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**(2006) 07 CAL CK 0071**  
**In the Calcutta High Court**  
**Case No : C.O. No. 2129 of 2006**

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|----------------------------------------|------------|
| Sri Atin Kundu Chowdhury and Another   | APPELLANT  |
| Vs                                     |            |
| Smt. Krishna Chattopadhyay and Another | RESPONDENT |

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**Date of Decision :** 12-07-2006

**Acts Referred:**

**Citation :** (2006) 3 CALLT 626 : (2007) 2 CivCC 723 : (2007) 5 RCR(Civil) 375

**Hon'ble Judges :** Pranab Kumar Deb, J

**Bench :** Single Bench

**Advocate :** Jiban Ratan Chatterjee, Dinabandhu Chowdhury and Amal Kr. Saha, for the Appellant; Sadananda Ganguly, Mahinoor Rahaman and Shahan Shah, for the Respondent

**Final Decision :** Allowed

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## Judgement

Pranab Kumar Deb, J.—This instant revisional application has been directed against the order dated 25.04.06 passed by the learned Civil Judge (Senior Division) 1st Court, Hooghly in Misc. Appeal No. 99 of 2005 whereby the order of injunction dated 11.08.05 passed by the learned Civil Judge (Junior Division), Hooghly in Title Suit No. 40 of 2005 was set aside.

2. As indicated in the record, the petitioners entered into an agreement with opposite party No. 1 for purchasing a cinema hall called Rama Talkis at a consideration of Rs. 4,50,000. The agreement for sale was executed on 15.09.90. It was followed by delivery of possession of the cinema hall with all its fixtures and furnitures in favour of the petitioners. The owner of the cinema hall received Rs. 1,90,000 on the date of agreement as earnest money. The petitioners claimed having paid the balance amount by instalments, whereas the opposite party No. 1 denied paying received the entire balance amount. Alleging that the opposite parties threatened the petitioners to dispossess them from their possession of the cinema hall, the plaintiffs filed a suit for declaration for their right and also for a decree for an injunction restraining the opposite party from dispossess them from the cinema hall. The Trial Court granted interim

injunction in favour of the petitioners. The opposite parties preferred an appeal which was registered as Misc. Appeal No. 99 of 1995. The learned Additional District Judge set aside the order dated 11/08/05 passed by the learned Court in connection with T.S. No. 40 of 2005, thereby vacating the order of injunction.

3. Appearing on behalf of the petitioner, Mr. Jiban Ratan Chatterjee, learned senior counsel, has submitted that the Appellate Court completely lost sight of the fact that the petitioners had been in lawful possession of the suit property after the execution of the agreement for sale. Drawing the attention of the Court to the receipts as to the payment in instalments, Mr. Chatterjee has submitted that the entire balance amount having been paid to the transferor, the transferee in lawful possession should not be evicted from the lawful possession of the property.

4. Challenging the contention of the petitioner, Mr. Sadananda Ganguly representing the opposite party, has submitted that the revisional application was filed, suppressing the caveat filed by the opposite parties. Fraud being practiced on the Court, the revisional application should be rejected outright.

5. Referring to the claim of the petitioners that they had been in lawful possession of the suit property since the execution of agreement, Mr. Ganguly has submitted that since the balance consideration of amount was not paid, the opposite party No. 1 duly recovered the cinema hall in question from the petitioners. Thereafter the cinema hall was gifted to opposite party No. 2 by execution of deed of gift. Licence for operation of the cinema hall was also granted in favour of the opposite party No. 2 by the Municipal Authorities. Had the petitioners been in lawful possession of the cinema hall, the licence would not have been granted in favour of the opposite parties, as contended by Mr. Ganguly. The R.S. record also vindicates the claim of the opposite parties that the petitioner had no longer been in possession of the suit property at the time of the institution of the suit. Having been ousted from the cinema hall, the petitioners, it is argued, cannot claim right and title as well as permanent injunction against the opposite parties. Citing to the case of Pushparani S. Sundaram and Ors. v. Pauline Manomani James and Ors. Mr. Ganguly has submitted that the petitioners not having averred and proved that they had actually performed or they were always ready and willing to perform their essential obligations under the contract, the petitioners/plaintiffs should not be entitled to any relief whatsoever under the Specific Relief Act.

6. A vendee cannot secure permanent possession in respect of a property by virtue of payment of a part of the consideration amount. It is equally true that part performance can be claimed by way of defence only. It cannot be the foundation of vendee's right, alleged title and interest. As aptly observed, it can be used as a shield, but not as a sword. The Appellate Court proceeded on the footing that the petitioner sought to justify their possession of their claim on the basis part performance of the contract. The Appellate Court vacated the order of injunction, observing the stand that it would be too risky to accept the case of

plaintiff that he was in possession of the suit property without performing his part of the contract. Surprisingly enough, such observation was made by the learned Appellate Court after quoting the relevant portion of the agreement that the vendor had on 11.06.90 made over the possession of the cinema business including its fixtures and furnitures to the purchaser. That the possession was handed over to the petitioners is borne out by the agreement deed itself. How and wherefrom the petitioners were ousted had not been disclosed in the entire record. There is no convincing proof as to ouster of the petitioners from the suit property. The licence was issued in favour of the opposite parties for running cinema business. The issuance of such licence was, however, stuck down by the order of the Hon"ble Court. The creation of a solitary R.S. record is not also a conclusive proof as to possession. It has not been divulged how such stray R.S. record was created. There is nothing to show that recording of R.S. was effected following modification or correction of the existing R.S. record in appropriate proceeding. In the absence of any cogent proof as to the lawful ouster of the petitioners from the suit property, little importance can be attached to the stray recording made in the solitary R.S. record. There is no denying the fact about the petitioners were put in possession following the execution of agreement. Whether the full consideration of amount was paid or not is to be decided in the trial itself. Till that issue is settled, the person in lawful possession should not be disturbed from their possession. Even an owner of a property has got to secure his possession through due process of law. The learned Court dolefully missed these aspects.

7. In granting an order of temporary injunction, the Court is required to see - whether there exists a prima facie case (ii) the balance of convenience and inconvenience and (iii) whether the extent of damage can be compensated by payment of money.

8. Admittedly, lumpsum amount was paid at the time of agreement deed. There are documents indicating payments in instalments. In the event of ouster from the cinema hall, the petitioners will be highly inconvenienced. The balance of inconvenience also tilts in their favour. The loss or sufferings resulting from ouster cannot be compensated by payment of money. Judging these aspects also, the petitioners are entitled to have an order of temporary injunction. The Appellate Court was not justified in vacating the order of injunction passed by the Trial Court.

9. In the result, the revisional application being 2129 of 2006 is allowed, setting aside the order dated 25.04.06 passed by the learned Civil Judge (Senior Division), Hooghly, 1st Court in Misc. Appeal No. 99 of 2005 by restoring the order dated 11.08.05 passed by the learned Civil Judge (Junior Division), Hooghly in Title Suit No. 40 of 2005, with a direction to the Trial Court to dispose of the title suit 40 of 2005 within four months from the communication of this order.

10. Before concluding, I would like to mention that a caveat was filed on behalf

of the opposite parties. The Registrar (Administration) will be required to hold an enquiry as to why the factum of lodging of caveat was not reported. Whether the petitioners were duly appraised of the filing of the caveat is also be ascertained. On collection of such information, appropriate action, if required, would be taken.

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