

## CIVIL REVISION

Present : The Hon'ble Mr. Justice Prasenjit Mandal

Judgment on 26.08.2010

C.O. No. 2423 of 2010

Saroj Kumar Karmakar.

Versus

Sanjib Koley and Ors.

Points:

**Scope of Revision-** Injunction restraining purchasers from constructing building refused by both the courts below whether can be interfered by High Court in revision.- Code of Civil Procedure, 1908 S.115

Facts:

The plaintiff filed the suit for declaration that the plaintiff is a co sharer in joint possession of the scheduled property and that the defendant nos.1 to 4 are strangers and they have no right to construct any building in respect of the property, as described in the schedule of the plaint, without effecting partition with the plaintiff, for permanent injunction restraining the defendant, their men, agents and servants and illegal construction of the building and other prayers. The plaintiff filed an application for temporary injunction and they prayed for injunction. Trial Judge dismissed the application under Order 39 Rule 1 & 2 of the Code of Civil Procedure on contest. The plaintiff preferred a misc. appeal which was also dismissed on contest.

Held:

Plaintiff did not specifically describe the portion of the said plots upon which he claims restraint order against the defendants/opposite parties. The

total area of the land is to the extent of 1 acre and 23 decimals of land. The plaintiff did not incorporate all the coowners in the suit property as defendants in the suit. The portion of the plaintiff being not specifically described; if the injunction, as prayed for, is granted the co-owners will be affected and they are likely to commit violation of the order of injunction. So, multiplicity of suits /proceedings is likely to occur. Therefore, on the basis of the schedule of the suit property, as described in the plaint the learned courts below were justified in refusing the prayer for temporary injunction. It is the specific defence of the defendants that they have started construction on the portion of the plots in suit which had been sold by the plaintiff to the defendant nos.1 to 3 after proper demarcation. Above all, the defendant nos.1 to 3 to whom the plaintiff has described as stranger purchasers, have actually purchased a portion of the suit plots from the plaintiff himself. They have also purchased some other portion from the other co-owner/defendant no.4. At the time of sale, the plaintiff must have delivered possession of the portion of the land to the so-called stranger purchasers to whom he had sold the land. So, it could well be held that the plaintiff had sold the best portion of his land to the so-called stranger purchasers for gaining more consideration value by selling the best portion of the land while he himself is retaining the rear portion of the said two plots on his own accord. So he has delivered the best portion of the property for his own gains. Therefore, the learned Trial Judge has rightly observed that the plaintiff has failed to show prima facie case to have an order of injunction over the unspecific suit property.

Para 5

The order of granting injunction is a discretionary relief and such discretionary power is exercised upon certain principles. If the injunction, as prayed for, is granted, it will cause restraint to the stranger purchasers to

raise construction on their purchased land. The value of the building materials are going up day by day and if the suit is disposed of at later stage, it may be difficult to assess compensation for the loss actually to be suffered by the defendants. So, the question of payment of compensation if the injunction is ultimately vacated after disposal of the suit does not prevail. Such measures may not subserve the interest of justice towards the defendant. The balance of convenience in granting injunction is not at all in favour of the plaintiff in such circumstances. If injunction is granted, it is the defendants who are to suffer irreparable loss because the plaintiff will take advantage after selling the best portion of the land to the defendant nos. 1 to 3. Therefore, the concurrent findings of the learned Trial Judge and the lower appellate court over refusal of the prayer for injunction, I hold, should not be disturbed. So, the discretion exercised accordingly by the two courts below should not be interfered with. Para 7

Cases cited:

(2004) 8 SCC 488; (1997) 4 Supreme 645

For the Petitioner: Mr. Haradhan Banerjee.

For opposite party Nos.1 & 2: Mr. Kishore Mukherjee.

**Prasenjit Mandal, J.:** This application is at the instance of the plaintiff and is directed against the order dated April 9, 2010 passed by the learned Additional District Judge, Third Court, Howrah in Misc. Appeal No.19 of 2007 thereby affirming the order of injunction passed by the learned Trial Judge by order no.90 dated December 22, 2006 passed by the learned Civil Judge (Junior Division), First Court, Howrah in Title Suit No.97 of 2006.

2. The plaintiff filed the suit for declaration and injunction praying for a decree of declaration that the plaintiff is a co sharer in joint possession of the scheduled property and that the defendant nos.1 to 4 are strangers and they have no right to construct any building in respect of the property, as described in the schedule of the plaint, without effecting partition with the plaintiff, for permanent injunction restraining the defendant, their men, agents and servants and illegal construction of the building and other prayers. In that suit, the plaintiff filed an application for temporary injunction and they prayed for ad interim injunction. The order of ad interim injunction was extended from time to time. But upon hearing both the sides, the learned Trial Judge has dismissed the application under Order 39 Rule 1 & 2 of the Code of Civil Procedure on contest. Being aggrieved by the said order of dismissal of the petition for temporary injunction, the plaintiff preferred a misc. appeal which was also dismissed on contest by the order impugned. Being aggrieved, the plaintiff has filed this application.

3. Upon hearing the learned counsel for the parties and on going through the materials on record, I find that the plaintiff actually did not file any suit for partition but his prayer is to the effect that the defendant nos.1 to 4 are strangers and they have no right to construct any building in respect of the suit property without effecting partition with the plaintiff and for other reliefs.

4. Mr. Haradhan Banerjee, learned Advocate appearing on behalf of the petitioner, submits that the appellate court was totally wrong in not considering the documents filed by the plaintiff under a firisti without being supported by affidavit. He has also contended that the defendant nos.1 to 4 who are the strangers intend to make construction on the best portion of the land situated beside the main road having high value of the land they occupy

while the plaintiff possesses the land in the rear portion which has less value. So, unless any partition is effected, the defendant nos.1 to 4 should be restrained from making any illegal and unauthorised construction over the suit property. He has also referred to the decision of (2004) 8 SCC 488, para 7 & 10 and (1997) 4 Supreme 645 over the principles of granting injunction and he has submitted that in appropriate cases, an order of remand could be passed when the documents were not properly considered.

5. In the instant case, I find that the plaintiff claims that he is the owner having 2 annas share in respect of the entire two plots having no.2739 (new dag number) and 2729 (new dag number) under Khatian No.2332 of Mouza – Biki Hakola under P.S. – Panchla, District – Howrah. From the copy of the plaint as made annexure A to the application, I find that plaintiff did not specifically describe the portion of the said plots upon which he claims restraint order against the defendants/opposite parties. The total area of the land, I find is to the extent of 1 acre and 23 decimals of land. The plaintiff did not incorporate all the coowners in the suit property as defendants in the suit. The portion of the plaintiff being not specifically described; if the injunction, as prayed for, is granted the co-owners will be affected and they are likely to commit violation of the order of injunction. So, multiplicity of suits /proceedings is likely to occur. Therefore, on the basis of the schedule of the suit property, as described in the plaint, I am of the view that the learned courts below were justified in refusing the prayer for temporary injunction. It is the specific defence of the defendants that they have started construction on the portion of the plots in suit which had been sold by the plaintiff to the defendant nos.1 to 3 after proper demarcation. Above all, I find that the defendant nos.1 to 3 to whom the plaintiff has described as stranger purchasers, have actually purchased a portion of the suit plots from

the plaintiff himself. They have also purchased some other portion from the other co-owner/defendant no.4. At the time of sale, the plaintiff must have delivered possession of the portion of the land to the so-called stranger purchasers to whom he had sold the land. So, it could well be held that the plaintiff had sold the best portion of his land to the so-called stranger purchasers for gaining more consideration value by selling the best portion of the land while he himself is retaining the rear portion of the said two plots on his own accord. So he has delivered the best portion of the property for his own gains. Therefore, I am of the view that the learned Trial Judge has rightly observed that the plaintiff has failed to show prima facie case to have an order of injunction over the unspecific suit property.

6. Mr. Haradhan Banerjee contended that according to the decision of (2004) 8 SCC 488 if the order of injunction is not granted and if the defendants are able to be raise construction, the object of filing of the suit would be frustrated. The object of granting injunction is to keep the property in status quo during the pendency of the suit and if ultimately the order of injunction is vacated subsequently the defendants can be compensated by way of payment of money or otherwise. So, during the pendency of the suit, the property in suit should be kept in status quo. In this regard, since the plaintiff did not pray for partition and he has no intention to file a suit for partition but only to resist the construction of the defendants over their purchased land from the plaintiff, such conduct of the plaintiff cannot be supported and he loses his right to have an order of temporary injunction as soon as he delivered the best portion of the land in favour of the vendees.

7. The order of granting injunction is a discretionary relief and such discretionary power is exercised upon certain principles. If the injunction, as prayed for, is granted, it will cause restraint to the stranger purchasers to

raise construction on their purchased land. The value of the building materials are going up day by day and if the suit is disposed of at later stage, it may be difficult to assess compensation for the loss actually to be suffered by the defendants. So, the question of payment of compensation if the injunction is ultimately vacated after disposal of the suit does not prevail. Such measures may not subserve the interest of justice towards the defendant. The balance of convenience in granting injunction is not at all in favour of the plaintiff in such circumstances. If injunction is granted, it is the defendants who are to suffer irreparable loss because the plaintiff will take advantage after selling the best portion of the land to the defendant nos. 1 to 3. Therefore, the concurrent findings of the learned Trial Judge and the lower appellate court over refusal of the prayer for injunction, I hold, should not be disturbed. So, the discretion exercised accordingly by the two courts below should not be interfered with.

8. This application has no merit at all. It is, therefore, dismissed.

9. Considering the circumstances, there will be no order as to costs.

10. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocate for the parties on their usual undertaking.

**(Prasenjit Mandal, J.)**

