

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present :- **Hon'ble Mr. Justice I. P. Mukerji**
Hon'ble Mr. Justice Subhendu Samanta

FMAT 227 OF 2022
With
CAN 1 of 2022

Prasanta Maji & Ors.

Vs.

Sukhbinder Singh & Ors.

For the Appellants	:-	Mr. Iftekhar Munshi Adv.
For the Respondents	:-	Mr. Sudip Deb, Mr. Riju Ghosh, Mr. Sumitava Chakraborty, Advs.
Judgment On	: -	05.08.2022.

I. P. MUKERJI, J.:-

The suit before the learned court below was for declaration of title of the appellants/ plaintiffs (the appellants) and for partition of a property claimed to be jointly owned and possessed by them and the respondents/defendants (the respondents).

The subject matter of dispute is a parcel of about 53 decimals of land situated at Mouza – Barisha under P.S – Kolaghat in the district – Purba Medinipur. The appellants say that the appellant Nos.1 to 7, the five sons and two daughters of Bhupati Majhi inherited intestate from their father 18 decimals. The other appellants 8 to 14 have inherited 17 decimals from Jugal Chandra Maiti. All this adds upto 35 decimals. The appellants also say that the respondent No. 1, Sukbinder Singh is the owner of 18 decimals of land out of which he has transferred some part to his minor children the respondent Nos. 2 and 3.

According to the respondents, this 53 decimals of land originally belonged to Rakhal Chandra Bera and his brother Madhab Chandra Bera in equal

shares. One Gunadhar Bera became the owner of the entire 53 decimals of land. As he was illiterate, he could not record his name in the land register as a result of which only 1/3rd share was recorded in the name of Jugal and Gunadhar Bera and 2/3rd in the name of Jugal Chandra Maiti and Bhupati Majhi. Therefore, according to the respondents, the appellants have no share in the property. The respondents say that the Beras have transferred the property in favour of the first respondent who along with the other respondents to whom he has transferred part of the property claims to be the owner of the entire property.

In this suit for declaration and partition, an interim application was moved by the appellants to restrain the respondents from making any construction on the land. The appellants say that such is the speed of construction undertaken by the respondents that if they are not restrained by the court, they will make construction over the entire parcel of land, to their great prejudice.

The learned judge of the court below narrated all the above facts in a detailed judgment and order. He refused the order of injunction. It was on the ground that the appellants could only produce the "LRR-OR in the name of Bhupati Majhi and Kanan Bala." They could not produce the original title deeds, by which their predecessor-in-interest Bhupati Majhi had allegedly purchased the property from Subal Chandra Majhi on 26th June, 1953.

Learned counsel for the respondents submits that the appellants had to prove their title to the property in order to obtain any order of injunction.

Learned counsel for the appellants submits that even when the initial order of injunction passed by the learned court below was in force, the respondents were making construction in violation of the said order. Now, that the order of injunction has been vacated, they are making construction with great rapidity.

The learned court below had initially passed an order of injunction. On hearing the interim application and on the above grounds it vacated this order.

Hence this appeal.

In a partition suit, ownership is undivided and possession is joint. This suit may include reliefs seeking declaration of title and thereafter partition. In such a suit, the court has to declare the title of the parties in a preliminary decree and then proceed to partition the property.

In this suit the right to the property is in question. The property under the rule of *lis pendis* in Section 52 of the Transfer of Property Act, 1882 cannot be transferred to a third party except with the leave of the court and on the terms and conditions imposed by it.

Transfer of property by the respondents is not alleged. It is alleged that they are proceeding to make construction thereon.

An important question arises in this appeal. What considerations are to be taken into account by the court in granting or refusing to grant an interim order of injunction restraining construction in the property which is the subject matter of the partition suit?

Like in all other applications seeking interlocutory injunction, the plaintiff has to establish a *prima facie* case and that the balance of convenience is in favour of the order sought and that irretrievable injury would result, if it was not granted.

The general principles for grant of interim injunction were laid down in **Morgan Stanley Mutual Fund vs. Kartick Das** reported in **(1994) 4 SCC 225**.

Paragraph 36 is important and is set out below:-

“36. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the Court in the grant of ex parte injunction are—

- (a) Whether irreparable or serious mischief will ensue to the plaintiff.*
- (b) Whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve.*
- (c) The Court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented.*

- (d) *The Court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;*
- (e) *The Court would expect a party applying for ex parte injunction to show utmost good faith in making the application.*
- (f) *Even if granted, the ex parte injunction would be for a limited period of time.*
- (g) *General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court.....*

25. *The need to see that a prima facie case is made out, before a Court grants an ad interim injunction, cannot but be over-emphasized. Prima facie case also should be such that it should appear on record that there is a bonafide contest between the parties and serious questions is required to be tried. If the plaintiff has no right, title or interest in the property, normally there is no question of granting equitable relief in his favour. The fact of dispute could hardly be a ground. In this regard, reference may usefully be made to the following observations of the Supreme Court in the case of **United Commercial Bank vs. Bank of India, (1981) 2 SCC 766**, which was quoted with approval in **Morgan Stanley's case (supra)** at page 787.”*

Prima facie case is also seen as one arising out of a “bonafide contest between the parties” or where serious questions are required to be tried.

(See **United Commercial Bank vs. Bank of India and Ors.** reported in **(1981) 2 SCC 766**.

To what extent the appellants were required to prove their title, to establish a prima facie case for the purpose of obtaining an order of injunction restraining construction by the respondents?

In **Sopan Maruti Thopte and Anr. Vs. Pune Municipal Corporation and Anr.** reported in **AIR 1996 BOMBAY 304**, the Bombay High Court held in relation to a title suit that the plaintiff had to show some right, title or interest in the property to get an order of injunction against the defendant.

The plaintiff seeking a restraint order on the defendant from making construction on a property is required to prove prima facie that he has title to it or is entitled to possession thereof or both. Assertion of title or title and

possession in the pleadings, with the necessary details is sufficient for this purpose. There is no requirement to produce the original title deeds. However, this *prima facie* case is subject to displacement by the defendant upon his showing on affidavit evidence that such claim of the plaintiff is absolutely non-existent. In that case, the order of injunction may be refused.

The averments in the plaint disclosing the title of the appellants which also included the source thereof, at the stage of consideration of the interim application should have been considered as sufficient for the court. The appellants had also produced the record of rights which *prima facie* showed that they were in possession of the property. The respondents could not prove at that stage on affidavit evidence that the assertion of title had got absolutely no basis and that the appellants were devoid of any right whatsoever to the property. On that basis, the court had to consider grant of an injunction. They were not required at the interim stage to produce the original title deeds.

The appellants had been able to discharge their onus of making out a *prima facie* case.

The respondents have been unable to displace this *prima facie* case.

If injunction was refused and the respondents continued with the construction and ultimately, the appellants were able to establish their title, it may not be possible for the court to easily reverse the effect of construction and restore the land or property to the said position it was prior to the construction. On the other hand, if an injunction was granted and ultimately the appellants lost, it would be open to the court to consider award of damages to the respondents for being unable to make construction during this period. This is how the balance of convenience ought to have been adjudged.

In this kind of a suit for declaration of title and partition, the title is determined by a preliminary decree, on trial, by examination of witnesses and proof of documents. Till this exercise was completed by the court below,

on the *prima facie* case made out by the appellants and considering the balance of convenience, they were entitled to an order of injunction restraining the respondents from making construction.

I pass an order of injunction restraining the respondents from carrying on construction till the preliminary decree is pronounced. We request the learned court below to pronounce the preliminary decree by 31st December, 2022. Only after pronouncement of the preliminary decree, it would be open to the respondents to make an application before the learned court below to carry on the construction, which the learned court below will consider in the light of the preliminary decree.

The impugned judgment and order is set aside.

The appeal is allowed. CAN 1 of 2022 is disposed of.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree.

(SUBHENDU SAMANTA, J.)

(I. P. MUKERJI, J.)