

105 CWN 216

Calcutta High Court

Case No: C.O. No. 1181 of 2000

Anil Kumar Mitra
Modak and Others

APPELLANT

Vs

Tapan Kumar Mitra
Modak and Others

RESPONDENT

Date of Decision: June 13, 2000

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, 115
- Partition Act, 1893 - Section 4
- Transfer of Property Act, 1882 - Section 44

Citation: 105 CWN 216

Hon'ble Judges: Bhaskar Bhattacharya, J

Bench: Single Bench

Advocate: Subhro Kamal Mukherjee and Bhagat Chowdhury, for the Appellant; Anjan Banerjee, for the Respondent

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, J.

This revisional application u/s 115 of the CPC is at the instance of plaintiffs in a suit for declaration and injunction and is directed against order dated April 27, 2000 passed by the learned District Judge, Hooghly in Misc. Appeal No. 77 of 1999 thereby affirming order No. 22 dated June 14, 1999 passed by the learned Civil Judge, Junior Division, 1st Court, Chandannagar in Title Suit No. 47 of 1999. The petitioner herein filed the aforesaid suit for declaration that the suit property is the joint property of the parties and that the defendants should not be permitted to make any construction on any part thereof without any partition and for permanent injunction restraining the defendants from changing the nature and character of the property and from creating any disturbance in the joint possession of the petitioners in the property.

2. In the aforesaid suit, the petitioners filed an application under Order 39 Rules 1 and 2 of the CPC thereby praying for an order of temporary injunction restraining the opposite parties from making any construction over the property in question.

3. The case made out by the petitioners in the plaint as well as in the application for temporary injunction can be summarized thus:

4. The suit property which is described as 86 decimals of land in Khaitan No. 479, Plot No. 492 of Mouza Kishmat Apurbapur, District Hooghly is the joint property of the parties and the parties are in joint possession thereof. There has been no partition by metes and bounds at any point of time and that in the settlement record, name of the parties are recorded as co-sharers. The defendant Nos. 1 to 3 are illegally trying to make construction over the better portion of the property after turning down the objection raised by the plaintiffs. Hence the suit for declaration and injunction.

5. The aforesaid application for temporary injunction was opposed by the opposite parties by filing two sets of written objections, one by defendant Nos. 1 and 2 and other by defendant No. 3. In both the written objections, the prayer of the petitioners has been opposed and the objection raised by the opposite parties are as follows:

a) The suit for injunction was bad for mis-joinder and non-joinder of necessary parties. All the heirs of Rajendranath Mitra, Nagendranath, Jogendranath, Mahendranath, Sabitri, Jagattarini as well as Swapan Kumar Khan are necessary parties and the defendant No. 2 was unnecessary party as he had already conveyed his interest in the property.

b) The suit property was amicably partitioned among co-sharers long ago and the petitioners and other co-sharers were allotted with eastern portion which is more valuable than the western portion. In the eastern portion, there is a dwelling house and the plaintiff is staying in the eastern portion of the property and are themselves making construction thereon. The eastern portion is well demarcated by partition or boundary wall and there was separate entrance for the plaintiff and other co-sharers in the said property. The person, who transferred the property in favour of defendant No. 3 was in exclusive possession of the demarcated western portion.

c) Even the sisters of the plaintiffs had not been impleaded. Moreover, the plaintiff Nos. 1 and 2 executed one sale deed on August 12, 1997 in favour of one Swapan Kumar Khan, son of late Gobinda Pada Khan in respect of some portion of the suit plot and the said Swapan Kumar has not been made a party.

d) There were so many deeds in which the fact of mutual partition and demarcation of the 4 property among the co-sharers has been admitted.

6. For the purpose of hearing of the aforesaid application, an Advocate Commissioner was appointed, who has noticed in his report that the portion occupied by the plaintiffs is demarcated by a separate wall and in the portion of the plaintiffs also, a new construction

has been made.

7. Ultimately the learned Trial Judge by Order No. 22 dated June 14, 1999 dismissed the application for injunction holding that the plaintiffs were in occupation of specific demarcated portion and as such the plaintiffs could not prove prima facie case to get any injunction. The learned trial Judge further made it clear that in the plaint or in the injunction application no case of family dwelling house of a joint family has been made out. The learned trial Judge also considered the question of balance of convenience and inconvenience and the question of irreparable loss and injury of the parties.

8. Being dissatisfied, the petitioners preferred a Misc. Appeal before the learned District Judge and by the order impugned herein, the learned District Judge has affirmed the order passed by the learned trial Judge.

9. Being dissatisfied the plaintiffs have come up in revision.

10. After hearing Mr. Mukherjee appearing on behalf of the petitioners and Mr. Banerjee appearing on behalf of the opposite parties and after going through the materials on record I find that both the learned courts below concurrently found from the materials on record that the suit property was not a joint property as alleged by the plaintiffs. The learned courts below took note of the Commissioner's report and of the fact that the petitioners themselves have sold a portion of the property to an outsider and that person has not been made a party.

11. It is also apparent that in the plaint, the petitioners have not disclosed their actual share in the property nor have they prayed for any partition. It is needless to mention that all the alleged co-sharers have not been made parties to this proceeding. Although, a case of dwelling house of a joint family has been introduced for the first time before the learned first appellate court below, in my opinion, such fact not being borne out by the pleadings of the petitioners should not be taken into consideration as rightly pointed out by the learned trial Judge.

12. Mr. Mukherjee, the learned advocate appearing on behalf of the petitioners has strongly relied upon the following decisions and has contended that the learned courts below in passing the order impugned did not take into consideration the principles laid down in these decisions :

a) [I. Gouri and Others Vs. C.H. Ibrahim and Another,](#)

b) [Gangubai Bablya Chaudhary and Others Vs. Sitaram Bhalchandra Sukhtankar and Others,](#)

c) [Dorab Cawasji Warden Vs. Coomi Sorab Warden and others,](#)

13. In the case of I. Gouri (supra) the Kerala High Court had the occasion to consider the scope of an application of injunction in a case where one of the several co-sharers of an undivided property wanted to erect a building so as to materially alter the position without consent of the co-owner. There is no dispute with the proposition laid down therein but as pointed out earlier, in this case both the learned courts below after considering the conduct of the plaintiffs came to a prima facie conclusion that a property is not a joint property as the plaintiffs themselves are staying in a particular property separated by boundary wall and they also transferred a portion of the property to an outsider. Thus, the principle laid down in the said decision has no application to the fact of the present case.

14. In the case of Gangu Bai (supra), it was found that plaintiff and defendant were in possession of about half portion of the disputed land and under such circumstances an injunction restraining the defendant from putting up construction on entire land was found to be justified. Therefore, the principle laid down in the said decision cannot have any application to the fact of the present case.

15. In the case of Dorab Warden (supra), Supreme Court was considering the scope of Section 44 of the Transfer of Property Act and Section 4 of the Partition Act. In this case as pointed out earlier, although the petitioners tried to make out a new case in the learned first court of appeal below, in the plaint as it stands there is no averment that the suit property is a family dwelling house of a joint family as contemplated in Section 44 of the Transfer of Property Act. Therefore, in the absence of necessary pleading the principle of injunction in case of such a property cannot be invoked.

16. On consideration of the entire materials on record I find that the plaintiffs have not come forward with a clean hand although they are enjoying a specific portion of the property by erecting boundary wall and within their specific portion they are making construction. Their sole intention is not to allow the defendant No. 3 from making any construction. Moreover, all the co-sharers have not been made parties nor have the plaintiffs prayed for partition. As mentioned earlier, the allegation of the defendant No. 3 is that the plaintiffs have sold the property to one Swapna Kumar Khan, has not been disputed before the learned courts below. Although, Mr. Mukherjee appearing on behalf of the petitioners tried to make out a new case before this court I have not permitted him to argue such point in the absence of any pleading before the learned trial Court. The view taken by the learned courts below are quite consistent with the materials on record and is reasonable in the facts and circumstances of the case. The learned courts below have also followed the well accepted principles which are required to be followed in disposing of an application for temporary injunction. Therefore, I do not find any illegality or material irregularity in the orders passed by the learned courts below justifying interference u/s 115 of the Code of Civil Procedure.

17. The revisional application is thus devoid of any substance and is dismissed. No costs. Revisional application, dismissed.