

**(2011) 12 CAL CK 0077**

**Calcutta High Court**

**Case No:** F.M.A. No"s. 1244, 1418 of 2010 and C.A.N. No. 9109 of 2010

Sri Sailendra Nath Patra

APPELLANT

Vs

Smt. Geetanjali Manna and  
Others

RESPONDENT

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**Date of Decision:** Dec. 23, 2011

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 4

**Citation:** (2012) 2 CHN 436

**Hon'ble Judges:** Tarun Kumar Gupta, J; Subhro Kamal Mukherjee, J

**Bench:** Division Bench

**Advocate:** S.P. Roy Chowdhury and Mr. Balailal Sahoo, for the Appellant; Puspendu Bikash Sahoo and Mr. Sudhakar Biswas, for the Respondent

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### **Judgement**

Tarun Kumar Gupta, J.

This appeal is directed against order No.16 dated August 25, 2010 passed by learned Civil Judge (Senior Division), 1st Court, Contai in Title Suit No.49 of 2010. By the impugned order learned Trial Court rejected the petition filed by the present petitioner defendant No.6 under Order 39 Rule 4 of the CPC praying for variation and / or setting aside ex-parte order of status quo passed by the learned Court vide order No.1 dated February 19, 2010 in Title Suit No.49 of 2010.

2. Respondent No.1 - 5 being plaintiffs filed said Title Suit No.49 of 2010 praying for declaring those plaintiffs" one-fourth undivided share in both "ka"and "kha" Schedule properties with a further prayer for partition by metes and bounds with other consequential reliefs.

3. It was the case of those plaintiffs that plaintiffs" predecessor-in-interest Amulya Manna along with his three brothers namely, Kartick Manna, Hanu Manna and Paresh Manna purchased 47 decimals of land in plot No.455 and 15 decimals of land in plot No.455/1074 from their original owner Monnothonath Sarangi through a

registered deed of Kobala dated February 28 of 1970. While those four brothers were in possession of said property in Ejmal, five decimals of land in plot No.455 vested to the State. Accordingly, they continued to possess in Ejmal 42 decimals in plot No.455 as described in Schedule "ka" and 15 decimals of land in plot No.455/1074 as described in Schedule "kha" of the plaint. Plaintiffs' predecessor-in-interest Amulya Manna had one-fourth undivided share in both "ka" and "kha" Schedule properties. He died leaving the present plaintiffs and one daughter Kalpana Pramanick as his only legal heirs. Said Kalpana Pramanick gifted her share of suit property in favour of plaintiff No.4 Kalipada Manna through a registered deed of gift dated September 29, 2004. Accordingly, present plaintiffs jointly had one-fourth undivided share in the suit properties. Though there was no partition by metes and bounds between the co-sharers, but other co-sharers and on their death their heirs and legal representatives started to transfer specific portion of suit property to different purchasers, and some of those transfers were in excess of their admitted share in the suit properties though there was no partition by metes and bounds among the co-sharers. Some of those purchasers started to possess definite portions of the suit property and some of them made illegal construction thereupon. Defendant No.6's vendor Ruma Roy though claimed to purchase from legal heirs of Bhanu Manna but those legal heirs of Bhanu had no saleable interest in the property as they already sold out their entire share to other parties. Present defendant No.6 Sailendra Nath Patra did not acquire any title through said purchase but he and others were trying to construct houses on valuable portions of the unpartitioned land. As the defendants also refused the plaintiffs' claim for partition, the present plaintiffs were compelled to file said suit for partition. At the time of filing of said suit plaintiffs filed a petition for temporary injunction with a prayer for ad-interim injunction and learned Trial Court directed the parties to maintain status-quo which was extended from time to time.

4. Present appellant being defendant No.6 filed a petition under Order 39 Rule 4 praying for modification of said order of injunction on the ground that while his vendor Ruma Roy was in possession of a definite portion of the suit property surrounded by boundary wall after purchase of the same from one of the co-sharers, she sold out said specific demarcated portion to said defendant No.6. Many other purchasers were also in possession of definite portions of suit land surrounded by boundary wall and were residing there by constructing structures. This petitioner defendant No.6 was made to believe that there was partition between the co-sharers and accordingly, he started to construct his building on his purchased portion after obtaining necessary approval from proper authorities. The order of status-quo was causing undue hardship to the defendant No.6 as he already collected the building materials. When his construction went up to the linton level the plaintiffs disclosed about the suit and the order of status-quo. Defendant No.6 is facing undue hardship on account of said ex-parte order of status-quo and that the order of status-quo should be modified so that defendant No.6 may be

permitted to complete his construction in his bounded portion.

5. The plaintiffs filed written objection against said petition under Order 39 Rule 4 of the Code of Civil Procedure.

6. After contested hearing learned Trial Court rejected said petition under Order 39 Rule 4 of the CPC by the order impugned. Learned Trial Court observed that as there was no partition by metes and bounds in the suit property and the purchaser of defendant No.6 was also under cloud, defendant No.6 was not entitled to get any order of modification of the order of status-quo.

7. Being aggrieved with said order, the instant appeal has been filed by defendant No.6.

8. Sri S. P. Roy Chowdhury, learned Senior Advocate for the appellant defendant No.6 submits that the report of Commissioner dated August 27, 2010 filed in the Trial Court goes to show that "ka" and "kha" Schedule plots were almost amalgamated with each other having no separate identity and that "ka" and "kha" Schedule lands have been sub-divided into several parcels. Said report also showed that several residential houses were standing on suit plots surrounded by boundary walls and that defendant No.6's construction was found to be lying unfinished upto linton level but within the demarcated portion surrounded by boundary walls.

9. Sri Roy Chowdhury submits that when appellant defendant No.6 has already constructed upto linton level within a bounded portion purchased by him and there are other constructions on the suit lands within specified portions surrounded by boundary walls, it prima facie goes to show that there was some sort of partition between co-sharers and that purchasers purchased definite portions of suit property and were allowed to raise construction in definite portions. Mr. Roy Chowdhury submits that accordingly present appellant defendant No.6 started to construct with necessary sanctioned plan after purchasing of an earmarked portion surrounded by boundary walls. According to Mr. Roy Chowdhury under these circumstances there will be undue hardship to this defendant No.6 if he is not permitted to finish his construction by modifying the order of status-quo. In support of his contention he has referred case laws reported in [Bepin Krishna Sur and Others Vs. Gautam Kumar Sur and Others](#), 91 CWN 1078 (Phani Bhusan Dey v. Sudhamoyee Roy), 2004 (1) CLJ (Cal) 430 (Satish Chandra Som and Ors. v. Tarak Nath Mahapatra & Ors.) and an unreported decision of this Court passed in F.M.A. No. 842 of 2008. It was observed on those reported judgments as referred by Mr. Roy Chowdhury that if it is found that for continuation of order of injunction one of the parties is facing great hardship then the Court should modify the order of injunction accordingly. In the unreported decision also the same principle was followed and the appellant defendant was permitted in a suit for partition to complete his construction in the demarcated portion at his risk and without permitting him to claim any equity for said construction.

10. Sri Shaw, learned advocate for the contesting respondent plaintiffs, on the other hand, submits that order of injunction can only be discharged, varied or set aside under Order 39 Rule 4 of the CPC if the ingredients of one of the provisos appended to said rule are fulfilled. According to him, neither the respondent plaintiffs obtained the order of temporary injunction of status-quo by making a false or misleading statement nor there was change of circumstances justifying variation of said order of status-quo. For proper appreciation of his argument it is worthy to note down the entire provision of Order 39 Rule 4 of the CPC which stands as follows:-

Any order for an injunction may be discharged or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.

11. Those provisos were inserted by CPC (Amendment) Act, 104 of 1976 which came into force with effect from 1st of February, 1977. As per first proviso, an ex-parte ad-interim injunction obtained by making a false statement to the knowledge of the party or by misleading statement in relation to material particulars, should be vacated by the Court granting said injunction.

12. As per second proviso if an order of injunction is passed after giving a party an opportunity of being heard, the same shall not be discharged or varied or set aside on the application of said party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances or unless the Court is satisfied that order has caused undue hardship to that party.

13. But even before incorporating said provisos through Amendment Act of 1976 the main portion of Order 39 Rule 4 of the CPC remained in the statute book. It is palpable that even without existence of those provisos the Court had the power to discharge or to vary or to set aside an order of injunction at the instance of any party to the suit if situation so demands. In other words, even if the conditions as laid down in those provisos are absent even then the Court had the power to vary, to discharge or to set aside an order of injunction at the instance of any party to said suit. The Court has always the power to discharge or to vary or to set aside an order of injunction be it ex parte or contested, if the Court is satisfied that the order

requires variation etc. for the interest of justice.

14. Sri Shaw has submitted that appellant defendant No.6's title to the suit property is disputed and that a person having no title to the property which is unpartitioned one can be evicted therefrom by a co-sharer. According to him even parties in illegal possession of definite areas of an unpartitioned property can be evicted therefrom. According to him, learned Trial Court was justified in rejecting the petition filed by the appellant defendant No.6 under Order 39 Rule 4 of the Code of Civil Procedure. In support of his contention he referred case laws reported in [Gajara Vishnu Gosavi Vs. Prakash Nanasahed Kamble and Others, Ramdas Vs. Sitabai and Others,](#)

15. On going through those case laws as referred by Mr. Shaw it appears that all those case laws were relating to second appeals preferred in connection with partition suits.

16. At the time of hearing a petition under Order 39 Rule 4 of the CPC there is no scope of deciding a party's title and / or share in the suit property. The Court has to see whether the ex-parte ad-interim order of status-quo is causing much hardship to one of the parties justifying variation of the same. There is no denial that respondent plaintiffs have made out a prima facie case of having one-fourth share in the suit property. It was alleged that there was no partition by metes and bounds amongst co-sharers. But it appears from the report of the learned Commissioner that several persons were found to reside on suit property by constructing buildings in demarcated portions. It also came out that appellant defendant No.6 purchased a demarcated portion through a registered kobala and started to make construction thereupon and that said construction came up upto linton height. It is true that at the time of final hearing in the suit it would be decided on evidence as to whether appellant defendant No.6 and some other defendants who are admittedly residing on suit land by making construction on a demarcated portions, had title and / or share in the suit property or not. Prima facie it appears that appellant defendant No.6 is in occupation of a demarcated portion in the suit property and that his demarcated portion is surrounded by boundary walls and that he already constructed upto linton height after obtaining necessary sanction from appropriate authority. If appellant defendant No.6 is prevented from completing his unfinished construction but later on it is found that he had the authority to make said construction then his loss will be irreparable. On the other hand, if appellant defendant No.6 is permitted to finish his unfinished construction at his risk and without permitting to claim any equity, and later on it is found that he had no authority to possess said land then plaintiff will be at liberty to get vacant possession of said land after demolition of said construction at the cost of the defendant No.6.

17. Considering all these facts we are of opinion that learned Trial Court failed to exercise his discretion vested in him by law under Order 39 Rule 4 of the CPC causing injustice to this appellant defendant No.6.

18. In the result, the appeal succeeds.

19. The impugned order of rejection of the petition filed by the appellant defendant No.6 under Order 39 Rule 4 of the CPC is hereby set aside. The appellant defendant No.6 is at liberty to complete his unfinished construction at his risk within his bounded area. However, said construction should be limited to one storied. The appellant defendant No.6 shall not be entitled to claim any equity whatsoever for said construction and the same shall be subject to the result of the suit. The order of status-quo is modified only to this extent. The appellant defendant No.6 should, however, finish said unfinished construction only as per rule after obtaining necessary approval from concerned authorities. However, learned Trial Court is at liberty to appoint an Advocate Commissioner who was earlier appointed or any other Advocate Commissioner at the cost of the appellant, for supervising the construction of appellant defendant No.6 and for submitting a report to the Court on completion of said construction.

20. The application for stay being C.A.N. No.9109 of 2010 stands disposed of being infructuous. There would be no order as to costs.

21. Urgent photostat certified copy of this judgment, if applied for, be handed over to the parties at the earliest.

Subhro Kamal Mukherjee, J.

22. I agree

Later on:

23. Mr. Sudhakar Biswas, learned advocate appearing for the respondents, prays for stay of operation of this order.

24. Such prayer is considered and rejected.