

(2013) 08 CAL CK 0069
In the Calcutta High Court
Case No : C.O. No. 1684 of 2013

Sri Dibyendu Adhurjya and Others

APPELLANT

Vs

Sri Birendra Mishra and Others

RESPONDENT

Date of Decision : 26-08-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2A, Order 39 Rule 7

Citation : (2014) 2 CALLT 33

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : S.P. Roychowdhury and Mr. Sukumar Bhattacharjee, for the Appellant; Jiban Ratan Chatterjee and Mr. Kaushik De, for the Respondent

Final Decision : Allowed

Judgement

Prasenjit Mandal, J.—This application is at the instance of the defendants and is directed against the Order No. 22 dated April 8, 2013 passed by the learned Civil Judge (Senior Division), Bankura in J. Misc. Case No. 26 of 2013 arising out of the Title Suit No. 134 of 2012. The plaintiffs/opposite parties herein instituted the aforesaid title suit against the defendants/petitioners herein and other opposite parties for partition and other consequential relief's before the learned Trial Judge. In that suit, they prayed for temporary injunction along with a prayer for ad interim injunction. The learned Trial Judge granted the ad interim order of injunction in the nature of status quo in respect of the suit property upon the parties. The defendants/petitioners herein entered an appearance in the said suit and prayed for time to file a written objection and a written statement. They also moved the Hon''ble High Court against the ad interim order of injunction.

2. Subsequently, the plaintiffs filed a misc. case under Order 39 Rule 2A of the C.P.C. for violation of the order of status quo against the defendants/petitioners herein and that application has been converted into the J. Misc. Case No. 26 of 2013. In that misc. case, they filed an application for inspection by a Survey Passed Commissioner to see whether the order of injunction is being violated.

That application was allowed ex parte. Being aggrieved, this application has been preferred.

3. Now, the question is whether the impugned order should be sustained.

4. Upon hearing the learned Advocates of both the sides and on perusal of the materials on record, I find that the plaintiffs/opposite parties herein instituted the aforesaid suit for partition in respect of the property under Dag No. 466 as described in the schedule to the plaint. The learned Trial Judge granted an ad interim order of injunction and the matter came up before this Hon''ble Court in an appeal which was disposed of subsequently. The learned Trial Judge, thereafter, allowed the application for temporary injunction and being aggrieved by such order, the defendants/petitioners herein preferred an appeal before this Hon''ble Court and the said appeal is still pending.

5. Mr. S.P. Roychowdhury, learned Senior Advocate appearing for the petitioners, has submitted that the plaintiffs have claimed 1/16th share in the said plot of land and so, the plaintiffs have a very nominal share in the suit plot. The plaintiffs have contended that the defendants are making construction in violation of the order of status quo over the plot in suit and other non-suit plots by amalgamation and thus, they are violating the order of status quo.

6. He has also submitted that this allegation is not true. The defendants are not making any construction on the plot in suit by amalgamation of the same with other non-suit plots. They are making construction over the non-suit plots. He has contended that the impugned order cannot be sustained and it must be set aside.

7. He has also contended that as per report of the Special Officer, the constructions on the roof in the 2nd & 3rd floor had been done recently inasmuch as the entire construction is in uniform.

8. He has also contended that as per report of the Special Officer, there is a vacant land beside the plot on which the construction is being made by the defendants/petitioners herein and such vacant land is the plot in suit and so, there is no necessity of passing the impugned order.

9. He has referred to the decision of *Khushro S.Gandhi and Others Vs. N.A. Guzder and Others*, particularly the Head Note "A" and thus, he has contended that the revision to High Court against interlocutory order of trial Court - High Court cannot in revision try other issues arising in the case, even if the parties conceded - Action of the High Court cannot be justified u/s 24, when it has not purported to withdraw suit and try the same.

10. On the other hand, Mr. Jiban Ratan Chatterjee, learned Advocate appearing for the opposite parties, has contended that the appeal against the order of temporary injunction is still pending before this Hon''ble Court. As per report of the Special Officer appointed by this Hon''ble Court, new constructions have been done by the petitioners and so, he has supported the impugned order for coming

to the conclusion over the application for violation of the order of status quo passed by the learned Trial Judge.

11. Having due regard to the submissions of the learned Advocates of both the parties and the above decision referred to by Mr. Roychowdhury, I find that the question of justiciability of the impugned order is the subject matter of this revisional application.

12. What I find is that the defendants/petitioners herein entered an appearance in the suit and they prayed for time to file a written objection against the application for temporary injunction and then, the learned Trial Judge, upon hearing both the sides, fixed the date of hearing on January 28, 2013 and the defendants have filed the written statement accordingly.

13. So, from the above noted facts, it is clear that the defendants have already entered an appearance in the said suit and they are very much contesting the suit as well as the application for temporary injunction.

14. What is surprising is that though the defendants/petitioners have entered an appearance in the said suit, the learned Trial Judge has entertained the application under Order 39 Rule 7 of the C.P.C. on a off day and the said application has even been allowed ex parte.

15. From the impugned order, it is not clear why the learned Trial Judge has entertained the application on an off day without any notice upon the opposite parties and why the application for inspection has been allowed ex parte keeping the defendants/petitioners dark about the order. There is no record that there is a grave urgency in passing the ex parte order on the application for inspection and that unless such an order is passed ex parte, justice may be defeated by the delay. In an adversarial system, when such an important matter is to be taken up and the cooperation of both the parties are required in the matter for proper adjudication, it is expected that the appropriate orders should be passed upon giving an opportunity to file a written objection against the application for inspection, i.e., the defendants are entitled to get a chance of hearing over the matter.

16. This being the position, without going into the details about the matter and the merit of the order or if any construction has been done in utter violation of the order of injunction, I am of the view that if I discuss about the merit of the application for inspection now, it would not be proper at all. This Court is to see whether there is any illegality or material irregularity in passing the impugned order.

17. Accordingly, I am of the view that I should refrain from considering the merit of the application for inspection. What is apparent is that the learned Trial Judge has committed illegality and material irregularity in passing the impugned order by keeping the petitioners completely in dark about the matter.

18. Since I am determined to set aside the impugned order, I am not discussing

the report submitted by the Special Officer before this Court, but, a copy of the same should be sent to the learned Trial Judge for consideration, if the situation demands.

19. Accordingly, I am of the view that the impugned order should not be sustained. The learned Trial Judge should be directed to hear out the application afresh after giving an opportunity to the defendants to file a written objection, if any, within a specified time to be fixed by him.

20. Accordingly, the application is allowed.

21. The learned Trial Judge is directed to give an opportunity to the defendants to file a written objection against the application under Order 39 Rule 7 of the C.P.C. filed by the plaintiffs on April 4, 2013. Thereafter, he shall dispose of the said application in accordance with law. The learned Trial Judge is directed to dispose of the said application within a period of 30 days from the date of communication of this order following the directions as given above.

22. Send a copy of the report of the Special Officer appointed in this revision to the learned Trial Judge for keeping the same with regard for further consideration, if the situation demands.

23. 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.