

Miscellaneous Appeal no. 39 of 2022

Order no.20 dated 30/06/2026

1) Today is fixed for passing order as regards to the instant Miscellaneous Appeal (in short Misc appeal). The instant appeal has been preferred by the appellants-defendants against the order dated 24.08.2022 passed by Ld. Civil Judge (Jr. Div.) 2nd Court, Bardhaman in connection with Title suit being No. 63 of 2017 whereby a prayer for temporary injunction in an application filed by the respondent-plaintiff under Order 39 Rule 1 & 2 read with 151 of Civil Procedure Court (in short C.P.C) was allowed on contest by restraining the defendants from making a pucca drain over any portion of the 'B' schedule property including the 'C' schedule property till the disposal of the instant suit.

2) Perused the contents of the Misc. Appeal on the grounds mentioned therein and also rummaged through the documents submitted by both the parties.

3) For the sake of convenience, the parties are referred to by their nomenclature in the original suit.

Heard Ld. Advocates of both sides at length.

The Case of the plaintiff/Respondent

4) The case of the plaintiff/respondent in brief is that the suit property originally belonged to his mother, Bharati Bala Panja, who acquired title thereto by virtue of two (2) registered sale deeds bearing numbers 3952 and 3953 of 1967. Subsequently, she transferred two kathas of land in favour of defendant no.2 by a

registered deed executed in the year 1968 together with a right to use a three (3) feet -width passage situated on the eastern side for ingress and egress. Thereafter, the remaining portion of the property was transferred in favour of the plaintiff. According to the plaintiff, defendant no.1 later purchased a portion of the property but acquired no title over the disputed passage. The plaintiff contended that the defendants, taking advantage of their possession attempted to excavate and construct a permanent pucca drain over the western passage in north- south direction and portions of the suit property described in Schedule 'C' of the plaint. It is further alleged that the defendants have also encroached upon certain portion of the plaintiff's land and are attempting to alter the nature and character of the suit property described in schedule 'B-1' Apprehending unlawful construction and irreparable injury, the plaintiff filed the suit for declaration, permanent injunction and also mandatory injunction along with an application for temporary injunction.

The case of the Defendants/Appellants (in gist)

5) The defendants/appellants contested the injunction application by filing written objection and denied all material allegations made by the plaintiff. According to them, the plaintiff has suppressed material facts regarding the use of the passage and drainage system. The defendants contended that the defendant no.2 lawfully acquired the property together with the right to use the passage under the registered sale deed executed in the year 1978. Subsequently, defendant no.1 purchased his portion of the property through a valid registered deed and constructed his dwelling house strictly in accordance with the sanctioned building plan issued by the Municipal

authority. The defendants deny having made any encroachment upon the plaintiff's property. Their further case is that the drainage arrangement in question has been in existence for a long period and is being used for discharge of wastewater. The proposed drain is alleged to be in conformity with the Municipal permission and is necessary for proper drainage of the premises. According to the defendants, the plaintiff himself has altered the existing arrangement and is attempting to create obstruction in the defendants' lawful enjoyment of passage.

Submissions of Ld. Advocates for the Defendants-Appellants

6) Ld. Advocate for the appellants submitted that the Ld. Trial Court failed to appreciate the materials on record properly and granted injunction on mere apprehensions. It was argued that the defendant no.1 raised construction in accordance with a sanctioned Municipal plan and the proposed drainage work was supported by Municipal permission. It was further contended that the plaintiff failed to establish any actual encroachment or eminent threat to his legal rights. The allegations regarding unauthorized construction and obstruction are disputed questions of fact which can only be decided after trial. According to the appellants, the plaintiff failed to establish the essential ingredient of a temporary injunction namely, prima-facie case, balance of convenience and irreparable injury. Therefore, the order granting temporary injunction is liable to be set aside.

Submissions of the Ld. Advocates for the Plaintiff/Respondent

7) Ld. Advocate for the plaintiff/respondent submitted that the plaintiff has established a strong prima-facie case by producing the title deed and other documents showing his ownership and possession

over the suit property. It is argued that the defendants possesses merely a limited right of user in respect of the passage and have no title over ownership therein. Therefore, they cannot lawfully excavate or construct a permanent drain over the disputed land. It is further submitted that if the defendants are permitted to proceed with the proposed construction, the physical feature of the property would be permanently altered, the plaintiff would suffer irreparable loss and injury which cannot be adequately compensated by damages. Accordingly, the balance of convenience lies wholly in favour of the plaintiff for preserving the existing state of affairs till the disposal of the suit and as such no interference with the impugned order is called for in the instant Misc. Appeal.

8) Be it mentioned here that the Ld. Advocates have also advanced several other submissions touching the merit of the instant Appeal which are not recorded separately at this stage and shall be duly considered in course of discussion and analysis of the issues involved herein for arriving at a just decision of this appeal.

DECISION WITH REASONS

9) At the very outset, let me rummage through the rudiments of the order 39 Rule 1 & 2 of the Civil Procedure Code (in short CPC).

10) To grant of interlocutory injunction during the pendency of the legal proceeding is a matter requiring the exercise of discretion of the Court and while exercising the discretion, the Court normally applies the following tests:-

i) Whether the plaintiff has a prima-facie case.

ii) Whether the balance of convenience is in favour of the plaintiff.

iii) Whether the plaintiff would suffer a irreparable injury if the prayer of interlocutory injunction is disallowed.

11) It is the trite law that the decision whether or not to grant an interlocutory injunction has to be taken at a time when exercise of the legal right asserted by the plaintiffs and its alleged violation are both contested and remain uncertain till they are established on evidence at the trial. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before which that uncertainty could be resolved. The object of interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial. The need of such protection has, however to be weighed against the corresponding need of the defendant. The Court must weigh one need against another and determine where the 'balance of convenience' lies.

12) From the perusal of the record including the Lower Court Record (in short L.C.R.), it appears that this Misc. Appeal has been filed by the defendants/appellants on being aggrieved and dissatisfied with the order of temporary injunction granted by the Ld. Court below on 24.08.2022 on the grounds mentioned in the memo of appeal.

13) It further appears that it is the case of the plaintiff-respondent that the defendants have encroached a portion of land and made a pucca construction namely a drain on their portion ignoring their protest.

14) On the other hand, Ld. Advocate for the defendants/appellants contended that the allegations levelled by the plaintiff/respondent are totally false, baseless and motivated, intended only to prevent the defendants from exercising their lawful right over the property purchased from the plaintiff in the year **2009**. It is specifically asserted that the defendants have not encroached upon any portion of the plaintiff's land and that the construction in question is being carried out strictly within the boundary of their own property after obtaining necessary sanction from Burdwan Municipality.

15) Ld. Advocate further submitted that the plaintiff has failed to establish a prima-facie case warranting grant of an order of temporary injunction. According to him, the balance of convenience also tilts in favour of the defendants, as refusal of injunction would not cause any irreparable loss or injury to the plaintiff.

16) It is argued that when lawful construction is undertaken on one's own property after obtaining due sanction from the competent Municipal Authority and upon compliance with all statutory formalities, interference by way of injunction cannot ordinarily be justified unless a strong prima-facie case is made out. On the contrary, suspension of such construction would cause substantial hardship and irreparable loss to the defendants.

17) Accordingly, it is prayed that the appeal be allowed and the impugned order granting temporary injunction under Order 39 Rule 1 and 2 of the Civil Procedure Code (in short C.P.C) be set aside.

18) Ld. Advocate for the plaintiff/respondent on the other hand, vehemently contended that the defendants have no manner of right to construct any drain adjacent to the plaintiff's land for the purpose of

discharging foul water. According to him, such an act, it permitted would directly affect the plaintiff's peaceful enjoyment of the property and may cause serious nuisance, inconvenience and potential health hazards. It is thus submitted that such construction cannot be treated as a lawful exercise of the defendants' right, particularly, when the same is alleged to adversely affect the plaintiff's property rights.

19) Therefore, Ld. Advocate for the plaintiff/respondent would strongly stand by impugned order passed by the Ld. Court below and prayed for rejection of the appeal with exemplary cost.

20) From the perusal of the Schedules (A, B, B/1 and C) and Hand sketch map annexed to the plaint as well as in the petition, it appears that plaintiff has claimed the area of his property depicted in 'B' schedule as 55 feet (extending from North to South) X 26.5 feet (East to West) i.e. 1457.5 sqft. But from the registered sale deed executed by the plaintiff in favour of the defendants on 28.08.2009, it shows that the area of the land of the plaintiff corresponding to the 'B' schedule was 54 feet (extended from north to south) X 23.5 feet (East to west) and thus the area was 1269 sqft. Besides above, the western side passage which was 3 (three) feet wide and 54 feet long i.e. 162 sqft. Thus, we apparently see that where length of the 'B' schedule belongs to the plaintiff is actually 54 feet X 23.5 feet i.e. 1269 sqft as per title deed but as per the schedule of the plaint its area has been increased from 54 feet to 55 feet in length and 23.5 to 23.6 in breadth. Thus, it cannot be said apparently that the defendants have encroached any portion of the plaintiff's land but the plaintiff himself has claimed an area of 161 sqft beyond his area as depicted in the sale deed so, it cannot be said that the plaintiff has come before this

Court in clean hand but his erroneous description of the schedule, the Court was misguided. Moreso, it is not clear to the Appellate Court as to why no local inspection was prayed for to bring the true picture before the Court at this stage for passing of an appropriate order?

21) We know when any person applies for any sanction or carrying out any construction work by way of excavation or construction of whatever it may be, he has to annex all his documents like Title deeds, Rent receipt along with a Hand sketch map depicting and mentioning the nature of work and the particular location within his land where he wants to carry on his construction work. We also know when the Municipal authority accord sanction allowing the prayer of the applicant it has verify all those documents by its Engineer, Surveyors/Architects or other competent staff before granting the same. Admittedly, the Municipal authority is the competent authority to accord sanction for carrying on any construction work and no person can make any construction work lawfully without sanction plan, and as such it may safely be presumed that being a public authority, it has discharged its duty according to law.

22) Most Surprisingly as it appears from the materials on record that where the plaintiff has challenged the impugned construction work carried on by the appellants/defendants after receiving the sanction from the Municipal Authority, the said Municipal Authority has not made a party to this suit! Only Municipal authority can answer as to why and under what circumstances they had granted the necessary sanction in favour of the defendant for carrying a construction work and none other else.

23) Not only that if the Court has come to conclusion that the alleged sanction granted by the Municipal authority was unlawful or illegal according to the facts and circumstances of this case that cannot be done directly without hearing the Municipal Authority and hence, its presence is necessary for complete and effective adjudication of the issues involved in this suit.

24) From the discussions made hereinabove and upon careful consideration of the facts, circumstances and materials available on record, this Court is of the considered view that the submissions advanced on behalf of the appellants/defendants carry considerable force.

25) This Court finds that the essential ingredients for grant of an order of temporary injunction, namely prima-facie case, balance of convenience and irreparable loss and injury, have not been satisfactorily established in favour of the plaintiff/respondent at this stage.

26) On the contrary, the materials on record, prima facie reveal substantial dispute with regard to the actual measurement, boundary and identity of the suit property. The question as to whether any encroachment has in fact been made by the appellants/defendants upon the land of the plaintiff/respondent cannot conclusively determine at this interlocutory stage merely on the basis of pleadings and documents presently available on record.

27) This Court further finds that the dispute involved in the present case is essentially one relating to boundary, measurement and foul water drainage, which requires proper adjudication upon detailed evidence. In the considered view of this Court, effective adjudication

of the controversy would require local investigation and proper measurement of the suit property through appointment of a competent Survey Commissioner so as to ascertain the exact location, boundary and extent of the respective properties of the parties and to determine whether any encroachment has actually been made by either side.

28) This Court is also unable to overlook the discrepancies appearing from the schedules and documentary materials discussed hereinbefore, as well as the absence of the concerned Municipal Authority in the suit despite the admitted existence of sanctioned construction. These aspects in the opinion of this Court, assumed considerable significance while considering the legality and propriety of the impugned order.

29) Having regard to the totality of the facts and circumstances, this Court is of the view that the Ld. Court below did not properly appreciate the materials on record while granting the order of temporary injunction. Consequently, the impugned order suffers from material irregularity and calls for interference by this Appellant Court.

30) At the same time considering the nature of the dispute, and in order to protect the interest of both the parties pending final adjudication of this suit, this Court is of the view that ends of justice would be sufficiently serve by directing both the parties to maintain status quo with regard to the nature, character and possession of the suit property till the disposal of the suit.

31) Accordingly, instant Misc. Appeal No.39 of 2022 stands allowed on contest without costs.

32) The impugned order dated 24.08.2022 passed by Learned Civil Judge (Junior Division), 2nd Court, Burdwan is hereby set aside.

33) Both the parties are directed to maintain status quo with regard to the nature, character and possession of the suit property until final disposal of the suit.

34) Considering that the suit is of the year 2017 and has already become considerably old, the Ld. Court below is requested to make all endeavour to dispose of the suit as expeditiously as possible, preferably within a period of six (6) months from the date of communication of this Order.

35) Let a copy of this judgment/order along with Lower Court record be transmitted forthwith to the Ld. Court below for information and necessary compliance.

Dictated & Corrected by me

Additional District Judge,
1st Court, Burdwan

Additional District Judge,
1st Court. Burdwan
J.O. Code-WB00702

