

(2013) 09 CAL CK 0085
In the Calcutta High Court
Case No : C.O. No. 3122 of 2013

Sri Kartick Raha and Others

APPELLANT

Vs

Sri Sanjeeb Kumar Dey @ Sri Sanjeeb Dey and Others

RESPONDENT

Date of Decision : 26-09-2013

Acts Referred:

Citation : (2013) 09 CAL CK 0085

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : S. Bhattacharya and Mr. I.A. Mina, for the Appellant; S.P. Roy Chowdhury, Prakash Kumar Mukherjee and Mr. Rajdeep Mukhopadhyay, for the Respondent

Final Decision : Disposed Off

Judgement

Prasenjit Mandal, J.—This application is at the instance of the plaintiffs and is filed against the Order No. 5 dated August 1, 2013 passed by the learned District Judge-in-charge, South 24-Parganas in Misc. Appeal No. 355 of 2013 thereby staying the operation of the Order No. 14 dated June 28, 2013 passed by the learned Civil Judge (Junior Division), 1st Court, Alipore in Title Suit No. 842 of 2011. The plaintiffs/petitioners herein instituted the aforesaid suit for a decree of declaration that the plaintiffs and the defendant no. 1 are the joint allottees/owners in respect of the suit property having half share each set therein, a decree for declaration that the deed of gift dated March 1, 2011 executed by the Government of West Bengal in favour of the defendant no. 1 is void and not binding upon the plaintiffs, permanent injunction, mandatory injunction and other consequential reliefs.

2. In that suit the plaintiffs prayed for ad interim order of injunction and the same was refused.

3. At the time of the disposal of the said application, the learned Trial Judge directed both the parties to maintain status quo with regard to the nature and

character of the suit property. Being aggrieved, the defendants filed an appeal being Misc. Appeal No. 355 of 2013 and they filed an application for stay of the impugned order. By the order dated August 1, 2013, the learned First Appellate Court allowed the stay of the operation of the order dated June 28, 2013. Being aggrieved, this application has been preferred by the plaintiffs.

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

5. Having heard the learned Counsel for the parties and on going through the materials on record, I find that the plaintiffs have contended that the defendants are raising construction over the suit property and by the order of stay passed by the learned District Judge-in-charge, they are free for raising the construction and so, the purpose of filing of the suit will be frustrated and, as such, immediate steps should be taken for vacation of the order of stay.

6. During argument Mr. S. Bhattacharya, learned Advocate appearing for the petitioners has referred to the decision of Sisir Kumar Arnab & Ors. v. Nitibrata Ghosh Dasidar & Ors. reported in 1983 (2) CLJ 72 and thus, he has submitted that the CPC does not expressly or implicitly confer on Appellate Court entertaining appeal under Order 43 of the CPC to pass stay order regarding an order impugned in the appeal.

7. He has also referred to the decision of Mobassor Hossain and Others Vs. Manik Chandra Pal and Others, and thus, he has submitted that the First Appellate Court was not justified in granting stay of operation of the order granting temporary order of injunction passed by the learned Trial Judge. In a misc. appeal arising out of order granting temporary injunction, all efforts should be made by the learned First Appellate Court to dispose of such appeal at early, but, normally, no stay of the operation of the order granting temporary injunction should be granted resulting practically allowing the appeal itself at the initial stage without hearing the other side.

8. He has also referred to the decision of 1993 ILR (Cal) 73 to the same effect and thus, Mr. Bhattacharya has contended that the learned First Appellate Court is not justified in allowing the prayer for stay of the impugned order.

9. On the other hand, Mr. S.P. Roy Chowdhury, learned Advocate appearing for the opposite parties has contended that there cannot be any straight jacket formula in granting or rejecting the prayer for stay. It depends upon the situation and the Court is to pass appropriate orders according to the situation.

10. In the instant case, since the allegation is that the defendants are making construction on the disputed land, there is a triable issue to be decided at the time of trial of the suit. I am of the view that the learned First Appellate Court is virtually allowed the prayer in the appeal by granting the order of stay of the impugned order.

11. Therefore, the decisions cited by Mr. Bhattacharya shall be applicable in the instant suit and the situation demands vacation of the order of stay. The

impugned order cannot, therefore, be sustained and the order of stay shall be vacated.

12. In consideration of the nature of the relief as sought for in the plaint, I am of the view that if the order of status quo as granted by the learned Trial Judge is vacated and if the construction as allegedly made, filing of the suit by the plaintiffs may be frustrated and it will be difficult for the plaintiffs to recover possession if they succeed in the suit. The plaintiffs have filed the photocopy of the so-called construction to show that the constructions are being made during the course of hearing. It transpired that the next date has been fixed on November 7, 2013 for hearing and the matter is ready for hearing.

13. This being the position, I am of the view that the learned First Appellate Court is not justified to grant the stay of the impugned order so as to facilitate the defendant to raise construction on the suit land. Accordingly, I am of the view that since the next date for hearing is not far off from today, the defendants/appellants/respondents herein should be restrained from making any construction on the suit land till November 7, 2013 and the learned First Appellate Court is then free to pass appropriate orders thereon as to extension or to pass appropriate orders as an interim measure in respect of the injunction matter.

14. The learned First Appellate Court is directed to dispose of the misc. appeal by the end of November without fail. The order of stay as granted by the learned First Appellate Court stands vacated and the order passed by the learned Trial Judge dated June 28, 2013 in the said title suit shall remain in force till November 7, 2013.

15. The application is disposed of with the observations indicated above.

16. Considering the circumstances, there will be no order as to costs.

17. While disposing of the misc. appeal, the learned First Appellate Court shall not be swayed away by my observations. He shall dispose of the misc. appeal on the basis of the materials placed before him. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.