
(2013) 08 CAL CK 0064
In the Calcutta High Court
Case No : C.O. No. 1132 of 2013

Smt. Kalpana Talukdar and Others

APPELLANT

Vs

Ashok Sarkar @ Golak Sarkar and Another

RESPONDENT

Date of Decision : 08-08-2013

Acts Referred:

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

Citation : (2013) 08 CAL CK 0064

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : Bidyut Kumar Banerjee and Ms. Shila Sarkar, for the Appellant; Shiva Prasad Ghosh for the Opposite Party No. 1, for the Respondent

Final Decision : Allowed

Judgement

Prasenjit Mandal, J.—This application is at the instance of the plaintiffs/appellants herein and is directed against the judgment and order dated March 14, 2013 passed by the learned District Judge, Barasat in Misc. Appeal No. 57 of 2013 thereby affirming the order dated February 27, 2013 passed by the learned Civil Judge (Senior Division), 1st Court, Barasat in Title Suit No. 690 of 2011. The predecessor-in-interest of the plaintiffs/appellants/petitioners herein instituted the aforesaid suit against the defendant/opposite party herein for a decree of declaration that the plaintiff is a lawful tenant of the Schedule "B" property including the common place of Schedule "C" property, a decree of permanent injunction against the defendant not to make illegal construction after blocking the windows of the plaintiff's room after dismantle the verandah and landing space of the first floor of the Schedule "B" property including blocking the only passage including common stair of the plaintiff's property for ingress from and egress to as per Schedule "C" below property and not to obstruct the plaintiff's possession over the schedule property by illegally and forcibly and also restraining the defendant not to evict the plaintiff from his tenanted property illegally and other consequential reliefs.

2. In that suit, the original plaintiff filed an application for temporary injunction praying for restraining the defendant from making illegal construction after blocking the windows of the plaintiff's room after dismantle of verandah and landing space on the first floor of the Schedule "B" property, blocking of the passage, common staircase, etc. The defendant had contested that application.

3. The defendant also filed an application under Order 39 rule 4 of the C.P.C. and both the matters were disposed of by the common order dated February 27, 2013 holding that the plaintiff has no prima facie case. The balance of convenience and inconvenience does not tilt in favour of the plaintiff and that the plaintiff will not suffer from irreparable loss and injury if the injunction is not granted. Therefore, the plaintiff is not entitled to get any order of injunction in respect of Schedule "B" & "C" property.

4. While disposing of the appeal preferred by the plaintiffs/appellants/petitioners herein, the learned First Appellate Court has also observed that the defendant/respondent was making construction under the approved authority and in a thickly populated area, one cannot expect that the adjoining building could be raised after making a considerable space which is considered as befitting to enjoy the air and light as per whims and caprice, rather the application of municipality rules will be considered as sufficient and thus, he has concluded that the misc. appeal has no merit and so, he has dismissed the said misc. appeal on contests. Being aggrieved, this application has been preferred by the plaintiffs/appellants.

5. Now, the question is whether the impugned judgment and order should be sustained.

6. Upon consideration of the submissions of the learned Counsel for the parties and on going through the materials on record, I find that the original plaintiff (now deceased) of the suit was a monthly tenant for one pucca room with kitchen, bath and privy on the first floor of premises No. 111, S.B. Road, P.O. Bengal Enamel, being Municipal Holding No. 28 now Holding No. 28/1 within the North Barrackpore Municipality with common stair and common passage for ingress from and egress to the said premises mentioned in Schedule "C" below at a monthly rental of Rs. 400/- according to English Calendar Month under Pratima Rani Dey (since deceased).

7. Pratima Rani Dey filed an eviction suit against the original plaintiff being Title Suit No. 129 of 1997 and the said suit was dismissed by the learned Trial Judge on May 12, 2005. Thereafter, as per plaint case, the defendant/respondent is constructing a new house to the North of the plaintiff's tenanted premises without leaving any side space after blocking the window of the tenanted room after demolishing the verandah and landing space on first floor of the tenanted premises in order to evict the plaintiff illegally from the Schedule "B" property.

8. The wife of the defendant being the landlady of the plaintiffs, filed a suit for eviction against the plaintiff being Title Suit No. 104 of 2010 before the learned Civil Judge (Junior Division), 4th Court, Sealdah and the said suit is still pending.

Under the circumstances, the plaintiff has been compelled to file the suit being Title Suit No. 690 of 2011 against the defendant and the concerned Municipality as proforma defendant.

9. The plaintiff has contended that the defendant is making construction without leaving any side space after blocking the plaintiff's tenanted property by dismantling verandah and also on landing space on the first floor of the Schedule "B" property and so, the prayer for temporary injunction was sought for. Both the Courts below have taken the concurrent views that the plaintiff has no prima facie case.

10. It is not in dispute at all that the plaintiffs/appellants/petitioners herein are tenants in respect of the Schedule "B" property as described in the schedule to the plaint under the wife of the defendant and in order to ascertain whether the construction would cause obstruction of air and light to the tenanted premises of the plaintiff or not, an Advocate Commissioner was appointed by this Court and he has submitted his report which has been made a part of this record. According to this report, he has found that just in front of the Northern Side of the verandah of the first floor of the suit premises though foundation work like tie beam has been made in the ground level and iron rods have been fixed up to the first floor level for the purpose of construction of pillar but no concrete construction has yet been made except one wall up to the ground floor lintel. Upon inspection in presence of both the parties and their respective lawyers, he found that a rear space left from the first floor verandah of the suit property to the said iron rods at the Northern Side is 5". The side rear space left from the ground floor wall to the said iron rods at the Northern Side is 4" to 4'1". But, when the construction would be raised on the first floor, certainly the gap between the pillar and the first floor verandah of the said premises would be 5" or less. Thereafter, if the pillars are connected by wall, certainly, such construction would cause obstruction to the air and light to the suit premises.

11. Mr. Shiva Prasad Ghosh, learned Advocate appearing for the opposite party no. 1, has referred to the decision of ECE Industries Ltd. v. S.P. Real Estate Developers Pvt. Ltd. & anr. reported in (2009) 12 SCC 776 and thus, he has submitted that it would not be proper for the 3rd Court to interfere unless, the findings of both the Courts suffers from perversity or arbitrariness. In the instant case, since inspection was not held beforehand, both the Courts were not in a position actually whether the construction was going on and if the defendant is permitted to raise construction, it would cause obstruction of air and light to the premises of the plaintiff. Therefore, in my view, concurrent findings of the courts below could be interfered with, when there is a perversity in the impugned order.

12. He has next referred to the decision of Bhojraj Kunwarji Oil Mill and Ginning Factory and Another Vs. Yograjsinha Shankarsinha Parihar and Others, and thus, he has submitted that interference only on the ground of different view on facts elicited was possible not permissible in exercising a revisional jurisdiction. This decision, I hold, will not be applicable in the instant situation in view of the

report submitted by the Special Officer that the pillar is going to be constructed leaving 5" only from the verandah of the plaintiff's premises.

13. Mr. Ghosh has next referred to the decision of Bans Ropan and others Vs. IIIrd Addl. Distt. Judge, Ghazipur and another, and thus, he has submitted that if there is no error apparent on the face of the record, the order cannot be the subject matter of challenge. This decision also, in my view, will not be applicable as the encroachment as indicated above has been established.

14. Mr. Bidyut Kumar Banerjee, learned Senior Advocate appearing for the opposite party, has submitted that as per report of the Special Officer who is a practising advocate of the Hon"ble Court, the defendant is making construction leaving 5" space only from the premises of the plaintiff. So, such construction would certainly cause obstruction of air and light to the premises of the plaintiff. He has also drawn my attention to the findings of the courts below and thus, he has submitted that the findings of the courts below are not tenable at all and so injunction as prayed for should be granted.

15. It is pertinent to mention here that the landlady who has filed a suit for eviction against the tenant/plaintiff had transferred the land in favour of her husband and after allotment of a separate holding by the concerned Municipality, the defendant is making the construction on the said transferred land in such a way that such construction would certainly cause obstruction to air and light as observed by the learned Advocate Commissioner.

16. So, in my view, the eviction of a tenant now-a-days may be either by direct way or by an indirect way as is being taken by the husband of the landlady of the plaintiff in a planned manner so that the tenant is compelled to leave the suit premises.

17. As per report of the Special Officer, the pillar so constructed is going to be raised just 5" away from the verandah of the tenant. Certainly such a pillar is being constructed for the purpose of connecting the pillars by construction of a wall and in that case, the obstruction of the air and light to the premises of the plaintiff would occur and as such, I am of the view that the plaintiff has shown prima facie case to go for trial.

18. While considering the essential ingredients of prima facie case for entertaining an application for injunction, the learned First Appellate Court has observed that "in such a thickly populous area, one cannot expect that the adjoining building could be raised after making a considerable space which is considered as befitting to enjoy the light and air, as per his whims and caprice, rather applications of the municipality rules will be considered as sufficient". This finding of the learned First Appellate Court is no doubt perverse. Accordingly, the finding of the learned First Appellate Court that the misc. appeal has no merit at all cannot be accepted. If construction as indicated is raised, certainly the plaintiff will suffer irreparable loss for the aforesaid reasons. So, the balance of convenience in granting the injunction is also in favour of the plaintiff.

19. Accordingly, I am of the view that the temporary injunction so far as restraining the defendant from raising construction on the first floor of the adjacent premises, i.e., suit premises should be granted in respect of 4" space from the end of the premises of the plaintiff. It is clarified more that save and except, 4" space from the end of the premises of the plaintiff's side, the defendant will be at liberty to raise construction on other sides, if he chooses to do so. He is also restrained from raising the construction of the roof over the space measuring 4" in wide from the wall of the premises under occupation of the plaintiff if any roof of the first floor suit premises is to be constructed.

20. The question framed is, thus, decided.

21. The application succeeds and the same is allowed.

22. The impugned judgment and orders of the courts below on the application for injunction stand vacated.

23. The defendant/opposite party herein is restrained from making any construction on the first floor of his land without leaving 4" space starting from the end of the plaintiff's premises. Similarly, if the roof of the first floor on that land is to be constructed, a 4" space is to be left from the end of the premises of the plaintiff.

24. Copy of the report of the Special Officer be sent to the learned Trial Judge along with a copy of this judgment.

25. Considering the circumstances, there will be no order as to costs. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.