

Order No. Dated 13.12.19

Record is taken up for disposing the application filed by plaintiffs under Order 39 Rules 1, 2 and 3 read with section 151 CPC on 31.08.17 and the application filed by defendant no. 2 under Order 39 Rule 4 CPC on 30.07.19.

The contention of plaintiffs in the temporary injunction application is that plaintiffs own and possess 1 ½ decimal of land as Ejmal property in respect of suit property and the rest share belongs to defendant nos. 1 and 3 to 6 where defendant no. 2 has no share. Plaintiffs have acquired the said share along with other properties with proforma defendants and the said property has not been partitioned by metes and bounds till date. It is alleged by plaintiffs that defendant nos. 1 and 2 are trying to raise illegal and unauthorized construction encroaching the suit property and the only pathway as referred in the plaint and as such plaintiffs have apprehended irreparable loss and injury in respect of the said property. Therefore, by filing this application plaintiffs have prayed for passing order of temporary injunction against defendant nos. 1 and 2 restraining them from raising construction encroaching suit property and only pathway till disposal of the suit.

On the other hand, defendant no. 2 filed written objection against this application on 28.05.18 where he denied and disputed the contents of plaint of plaintiffs. The positive case of defendant in this written objection is that defendant no. 1 has 8 anna share in the suit plot and his name is recorded in LRROR accordingly. The suit property is already partitioned between predecessors of plaintiffs and defendant no. 1 and accordingly, plaintiffs have been possessing their property by constructing house thereon. Defendant nos. 1 and 2 are father and son in relation and they have applied for making construction of house before Gopinathpur Gram Panchayat on plot nos. 1631, 1632, 1633 under Mouza Malikota and the said application was approved by Pradhan of the said Panchayat. Thereafter, as and when defendant nos. 1 and 2 have started construction, plaintiffs filed several false cases before the Court of Ld. SDEM, Bishnupur and all those cases are turned down / dropped by the concerned Court. It is further stated by this defendant that on the basis of sanctioned plan, defendant nos. 1 and 2 already made construction of house to some extent and knowing mutual partition of the suit property, plaintiffs have filed this suit in order to harass defendant nos. 1 and

2 so that they suffer loss. Thus, this defendant has prayed for rejection of this application.

By filing application under Order 39 Rule 4 CPC on 30.07.19, defendant no. 2 stated that stating false misleading statements, suppressing material facts and after misleading Court, plaintiffs have procured ad-interim order of temporary injunction and as such the said order is liable to be set aside or to be vacated, otherwise, this defendant will suffer loss and shall be highly prejudiced.

Plaintiffs objected the aforesaid application and filed one written objection against the said application under Order 39 Rule 4 CPC on 02.09.19 where plaintiffs denied the allegation made by defendant no. 2 in the said application and raised objection against the prayer of defendant no. 2 for setting aside and or vacating ad-interim temporary injunction order which is already passed by this Court earlier as because the contention of this application is totally baseless, afterthought and misconceived allegation.

Be it noted that during the course of hearing, defendant no. 1 expired and his legal heirs are made parties to this suit. Therefore, presently defendant nos. 1(a) to 1(c) and defendant no. 2 stepped into shoes of defendant no. 1. In other words, by way of inheritance, now defendant no. 2 becomes co-sharer of the suit property. Therefore, plea of plaintiffs that defendant no. 2 has got no share in the suit property is not sustainable at present.

The contention of contesting principal defendants is that suit property is already partitioned, but nothing has come before this Court to presume that suit property is already partitioned among the co-sharers. At the time of hearing, Ld. Counsel for defendants cited two case laws which are against the contention of objection petition filed by defendants against temporary injunction application as because defence case is that suit property is already partitioned by metes and bounds and parties are enjoying their portions separately, but citations referred to by defendants as reported in **AIR 2002 P & H 258 (Tarsem Singh and others vs. Prakash Kaur)** and **AIR 1996 Bom 36 (Prakash Akotkar and others vs. Mansoor Kha, Gulab Kha and others)** deal with properties which are joint in nature and right of co-owner in respect of injunction matter. Therefore, referring of those citations virtually it is admitted by defendants that suit property is joint property.

On perusal of documents filed by both parties, this Court is of clear view that suit plot has not yet been partitioned by metes and bounds as per law. In other words, suit property is still *ejmal* property. Now, the question has come for consideration

whether plaintiffs are entitled to get order of temporary injunction or not. This Court already passed an order of ad-interim injunction when plaintiffs moved this application in ad-interim form on 31.08.17, whereby this Court was pleased to pass an order directing both parties to maintain status-quo in the suit property by way of not changing the nature, character and possession of the suit property and the said order has been extended on subsequent dates. Therefore, it can be said that this Court was previously satisfied about existence of all essential ingredients for granting ad-interim temporary injunction order. Here, defendants by filing written objection and also at the time of hearing, disputed about very prima-facie case of plaintiffs in filing this application. At the time of hearing, Ld. Counsel for defendants has candidly submitted that now Court can again look for prima-facie case of plaintiffs after contest by defendants to see if injunction is necessary for preventing irreparable loss and injury of the parties and in this regard Ld. Counsel has relied on one case law as reported in **2005 (2) CHN (Gimpex Overseas Pvt. Ltd vs. J & C Package Pvt. Ltd and others)**, where it was held by the Hon'ble Court, Opinion formed by Court for the purpose of granting ex-parte interim order in a suit, can definitely be reversed by the same Court on a contested hearing of the application.

On looking into the schedule property it appears that description of the suit property is mentioned as LR plot no. 1631 having an area of 0.05 acre including land and southern side of the said plot used as only pathway 6 feet in breadth connecting from village morum road to the main village which is east to west. It is also written in the schedule property that pathway exists for more than 100 years. In the application under consideration it is not written as to how plaintiffs acquired share in the suit property, but on perusal of plaint it transpires that plaintiffs became co-sharer of the suit plot on the strength of one registered deed of gift being no. 3232 for the year 1989 and if a glance is given to the said deed which is filed by plaintiffs, it appears that in the said deed of gift, in the schedule of properties which are gifted, description of suit plot is mentioned as 8 anna share of Bastu 5 decimal measuring 2 decimal. There is no reflection about existence of any pathway as mentioned in the schedule of the property. Not only that, certified copy of LRROR of khatian no. 6, mouza Malikota goes to show that nature of suit plot no. 1631 is Bastu having total area of land is 0.05 acre and on remark column, it is written as 'Ghar-4'. Therefore, though plaintiffs are claiming that said disputed pathway is part and parcel of suit plot no. 1631 and it is being used for long more than 100 years, no document has come up before this Court from which this court prima-facie gets satisfied that disputed pathway is also part and parcel of suit plot

no. 1631. At the time of hearing, Ld. Counsel for defendants cited one case law as reported in **AIR 1971 HP 24 (Roop Singh vs. Nirmoo)**, where it was held, Where a party to the proceeding seeking interim injunction fails to make out a prima-facie case showing his title to the property in dispute, it could neither be said that he would suffer irreparable injury if the injunction is not granted, nor can it be said that the balance of convenience is in his favour to justify the grant.

The record goes to show that one local inspection was held at the instance of plaintiffs in order to show nature of suit property and its present condition and report of Ld. Advocate Commissioner dated 02.03.19 reveals that there exists one pathway and new construction is done on the suit plot to some extent from the side of principal defendants. At this stage, on bare reading of report of the Ld. Advocate Commissioner, it is not possible to say that said disputed pathway is part and parcel of suit plot no. 1631 and in order to ascertain the same, local investigation is inevitable as because documents of plaintiffs do not show existence of any pathway in respect to the suit plot no. 1631.

Here, crux point of dispute between the parties is unauthorized construction by principal defendants encroaching southern side 6 feet wide pathway and in order to identify the said unauthorized construction, plaintiffs made hand sketch map as described in schedule B of plaint. Once plaintiffs have failed to show prima-facie case by producing document that there is more than 100 years old 6 feet wide pathway (mentioning measurement of breadth only), it is not justified to say that said pathway falls within suit plot no. 1631.

This being the position, this Court is not inclined to hold that principal defendants being co-sharers of the suit property should be enjoined in enjoyment of the suit plot jointly with other co-sharers. As regard to balance of convenience and inconvenience is concerned, defendants will be much prejudiced if they are restrained from dealing with property by an order of Court where they are co-sharers of the suit plot and plaintiffs have failed to establish prima-facie by producing documents that schedule referred 6 feet wide pathway is the part and parcel of suit plot no. 1631 having total area of land measuring 0.05 acre. Once, plaintiffs have failed to show prima facie case plaintiffs are not entitled to get any order of temporary injunction. On this point Ld. Counsel for defendants cited one case law as reported in **AIR 1988 All 191 (Himachal Steel Rerollers and Fabricators vs. Union of India and others)**, where it was held, The plaintiff did not file any documentary evidence in support of its case except for an affidavit with an annexure containing the terms subject to which

plaintiff's tender had been accepted. On a consideration of the plaint allegations and what has been asserted in the affidavit, we are not at all satisfied that the plaintiff had succeeded in establishing a prima facie case. None of the three prerequisites for grant of an interim injunction has been established. It is well settled that no temporary injunction should be granted unless the plaintiff establishes a prima facie case, balance of convenience and likelihood of irreparable injury. Absence of any of these three ingredients must entail rejection of the application. In this case it was also held, Prima facie case having not been established and the plaintiff also having failed to show any irreparable loss or injury to it which cannot be suitably compensated, we find no ground to grant the injunction.

In such context, this court opines that there is no point to continue the ad-interim order passed by this court earlier vide order dated 31.08.17 and it is liable to be set aside. In this regard I would like to point out one citation as referred to by Ld. Counsel for plaintiffs as reported in **1993 (1) CCC 53 (Suresh Sopan Kadam and others vs. Jagannath Genu Kadam and others)**, where it was held, Judicial approach in the matter of interim injunction order should be to maintain status quo unless there are strong and exceptional reasons to alter the status quo.

So, in view of above observation, there appears to be strong ground for which the said order of status quo is required to be interfered with and as such the application filed by plaintiffs for granting temporary injunction against principal defendants seems to me has got no leg to stand and it is liable to be rejected.

Hence, it is,

Ordered

that the temporary injunction application filed by plaintiffs under Order 39 Rules 1, 2 and 3 read with section 151 CPC on 31.08.17 is considered and rejected on contest against principal defendants, but without cost.

Consequently, the application filed by defendant no. 2 under Order 39 Rule 4 CPC on 30.07.19 stands allowed on contest against plaintiffs by setting aside the ad-interim order of temporary injunction passed by this Court on 31.08.17. Here, I pass no order as to costs.

To 14.01.2020 for framing of issues.

Dictated and corrected by me.

Sd/- S. K. Kundu
Civil Judge (Sr. Division)
Bishnupur, Bankura.

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