

COMMERCIAL COURT AT ASANSOL

**(FOR THE DISTRICTS OF MURSHIDABAD, BIRBHUM, PURBA
BARDHAMAN, PASCHIM BARDHAMAN, PURULIA AND BANKURA)**

Present :- Shaikh Kamal Uddin.
Judge, Commercial Court at Asansol.

JO Code :- WB01311.

Commercial Suit No. : 02/2023

CNR No. : WBBD17-000006-2023

Defendant/ Petitioner :- Sri Smriti Bikash Bhattacharjee.

V/s

Plaintiff / Opposite Party :- Ghar Housing LLP.

Order No. 07

Dated – 28.07.2023

Today stands fixed for passing order on the application being IA No.07 of 2023 dated 03.05.2023 whereby prayer has been made for vacating the interim order of injunction dated 17.03.2023.

The plaintiff / opposite party filed the present suit for specific performance of contract for development of the ‘A’ schedule land as mentioned in the plaint and in the alternative for compensation and for injunction. There was no caveat and the plaintiff on 17.03.2023 moved an application under order 39 rule 1 & 2 read with section 151 of the CPC seeking temporary injunction with ad interim effect in terms of the prayer made in the said application. Considering the plaint, the application for injunction and documents enclosed with the plaint as well as the injunction application this court passed an ad interim order of injunction restraining the defendant from transferring and or alienating and or disposing of the suit property as described in ‘A’ schedule of the plaint and or transferring its interest in the said ‘A’ schedule property in favour of any 3rd party / 3rd parties till the next date of hearing which was fixed on 30.03.2023. The defendant was given liberty to seek for discharge, variation and or

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modification of the order and the plaintiff was directed to comply with the provisions as contemplated in order 39 rule 3 (a) & (b) of the Code of Civil Procedure. On 31.03.2023 the defendant / petitioner entered appearance and had submitted that the copy of the plaint had not been received by the defendant/ petitioner. Based on such submission the Learned Advocate for the plaintiff had handed over a copy of the plaint to the Learned Advocate for the defendant / petitioner on that very day itself. Subsequently on 03.05.2023 the defendant / petitioner filed the present petition under Section 151 of the CPC and prayed for vacating the interim order of injunction dated 17.03.2023.

It is the submission of the Learned Advocate for the defendant / petitioner that although direction was passed upon the plaintiff / opposite party to comply with the provisions of rule 3 (a) & (b) of order 39 of the CPC, the plaintiff / opposite party willfully neglected to comply the order of the Learned Court inasmuch as the plaintiff / opposite party had sent only a copy of the injunction application by speed posts and not a single document which was relied upon by the plaintiff/ opposite party at the time of moving the ad interim injunction application was served to the defendant / petitioner. In order to substantiate such submission the Learned Advocate produced the envelop wherein the postal charge of Rs.42/- is mentioned and the total weight of the envelop is shown to be 45 grams. The Learned Advocate thus submitted that from the weight of the envelop it is clear that no other documents were served to the defendant / petitioner. The Learned Advocate also submitted that the provisions of Rule 3 (a) & (b) of the order 39 of the CPC is mandatory and since the plaintiff has deliberately disobeyed the order of the Learned Court by violating the mandatory provisions of order 39 Order 3 (a) and (b) of the CPC the interim order of injunction is liable to be vacated. To buttress his submission the Learned Advocate relied on the decision of *Amiya Prosad V/s.*

Bejoy Krishna Chakraborty and others reported in AIR 1981 Cal 351 and A. Venkatasubbiah Naidu V/s. S. Chellappan and others reported in (2002) 7 SCC 695.

Written objection has been filed by the plaintiff / opposite party against the application for vacating interim order of injunction. At the time of argument it has been submitted by the Learned Advocate for the plaintiff / opposite party that incorrect, assertions and aspersions have been made against the plaintiff. The Learned Advocate also submitted that the plaintiff had sent copies of the plaint , injunction petition and the documents to the defendant by registered post immediately after the interim order was passed and apart from that another copy of the plaint was also served to the Learned Advocate for the defendant / petitioner in the court room. The Learned Advocate also submitted that the provisions of order 39 rule 3 (a) & (b) are not mandatory but are directory in nature. It is also submitted that the documents relied upon by the plaintiff are all bilateral documents and consists solely of admitted documents executed by and between the parties and therefore there is no question of the defendant taken by surprise. He, therefore, prayed for rejection of the instant petition.

I have heard the Learned Advocate for the parties and considered their submissions.

It is the contention of the defendant / petitioner that copies of the injunction application, plaint and other documents were not served to the defendant / opposite party. However, in paragraph No.2 of the petition I find that the defendant / petitioner had admitted receipt of the injunction petition and it is on record that on 31.03.2023 a copy of the plaint was also handed over by the Learned Advocate for the plaintiff / opposite party to the Learned Advocate for the defendant / petitioner .In order to substantiate that the provisions of order 39 rule 3 (a) & (b) are mandatory , the Ld Advocate for the

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petitioner have relied on the decision of *Amiya Prasad (Supra)* and *Venkatasubbiah (Supra)*. However, on perusing the aforesaid judgments I find that both the judgments have been passed in different contexts. Neither of the two judgments lay down the proposition that the provisions of order 39 rule 3 (a) & (b) are mandatory and that for their non-compliance of the said provisions interim injunction is liable to be vacated. In the case of *Amiya Prasad (Supra)* since the mandatory provisions of recording the reasons to grant an injunction without giving notice of the application to the opposite party was not followed, the interim order was held to be illegal and the same was accordingly set aside. Similarly, in the case of *Venkatasubbiah* the issue was “ what would be the position if a court which passed the order granting interim *ex parte* injunction did not record reasons thereof did not require the applicant to perform the duties enumerated in clause (a) and (b) of rule 3 of Order 39 of CPC”

The Hon’ble Apex Court in paragraph No.15 held:-

‘In our view such an order can be deemed to contain such requirements at least by implication even if they are not stated in so many words. But if a party, in whose favour an order was passed *ex parte*, fails to comply with the duties which he has to perform as required by the proviso quoted above, he must take the risk. Non-compliance with such requisites on his part cannot be allowed to go without any consequence and to enable him to have only the advantage of it. The consequence of the party (who secured the order) for not complying with the duties he is required to perform is that he cannot be allowed to take advantage of such order if the order is not obeyed by the other party. A disobedient beneficiary of an order cannot be heard to complain against any disobedience alleged against another party.’

Thus, the judgments relied on by the defendant / petitioner does not

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support the case of the defendant / petitioner.

Therefore, in view of the above discussion made hereinabove I do not find any merit in the application being IA No. 07 of 2023 dated 03.05.2023 for vacating the interim order of injunction due to alleged non-compliance of the provisions of order 39 rule 3 (a) & (b) of the CPC.

IA No. 07 of 2023 dated 03.05.2023 is accordingly rejected. There shall however be no order as to cost.

D/C by me.

**Judge, Commercial Court
At Asansol**

**Judge, Commercial Court
At Asansol**