
(2014) 03 CAL CK 0111
In the Calcutta High Court
Case No : C.O. 314 of 2014

M/s. Rescuwear India Private Ltd.

APPELLANT

Vs

Syed Muzibur Rahman and Others

RESPONDENT

Date of Decision : 12-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 4

Citation : (2014) 03 CAL CK 0111

Hon'ble Judges : Subrata Talukdar, J

Bench : Single Bench

Advocate : Arindam Banerjee, Sri Ashis Mukherji, Ms. Aspita Saha and Sri S. Prasad, Ld, for the Appellant; Saptangshu Basu, Ld. Senior Counsel and Sri Anjan Kumar Mukherjee, Ld. Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Subrata Talukdar, J.—This matter appears at the "Motion" stage and is assigned to this Bench. Accordingly the same is taken up for hearing by this Bench. Sri Banerjee submits that his client is the recorded owner of the suit premises bearing the municipality No. 38A Pulin Khatik road, P.S.-Tangra, Kol-700015 comprising more or less about 47 cottahs of land alongwith structures (for short the suit premises). He further submits that the suit premises were purchased by his client pursuant to a Court auction sale. After such purchase the possession of the suit premises was handed over in favour of his client by the Court appointed bailiff along with the possession certificate.

2. Sri Banerjee also submits that his client's name has been mutated and recorded as the owner of the suit premises in the records of the Kolkata Municipal Corporation. The electricity bills pertaining to the service being currently enjoyed by his client in the suit premises show that his client is in continuous possession of the same till date.

3. Sri Banerjee is aggrieved by the Order passed in Misc. Appeal No. 03 of 2014

by the Learned First Additional District Court, Sealdah refusing to grant relief to his client by not vacating an ad-interim Order granted in favour of the plaintiffs-opposite parties by the Learned Trial Court.

4. Sri Banerjee points out that the Learned Trial Court by Order No. 3 dated 11th September, 2012 has restrained his client from interfering in the suit property and directed the other defendants to ensure that status quo in respect of the suit property is maintained. He further points out that such ad-interim order, although initially passed ex parte has been extended from time to time in the teeth of the pendency of an application filed by his client as defendant under Order 39 Rule 4 praying for vacating the said ad-interim order.

5. Taking this Court through the order sheets of the Learned Trial Court, Sri Banerjee draws attention to order dated 21st November, 2013 recording the appearance of his client, the defendant and also the filing of an application by his client under Order 39 Rule 4 CPC for vacating the said ad-interim order. Sri Banerjee complains of arbitrariness on the part of the Learned Trial Court by regularly extending the said ad-interim order without making any effort to dispose of his client's application under Order 39 Rule 4 CPC.

6. The last extension of the said ad-interim order was granted by the Learned Trial Court on 3rd January, 2014. Aggrieved by such regular extension of the ad-interim order the petitioner filed Misc. Appeal No. 3 of 2014 before the Learned First Additional District Court, Sealdah. By the order impugned No. 4 dated 21st January, 2014 the Learned First Additional District Court, Sealdah was pleased not to interfere with the ad-interim Order as continued by the Learned Trial Court in Title Suit 305 of 2012 and therefore rejected the petitioner's prayer for stay of operation of the said Order dated 3rd January, 2014 passed in Title Suit No. 305 of 2012.

7. Sri Banerjee asserts that both the First Appellate Court and the Learned Trial Court have failed to exercise jurisdiction vested in them by law and acted to the utter prejudice of his client by refusing to take cognisance of his appearance before the Learned Trial Court as well as to take up the hearing of the application under Order 39 Rule 4 CPC filed on behalf of his client. He also submits that the Learned First Appellate Court ought to have stayed further operation of the ad-interim Order granted in favour of the plaintiffs by the Learned Trial Court having regard to the fact that the documents on record show the unimpeachable right, title and interest of the defendant and the exercise of such right is being gravely prejudiced in view of the subsistence of the Order of restraint granted by the Learned Trial Court.

8. Sri Saptangshu Basu, Learned Senior Counsel appearing on behalf of the opposite parties submits that in the absence of a formal affidavit filed by his client before this Court, this Court ought not to take cognisance of the merits of the status of Sri Banerjee's client in the suit premises. However, by relying on a decision reported in *In Re: Gautam Kumar Hada*,) he submits that there is no

infirmity in the Order of the Learned First Appellate Court by refusing to grant a stay on the ad-interim order as granted and extended from time to time by the Learned Trial Court. In Goutam Kumar Hada's case an Hon"ble Single Bench of this Court had held while sitting in a concurrent revisional jurisdiction that by granting a stay of the ad-interim injunction passed by the Learned Trial Court, the First Appellate Court "practically disposed of the appeal", which was an improper exercise of jurisdiction.

9. Sri Basu therefore submits that either the Learned First Appellate Court should be directed to hear out the application for stay filed in connection with Misc. Appeal No. 3 of 2014 expeditiously or, the Learned Trial Court should be directed to hear out the application of the petitioner under Order 39 Rule 4 or, alternatively the temporary injunction application filed by the plaintiffs.

10. Sri Banerjee by way of reply submits that the decision cited by Sri Basu is distinguishable on facts. He draws the attention of this Court to Para 10 of the said decision wherein the Hon"ble Single Bench has been pleased to observe as follows:--

...but ordinarily, the Lower Appellate Court should not pass any ad-interim Order resulting in practically allowing the appeal itself at the initial stage without hearing the other side.

11. Sri Banerjee submits that by using the expression "ordinarily" it cannot be argued that in all cases the First Appellate Court was shut out from granting a stay on an ad-interim Order passed by the Learned Trial Court.

12. He further submits that the facts of the present case stand on a different footing inasmuch as the ad-interim Order was granted in favour of the plaintiffs behind the back of the defendants and thereafter continued from time to time in spite of the fact that the defendant had long entered appearance and also filed an application under Order 39 Rule 4 CPC. He therefore emphasises that on the facts of the present case the petitioner is entitled to be treated as an exception to the "ordinary" course of judicial proceedings carved out by this Court in Goutam Kumar Hada's case.

13. Heard the rival submissions and considered the materials on record.

14. This Court notices the legitimate grievance of the petitioner on the score that his application under Order 39 Rule 4 CPC has been kept pending from 21st November, 2013 till date before the Learned Trial Court in spite of the fact that the petitioner has pleaded utter prejudice by non-consideration of the same.

15. This Court also notices Sri Basu's submission that a direction may be passed on the Learned Trial Court to dispose of the temporary injunction proceedings. Sri Banerjee is agreeable to withdraw Misc. Appeal No. 3 of 2014 if a direction is passed upon the Learned Trial Court to positively hear out the application for temporary injunction. It is pointed out by both parties that the next date fixed by the Learned Trial Court for hearing the application for temporary injunction is

20th March, 2014.

16. This Court therefore directs that the Learned Second Civil Court (Junior Division) at Sealdah shall positively hear out the application for temporary injunction on contest on the next date fixed without granting any unnecessary adjournment to either parties. The application filed by Sri Banerjee's client under Order 39 Rule 4 CPC shall be treated to be the written objection to the application for temporary injunction filed on behalf of the plaintiffs. The Learned Second Civil Court (Junior Division) at Sealdah shall, by treating the time limit fixed by this Court to be peremptory, proceed to hear out the application for temporary injunction on its own merits uninfluenced by any observation made by this Court in this Order.

17. C.O. 314 of 2014 is accordingly disposed of. There will be however no order as to costs.

18. In the light of the aforesaid direction passed by this Court Sri Banerjee's clients shall be at liberty, if so advised, not to proceed with Misc. Appeal No. 03 of 2014. Urgent photostat certified copy of this order, if applied for be given to the parties on usual undertakings.