

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Jyotirmay Bhattacharya

AND

The Hon'ble Justice Debi Prosad Dey

**F.M.A. 1524 of 2015
(CAN 3431 of 2015)
(CAN 3432 of 2015)**

**Sk. Riyasat Ali
-Versus-
Sk. Safiuddin Ahamed & Ors.**

For the Appellant : **Mr. Rabindra Nath Mahato.**

For the Respondents : **Ms. Manali Ali.**

Heard on: 25th June, 2015.

Judgement on: 25th June, 2015.

Jyotirmay Bhattacharya, J. :-

This first miscellaneous appeal is directed against an order being No. 4 dated 24th March, 2015 passed by the Learned Civil Judge, Senior Division, First Court, Paschim Medinipur in Title Suit No. 93 of 2015 at the instance of the plaintiff/appellant.

Though the appeal was not formally admitted for hearing under the provision of Order 41 Rule 11 but notice was directed to be served upon the respondents and a date was fixed for hearing of this appeal. While entertaining this appeal, the interim order was passed by the other

Division Bench of this Court on 8th April, 2015 directing the parties to maintain status quo as on that date with regard to the nature, character and possession of the 'B' schedule property mentioned in the plaint till 28th April, 2015. Subsequently, the said interim order was extended and that interim order continued till yesterday.

This appeal is listed today at the instance of the appellant for extension of interim order.

Let us now consider as to whether such interim order can be allowed to be continued in the facts of the present case.

Here is the case where we find that the plaintiff/appellant filed a suit for partition against the defendant nos. 1 and 2 describing them as co-sharers in the suit property. After filing the suit, the plaintiff/appellant filed an application under Order 39 Rule 1 & 2 of the Code of Civil Procedure praying for temporary injunction for restraining the defendants from changing the nature and character of the suit property and/or from transferring, alienating and/or encumbering the suit property and/or from disturbing the peaceful possession and enjoyment of the appellant in respect of the 'B' schedule property. An ad-interim order of injunction was also sought for by the plaintiff/appellant in similar terms.

The Learned Trial Judge passed an ad-interim order of injunction directing both the plaintiff and the defendant no.1 to maintain status quo as regard 'B' schedule property as mentioned in the schedule of the plaint till the next date. The plaintiff was directed to comply with the provision under Order 39 Rule 3 of the Code of Civil Procedure.

Upon receipt of the notice of such ad-interim order of injunction, the defendant no.1 appeared in the said suit and filed an application under Order 39 Rule 4 of the Code of Civil Procedure praying for vacating and/or discharging the ad-interim order of injunction passed by the Learned Trial Judge on the ground that the said defendant transferred 0.0727 acres of land

out of 9 decimals of land pertaining to 'B' schedule property in favour of Sk. Abtabuddin, Sk. Akbar, Sk. Jiko and Aklima Begum before filing of the said partition suit.

Photostat copies of the transfer deeds by which the defendant no.1 transferred his right, title and interest in respect of the land transferred were also annexed to the application for vacating the interim order. The said application was moved on a date which was not fixed for hearing of the said application for vacating the interim order. However, notice was given to the plaintiff before moving the said application and the plaintiff was also represented before the Learned Trial Judge at the time of hearing of the defendant's said application for injunction.

The Learned Trial Judge was pleased to allow the application for vacating the interim order filed by the defendant no.1 vide Order No.4 dated 24th March, 2015 as the plaintiff filed the said partition suit as well as the injunction application without disclosing the material fact relating to transfer of the part of the suit property by one of the co-sharers to the strangers.

The Learned Trial Judge held that the injunction is an equitable relief and since the plaintiff has not come with clean hands, the ad-interim order of injunction which was passed, cannot be allowed to continue. Hence, the interim order of injunction passed on 9th March, 2015 was vacated.

The instant appeal is directed against the said order passed by the Learned Trial Judge.

Let us now consider as to how far the Learned Trial Judge was justified in vacating the ad-interim order of injunction in the facts of the instant case.

We have already mentioned above that the plaintiff filed a suit for partition by joining the defendant nos. 1 and 2 therein as co-sharers in the suit property.

It is settled principle of law that the suit for partition cannot be maintained unless all the co-sharers are joined as parties in the suit.

Here is the case where we find that the defendant no.1 disclosed in his application for vacating the interim order that he had transferred part of his interest in the suit property to four purchasers as named above before filing of the suit.

Having regard to the fact that when one of the admitted co-sharers transferred a portion of his share in the suit property, the purchaser automatically became co-sharer by virtue of purchase. As such, in the absence of those co-sharers, the suit for partition cannot be held to be maintainable.

Mr. Mahata, learned advocate appearing for the appellant submits that those co-sharers have been joined in this appeal. As such, the interim order which was passed while entertaining this appeal, can be allowed to be continued.

We are unable to accept such submission of Mr. Mahata as we are informed that no such step for adding those transferees as parties in the suit has yet been taken by the plaintiff. Unless those transferees are made parties in the suit, they cannot be impleaded as party in this first miscellaneous appeal which arises out of an interlocutory order passed in such a suit.

This is not a regular first appeal where curing such defect by way of addition of party in the appeal is possible. This defect in the suit cannot be rectified by adding those transferees as parties in the first miscellaneous appeal without adding there as parties in the suit.

Thus, we do not find any illegality in the impugned order passed by the Learned Trial Judge as no interim order can be passed in a suit which prima facie is not maintainable in the eye of law.

Accordingly, we do not find any merit in this appeal. The appeal thus, stands dismissed.

We however, make it clear that in the event the defect, as pointed out in the suit, is cured by the plaintiff by impleading those transferees of the defendant no.1 as parties in the said suit, the plaintiff may renew his prayer for injunction in the suit and in the event such an application is filed by the plaintiff in the said suit, the Learned Trial Judge will be absolutely free to decide the plaintiff's said application in his own wisdom according to the law without being influenced by any of the observations made hereinabove.

Since the appeal is disposed of in the manner as aforesaid, no further order need be passed on the applications.

The applications are thus, deemed to be disposed of.

Urgent Photostat certified copy of this order, if applied for, be supplied to the Learned advocate for the appellant immediately.

(Jyotirmay Bhattacharya, J.)

(Debi Prosad Dey, J.)

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