

(2016) 03 CAL CK 0120
In the Calcutta High Court
Case No : C.O. 530 of 2016

Molla Mahmuder Rahaman @ Golap

APPELLANT

Vs

Khondakar Mominur Rahman and others.

RESPONDENT

Date of Decision : 01-03-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2016) 2 ICC 486

Hon'ble Judges : Soumen Sen, J.

Bench : Single Bench

Advocate : S.P. Mukherjee, Debanjan Mukherjee and Debabeena Mukherjee, Advocates, for the Appellant; Saptangshu Basu, Probal Kumar Mukherjee and Rajdeep Bhattacharya, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Soumen Sen, J.—This revisional application is directed against an order dated 30th November, 2015 passed by the learned Additional District Judge, First Court, Serampore in Miscellaneous Appeal No. 64 of 2015, by which an application for stay of the impugned order no. 19 dated 31st March, 2015 was rejected.

2. The petitioner preferred an appeal against an order of injunction passed by the Trial Court in the form of status quo in respect of the nature, character and possession of the suit property wherein the local inspection commission application was rejected.

3. The case of the appellants appear to be that they have been enjoying their demarcated portion of the suit property since 1913. They wanted to carry out certain renovation work of the old mud house, which was in a dilapidated condition. It was contended that in the event the order of status quo is survived then the defendants would be deprived of enjoying the property under their possession inasmuch as such construction could not in any way prejudice the

rights of the plaintiffs.

4. The Appellate Court on consideration of the materials on record observed that there are some constructions over the suit property and if the construction work is undertaken by the appellants at this stage the plaintiffs would suffer.

5. There cannot be any doubt that in a suit for partition every co-sharer has an interest in every inch of the land and unless there is a partition no one can claim to have any demarcated portion in the property in question, as such interpretation is anathema to the basic concept of partition.

6. It is an admitted position that the partition suit is pending and the appellants claimed to be in possession of certain portion of the property over which they want to raise certain construction. The appellants, however, claimed that they have a sanctioned plan to raise such construction.

7. If the appellants are in occupation of a portion of the suit property and have been enjoying the said property for some time interruptedly and equity would arise to enjoy such possession exclusively until the decree for partition is passed.

8. The party in possession of a demarcated portion of the suit premises may make additions and alternations with the leave of the Court for beneficial enjoyment of the property in question without claiming any equity. Although the Court would not ordinarily permit a party to make additions and alternations during pendency of the partition suit but if it appears to the Court that a party is in possession of a demarcated portion of the property and has been enjoying the said property for a considerable period of time and that there is a requirement for a descent living to make some construction in conformity with the Municipal Laws, the court may permit a party to raise such construction during pendency of the partition suit without claiming any equity.

9. Mr. Saptangshu Basu, learned senior counsel appearing on behalf of the opposite parties submits that the nature and character of the suit property cannot be changed in view of the judgment of the Division Bench of this Court passed in *Israil v. Samsher Rahman*, reported in 1914 ILR 42 Calcutta 436. Mr. Basu also submits that there cannot be any dispute with the aforesaid proposition.

10. In *Sanghati Pal v. Prakash Adhuryya and others*, reported in 2009 (2) CLJ (Cal) 153, a Division Bench of our Court held that it is a settled position of law that when a person purchased a specific and demarcated portion of the property he has every right to raise construction thereof. In the said decision the High Court permitted a purchaser to raise construction within her purchased share of the suit property without however claiming any equity and subject to the result of the suit for partition. The Hon"ble Division Bench found that the other co-sharers are in possession of their completely separate respective buildings and accordingly allowed the said prayer.

11. Although in the instant case, the petitioner is a co-sharer and not a

purchaser of a specific and demarcated portion, the Court may, as submitted by Mr. S.P. Mukherjee, learned senior counsel appearing on behalf of the petitioner, apply the same principle and permit the petitioner to complete the construction without claiming any equity in his favour.

12. In an appropriate situation a party taking the aforesaid risk may be allowed to raise construction on condition that may be imposed by the Court keeping in view the interest of other cosharers. These considerations, however, have not been taken note of presumably since not urged before the Court below.

13. This Court is informed that an application for modification of the order is pending before the Trial Court.

14. In my view, the Trial Court shall decide the said application for modification on merits being uninfluenced by its earlier order, the order passed by the Appellate Court on 30th November, 2015 as well as by this Court.

15. Mr. S.P. Mukherjee, learned senior counsel appearing on behalf of the petitioner submits that in view of the aforesaid direction the appellants are not pressing the appeal and appeal stands dismissed as withdrawn.

16. The written objection to the application for modification may be filed within a period of two weeks from date; reply thereto, if any, be filed within a week thereafter.

17. The Trial Court shall dispose of the said modification application within a period of four weeks after filing of the said affidavits without granting any adjournment to either of the parties.

18. With these observations, the revisional application is disposed of.

19. However, there shall be no order as to costs.