for temporary injunction in the manner indicated above. So, there is no illegality in the order impugned.

11. This application cannot be allowed under the circumstances. It is, therefore, dismissed.

12. Considering the circumstances, there will be no order as to costs.

13. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.