

**(2012) 04 CAL CK 0068**

**Calcutta High Court**

**Case No:** C.O. No. 2327 of 2011

Kalpana Rani Dutta

APPELLANT

Vs

Concorde Co-operative Housing  
Society Ltd. and Another

RESPONDENT

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**Date of Decision:** April 20, 2012

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2A, Order 39 Rule 4, 151
- Constitution of India, 1950 - Article 226, 227

**Citation:** (2012) 3 CALLT 662 : (2012) 5 CHN 408

**Hon'ble Judges:** Dipankar Datta, J

**Bench:** Single Bench

**Advocate:** Haradhan Banerjee and Mr. Sumit Ray, for the Appellant; Mrinal Kanti Das Mr. Ashoke Banerjee Mr. Partha Chakraborty, Subhabrata Das and Mr. Yudhajit Guha for the Opposite Party No. 1, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

Dipankar Datta, J.

The petitioner is the plaintiff in a suit for permanent injunction instituted by her against the opposite parties. She claims to be the owner of the suit property described in the schedule appended to the plaint, reading as under:

ALL THAT piece and parcel of land being 16 cottahs. 6 chittaks. 36 sq.ft. more or less being a portion of 1.86 satak in Mouza Kasba J.L. No. 13. Dag No. 4175. Khatian No. 1630. within Kolkata Municipal Corporation Ward No. 107. premises No. 30, Rajdanga Nabapally under P.S. Kasba. Kolkata-107, District- 24 Parganas (S) butted and bounded as follows:

On the North : R.S. Dag No. 4186.

On the South : Road.

On the East: KMC Road.

On the West R.S. Dag No. 4166 (P).

The suit property shall hereafter be referred to as property "A".

The plaint reveals how the petitioner has set up right, title and interest in respect of property "A". It is alleged that despite she being the owner thereof. The opposite party no. 1 wrongfully obtained a building plan, duly sanctioned by the Kolkata Municipal Corporation (hereafter the Corporation) for raising construction covering a portion of property "A" and that she is entitled to a decree for permanent injunction as prayed for. The main prayer in the suit reads as follows:

Permanent injunction-restraining the defendant No. 1, its men and agents from entering the suit property and from disturbing and/or interfering with the peaceful enjoyment and possession of the plaintiff in the suit property and/or from dispossessing the plaintiff therefrom and for making any obstruction in the matter of peaceful enjoyment and possession of the plaintiff in the suit property and restraining the defendant No. 1 from obtaining any plan sanctioned in his name from the defendant No. 2 by fraudulent means in respect of the suit property and restraining the defendant No. 2 from sanctioning the defendant No. 2, from sanctioning any plan in the name of defendant No. 1 in respect of the suit property more fully mentioned and described in the Schedule below in any manner, whatsoever.

2. The petitioner applied for temporary injunction under Order 39 Rules 1 & 2 read with section 151 of the Code of Civil Procedure. By an order dated December 4, 2008. the learned trial Court directed issuance of notice on the opposite party No. 1 to show cause as to why the prayer for injunction shall not be granted. Considering the urgency involved, the learned Trial Court was pleased to grant ex-parte ad-interim injunction restraining the opposite party no. 1 from creating any obstruction in peaceful enjoyment of the plaintiff and also from disturbing her peaceful possession of property "A" till January 5, 2009. The ad-interim order of injunction was extended from time to time and lastly, by an order dated December 17, 2009 it was again extended for a limited period.

3. Prior to that order, however, the opposite party No. 1 had applied under Order 39 Rule 4 read with section 151 of the Code seeking vacation of the ad-interim order of injunction. In the said application, the opposite party No. 1 pleaded that the petitioner had intentionally inserted a wrong address in the plaint as a result whereof the summons had not been served on it. It was only after receipt of the notice of a writ petition intended to be moved by the petitioner before this Hon"ble Court that it came to learn of the fact of institution of the present suit. It was the categorical case of the opposite party No. 1 that the property in respect whereof the

suit was instituted and the property over which it claims right, title and interest are different. The opposite party No. 1 also pleaded that the petitioner had filed a previous suit against it being Title Suit No. 1151 of 2007 seeking declaration and injunction in respect of property "A" and that having failed to obtain ad interim order of injunction she filed a misc. appeal and in course thereof had obtained an order of injunction. According to the opposite party No. 1. the present suit was not maintainable. Consequently, a prayer was made to vacate the order of ad-interim injunction dated December 4, 2008.

4. At the same time, the petitioner also applied under Order 39 Rule 2A of the Code alleging willful and deliberate violation of the ad-interim order of injunction of the trial Court dated December 4, 2008.

5. While the aforesaid applications were pending, the petitioner as well as the opposite party No. 1 had the occasion to approach this Hon"ble Court in its writ jurisdiction by filing separate applications under Article 226 of the Constitution of India. This Court considered the said two writ applications on April 19, 2010. It was noted that the petitioner was asserting right, title and interest in respect of property "A", whereas the opposite party No. 1 was asserting right, title and interest in respect of an area measuring 17 cottahs 11 chittaks and 37 sq.ft., being premises No. 533/4 Rajdanga Main Road. Kolkata - 78 under Ward No. 107 of the Corporation being portion of Dag No. 4175, Khatian No. 2582 under Mouza Kasba. The said property shall hereafter be referred to as property "B".

6. While the petitioner alleged in her writ application that her representations were not being considered by the respondent authorities by performing their statutory duty in accordance with law thereby posing a threat to her life and property, the opposite party No. 1 prayed for direction on the respondent authorities to ensure that lawful construction work may be allowed to be carried on by it in accordance with the sanctioned building plan on property "B".

7. In view of pendency of the suit before the Civil Court between the respective petitioners, the writ applications were not entertained. The same were disposed of with direction upon the trial Court to dispose of the applications under Order 39 Rule 2A of the Code filed by the petitioner and the application under Order 39 Rule 4 thereof filed by the opposite party No. 1 on the next date i.e. May 5, 2010 or soon thereafter without granting adjournment to any party. For preserving the rights of the parties till the applications referred to above are decided by the trial Court, the police authorities were directed to ensure that no further construction is raised on the respective properties on which the petitioner and the opposite party No. 1 seek to assert their right, title and interest.

8. The Trial Court considered the application under Order 39 Rule 4 of the Code filed by the opposite party No. 1 and by an order dated May 24, 2010 allowed the same and vacated the ad-interim order of injunction. The Trial Court assigned the

following reason in support of its order:

From the documents filed by defendant. I find that defendant No. 1 has purchased premises No. 533/4, Rajdanga Road. Though dag No. of plaintiff and defendant are common, but plaintiff's property appertains to khatian No. 1630 of premises No. 30 Rajdanga Nabapalli whereas property of defendant No. 1 appertains to khatian No. 2582 premises No. 533/4 Rajdanga Main Road. Defendant has filed document that they are the owner and possessor of 533/4 Rajdanga Main Road. They have also obtained mutation certificate in respect of that property. From the documents annexed by defendant No. 1 it also appears that CMC granted building permit to defendant No. 1 to raise construction on 533/4 Rajdanga Main Road. Defendant No. 1 has filed building plan from R.S. Map filed by defendant No. 1 it appears that 533/4 Rajdanga Main Road are the suit property and are not same property. So, I find that defendant No. 1 has got valid sanction plan in respect of premises No. 533/4 Rajdanga Main Road. So, question raised by plaintiff and allegation made by plaintiff that defendant is trying to get building plan sanctioned in respect of suit property is not tenable.

9. The order dated May 24, 2010 was carried by the petitioner in an appeal, being Misc. Appeal No. 311 of 2010. By an order dated June 30, 2011, the learned Judge of the appellate Court dismissed the appeal and affirmed the order under challenge. Paragraphs 23 to 25 of the order dated June 30, 2011 read as follows:

23. Following the valuable points as has been discussed by the learned Advocates while in argument the order dated 24.5.2010 passed by the learned Court below in the application under Order 39 Rule 4 C.P.C. is scrutinised in a very keen mind and thereafter it is found that the suit premises in which the injunction order passed is different from the defendant's one. To this score the statement of the plaintiff supported by affidavits to the effect that he (here in this case he plaintiff is Smt. Kalpana) retains no correct information about the particularity of the property of the defendant. And that is why he wanted to know under Right to Information Act. If that he so observation made clearly by the learned Court below in It's order dated 24.5.2010 as regard to the actual premises of the defendant throws no confusion to this Appellate Court. As a result it is very difficult for this court to accept the claim of the plaintiff for setting aside the order dated 24.5.2010.

24. This is also found that the learned Court below considered the matter as a whole and thereby reasonably came to the conclusion that the defendant I has got valid sanction-plan in respect of his premises No. 533/ 4 Rajdanga Main Road. On this ground learned Court below made it's order dated 24.5.2010 allowing the application under Order 39 Rule 4 CPC and thereby vacated the ad-interim order of injunction passed on 12.4.2008.

25. In view of the discussion made hereinabove there appears no valid ground to make any interference with the Order dated 24.5.2010 passed by the learned Court

below in the application under Order 39 Rule 4 CPC filed by the defendant No. 1 the Concorde Co-operative Housing Society Ltd. So it is held and decided that the Order dated 24.5.2010 passed by the learned Court below allowing the application under Order 39 Rule 4 CPC is correct valid and appropriate to the claim of the defendant/respondent. And thereby it is sustainable in law.

10. The appellate order dated June 30, 2011 is the subject matter of challenge in this revisional application under Article 227 of the Constitution.

11. While considering the revisional application, it appeared to this Court that the controversy between the parties centred around the point as to whether property "B" is part of property "A" or vice-versa. To obtain a correct picture in respect of the status of the aforesaid two properties, this Court was of the view that a local investigation of the same ought to be made and. accordingly, by an order dated August 24, 2011 requested the Director of Land Records and Survey. Government of West Bengal to depute a team of competent officers for submitting a report on the points formulated therein.

12. Although initially an interim report was filed on the ground that it would take some more time to complete the investigation as directed by order dated August 24, 2011. a final report followed which was taken on record by an order dated November 9, 2011. It would be profitable to set out the answers given by the Director in response to the points formulated by the Court in its order dated August 24, 2011. The same read as under:

13. The said report also contains a sketch map. Reading the contents of the report together with the sketch map. one would be inclined to form an impression that part of property "B" is part of property "A". Therefore, the reason assigned by the learned Judges of the trial Court and the appellate Court to the effect that the properties in respect whereof the disputing parties seek to assert their right, title and interest are different is not acceptable. This finding would have been sufficient to set aside the appellate order and the order of the trial Court allowing the application under Order 39 Rule 4 of the Code but I do not propose to do so considering the fact that the petitioner has not approached the Court for obtaining an equitable relief of injunction with clean hands. It has come to light in course of proceedings before this Court that a suit had been instituted in the year 1964. being Title Suit No. 208 of 1964. by one Sri Shibdas Bhattacharya impleading the petitioner as the first out of several defendants. He claimed declaration, recovery of possession, damages etc. in respect of the suit land being R.S. Plot No. 4175. Though the suit was dismissed, the first appeal preferred against dismissal of the suit succeeded. The petitioner has since challenged the appellate decree by filing a second appeal before this Court, which is pending. Reading the judgment of the first appellate Court, which is under challenge in the aforesaid second appeal as well as the judgment of the Trial Court, since reversed, it seems that purchase of property "A" by the petitioner from the defendant No. 3 in the said suit, M/s. Ashoke

Properties, was challenged and the first appellate Court held that the contention of the petitioner that the defendant No. 3 "acquired title to the demised land on the basis of surrender by the heirs.... cannot be accepted" and ultimately while allowing the appeal and decreeing the suit held that the said Sri Bhattacharya has been successful in proving his title to the suit land. The petitioner did not in her plaint or the application for temporary injunction refer to the proceedings giving rise to the aforesaid second appeal or the fact of pendency thereof. Right, title and interest of the said Sri Bhattacharya in respect of property "A" having been declared by a competent Court of law and the petitioner's claim of ownership of property "A" being clouded, she is not entitled to interim injunction.

14. In such circumstances, I decline to interfere with the appellate order. The revisional application stands dismissed without costs.

15. No useful purpose would be served in keeping the injunction application before the learned Judge alive. The same stands dismissed. The learned Judge of the Trial Court, however, shall proceed to decide the suit in accordance with law as early as possible, without being influenced by any observation contained herein. If any construction is raised by the opposite party No. 1 on property "B", the same shall abide by the result of the suit.

Urgent photostat certified copy of this judgment and order, if applied for. may be furnished at an early date.