

T.S. - 1102/22 CNR – WBCC0105178-2022

Present: Sri Jayanta Koley, Judge, Bench-II. (WB00562)

Order 19

14.3.24

Today is fixed for further hearing of the application u/o 26 Rule 9 read with section 151 CPC filed by the plaintiff on 11.9.23.

Both the sides file haziras. Heard the Ld. Advocates for both the sides at length.

Perused the application, whereby the plaintiff has prayed for passing necessary order to appoint an Advocate Commissioner to conduct local investigation and / or inspection of the suit property to ascertain the extent of encroachment made by the defendants in the common areas of the suit property as well as to ascertain the actual physical possession of the parties therein on the grounds that after passing of the ad-interim order of temporary injunction but before the said order was made absolute, he had filed a similar application which was however rejected by this court in view of the fact that he could not produce any document to show that there was any disturbance or encroachment in the suit property at the instance of the defendants after passing of the said ad-interim order but the plaintiff has now annexed copies of several documents including those of the defendants themselves where from the said alleged overt acts on the part of the defendants can be easily ascertained.

The defendant no 4 has resisted and contested the said application through his affidavit in opposition wherein he has categorically denied all the material allegations made in the application and has prayed for rejection of the same mainly on the grounds that the instant application has been preferred by the plaintiff only to fish out evidence which is not permissible in the eyes of law while there has been no change in the circumstances after the earlier application of the plaintiff with same prayer was rejected by this court.

Considered the respective submissions.

The Ld. Advocate for the plaintiff draws the attention of this court to the copies of some documents annexed to the application under consideration like a written complaint dtd 25.2.21 lodged by the plaintiff at the local PS for inaction on the part of the police authority in respect of an earlier written complaint lodged by some of the co-sharers of the suit properties against the defendants, another written complaint dtd 24.11.21 of the plaintiff to lodge a diary at the local PS against alleged removal of some electrical equipments from the suit property, a whatsapp message of defendant no 4 dtd 1.8.21 and a certified copy of police report dtd 6.1.22 in connection with M. Case no 477/21 u/s 107 CrPC instituted by the plaintiff against the defendants before the 3rd Court of Ld. Metropolitan and Executive Magistrate Calcutta. Relying upon the copies of those documents the Ld. Advocate for the plaintiff has tried to convince this court about the alleged illegal activities of the defendants in the suit property.

From the materials available on record I find that this is a suit seeking merely a relief of injunction only without seeking any relief in the shape of partition or declaration despite the admitted position that the suit property is an undivided joint property of several co-sharers including the parties to this suit. Once it is the admitted position that the suit property has not been partitioned by metes and bounds in accordance with law amongst the co-sharers, question of possession of any portion thereof by any co-sharer to the exclusion of the other co-sharers can never arise as the possession of one co-sharer of any portion of the suit property is to be construed as the possession on behalf of all co-sharers. In that perspective, question of ascertaining which area is common in the suit property and which area is the exclusive property of the co-sharer can never arise.

Apart from the above, it is the well settled principles of law that no commission can be granted to fish out evidence in any suit or litigation. In the present instance the attempt on the part of the plaintiff through his instant application for ascertaining the actual physical possession of the parties in the entire suit property is nothing but to fish out evidence regarding possession which is not tenable in the eyes of law.

So far as the copies of documents relied upon as disclosed above it is very much clear therefrom that those relate to a period prior to passing of the ad-interim order of temporary injunction in this suit on 20.5.22. It is explicit from the record that the earlier similar application of the plaintiff was rejected mainly on the ground that the plaintiff could not produce any document which could be accepted as proof of alleged disturbance / encroachments made by the defendants in the suit property subsequent to passing of the said ad-interim order. No subsequent development nor no new situation has arisen in this suit which can come to the aid and assistance of the plaintiff to prefer the present application for same relief again.

Though the Ld. Advanced for the plaintiff has relied upon the principles laid down in the reported decisions of 2016 SCC On Line Cal 1197 but after going through the same I find that the Hon'ble Court after taking into consideration the ratio of decisions of AIR 1960 SC 941 and 1964 SC 993(1) has been pleased to observe that “.. . . . *this Court is satisfied that the Hon'ble Apex Court took the view that an application for injunction may be filed second time if new situation emerged but in the same breadth the Hon'ble Apex Court observed that if applications were made for relief on the same basis after same has been disposed of the Court would be justified in rejecting the same as abuse of the process of Court*” Accordingly, considering the factual scenario in the present instance it is obvious that those principles practically go against the plaintiff himself.

Totality of the aforesaid deliberations made herein above in the context of the factual scenario and principles of law as discussed I have no hesitation in my mind to arrive at the definite conclusion that the application of the plaintiff is practically devoid of any merit and the same is noting but abuse of the process of the court.

Considered as such, the said application is liable to be rejected.

Hence it is

Ordered

that the application filed by the plaintiff on 11.9.23 u/o 26 Rule 9 read with section 151 CPC stands rejected on contest.

Fix 07.05.24 for P.hearing of this suit.

D/C by me

Judge

Judge 2nd Bench