

District: North 24 Parganas

In The High Court at Calcutta

Civil Appellate Jurisdiction

Memorandum of Appeal from Original Order

Appellate Side

FMAT No. 944 of 2019

1. Birendra Kumar Chopra,;

2. Ravindra Kumar Chopra,

Both residing at 88, College Road,

Rabindranagar Complex, Block - G, 4th

Floor, Flat No. 401, Howrah - 711 103

....Appellants

-Versus-

1. Tarun Kumar Das, son of Late Santi

Ranjan Das, proprietor of M/s. Artland,

residing at EE/13/8, Salt Lake City,

Sector - II, Kolkata - 700 091, under

Police Station - Bidhannagar (East), in

the District of North 24 Parganas

having its office earlier at CD-295, Salt

Lake City, Sector - 1, Kolkata - 700
064 and presently at CJ - 30, Salt Lake
City, Sector - II, Kolkata - 700 091, in
the District of North 24 Parganas;

....Respondent

2. Smt. Anjan Chanda, wife of Dr. Bikash
Chanda and daughter of Late
Bishnupada Das, residing at 23-D,
Bade Raipur Road, under Police Station
- Jadavpur, Kolkata - 700 032;

3. Amit Kumar Das, son of Late
Bishnupada Das, earlier residing at E-
130, Salt Lake City, Sector - 1, Kolkata
- 700 064, in the District of North 24
Parganas and also of 49 Suri Lane,
under Police Station - Muchipara,
Kolkata - 700 014;

....Proforma Respondents

Appeal valued at Rs 69,000/-

Being aggrieved by and dissatisfied by the order No. 67 dated August 17, 2019, passed by Smt. Somalee Nandy Chakrabarti, the Learned Additional District Judge, 3rd Court at Barasat in Title Appeal No. 36 of 2012 thereby setting aside the Judgement and Decree dated April 24, 2012 passed by 2nd Court of Learned Civil Judge, Sr. Division at Barasat in Title Suit No. 205 of 2010 and remanding the Title Suit No. 205 of 2010 before the Learned Civil Judge (Senior Division), 2nd Court at Barasat, the Appellants above named begs to prefer the instant First Miscellaneous Appeal before Your Lordships on the following amongst other:

GROUNDS

- I. For that the order impugned is vitiated by erroneous findings of law and fact.
- II. For that the Learned Appellate Court below erred in making out a third case which was neither the case of the appellants nor that of the respondents.

- III. For that the Learned Appellate Court below erred in remanding the suit without considering the materials on record which were sufficient enough to dispose of the appeal on merits.
- IV. For that the Learned Appellate Court below erred in transforming the complete nature of the suit by way of an amendment thereby relegating the suit for re-trial.
- V. For that the Learned Appellate Court below erred in remanding the case back for re-trial without adjudicating the issue of maintainability of the suit as decided by the Learned Trial Court.
- VI. For that the Learned Appellate Court below erred in not assigning any reason whatsoever for setting aside the finding of the Learned Trial Judge on the issue of maintainability prior to remanding the matter back on a completely different issue.
- VII. For that the Learned Appellate Court below erred in not considering that no trial of the suit was possible without the Court being satisfied as to the basic maintainability of the suit.
- VIII. For that the Learned Appellate Court below erred in sending the matter back on open remand thereby changing the nature and

character of the suit without recording any finding and/or satisfaction as regards the reason for such remand.

IX. For that the Learned Appellate Court below erred in misconstruing the provisions of Order 41 Rule 23 and Rule 23A of the Code thereby getting confused with the issue of preliminary point of maintainability and the issue of the matter as a whole.

X. For that the Learned Appellate Court below erred in not appreciating that the decree in the suit was neither based on the issue of purchase of the suit property by the appellants herein nor was it on the issue of subsistence of an injunction order, thus, allowing of amendment application or rejection of vacating application could not have any bearing for the issue to be remanded back for re-trial.

XI. For that the Learned Appellate Court below erred in shirking off its responsibility in adjudicating the matter thereby remanding the matter for an open re-trial.

XII. For that the order impugned is cryptic and suffers from lack of any reasons whatsoever for sending the matter back on open remand without adhering to the settled propositions of law on open remand.

XIII. For that the Learned Court below erred in not ascertaining the correct state of affairs.

XIV. For that the order impugned is otherwise bad in law and is liable to be set aside.

I certify that the above grounds are good grounds of appeal

SI/A Banerjee

Advocate

List of Papers

1. This Memorandum of Appeal1
2. Vakalatnama1
3. Certified Copy of order of Appeal Court dated 17.08.20191
4. Certified Copy of the Judgment of the Trial Court dated 24.04.20121
5. Certified Copy of the Decree of the Trial Court1
6. Hon'ble Second Judge's copy1
Total	6

District North 24 Parganas

In the Court of 2d. 3rd ADJ - at Barasat.

T.A - 36/12

Tarun Kumar Das

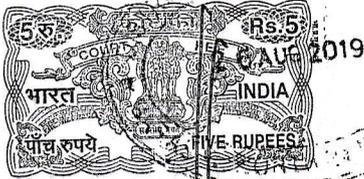
vs.

Anutt Dey Soti.

Petition No - 11599

Dated - 19/08/19

Assessment - 26-8-19



e-107

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Title Appeal No.36 of 2012

Present : Smt Sonalee Nandy Chakrabarti.

Order No.67

dated 17.08.19

Both parties file haziras.

The record is taken up for passing order in respect of petition under Order 6 Rule 17 read with Section 151 of CPC.

By filing the instant application the plaintiff/appellant has prayed for amendment of the plaint as per schedule of the application on the ground that Anjana Chanda and Amit Kumar Das during pendency of the Appeal has transferred the suit property to Arati Das and Arati Das transferred the lease in respect of the suit property to the added respondents. Such transfers are illegal, arbitrary and not binding upon the plaintiff/appellant.

Respondent No.3 /Amit Kumar Das through his constituted attorney Shanti Ranjan Paul filed written objection against the application and stated, inter alia, that the transfer made by Arati Das is beyond his knowledge and if the amendment is allowed no purpose will be served which will be made unanswered. He further stated that there is no such provision by which the prayer sought for in para-7 can be allowed and the nature and character of the suit will also change which is preferred on the basis of an agreement and was dismissed exparte. Lastly, he stated that the suit as well as the injunction petition is barred under the provision of Section 34 and 41(h) of Specific Relief Act. With all these he prayed for rejection of the application.

Perused the materials on record, the application and objection filed therein. By filing the amendment petition the appellant has prayed for amendment of the plaint. In that petition the plaintiff/appellant has prayed for cancellation of subsequent transfer of lease /deed of assignment dated 05.04.13 being No.01096 of Rs.1000/- and also that the alleged transfer is void, inoperative, illegal, arbitrary and not binding upon the appellant/plaintiff and lastly, injunction restraining the subsequent transferees/ assignees from doing any work over the suit property on the strength of such transfer. Initially the suit was filed before the Ld Court below for declaration and injunction only. From the prayer portion of th amendment application the relief claimed by the appellant requires evidence to be taken for determining regarding the cancellation of the said transfer and as to

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whether the said transfer is void and not binding upon the appellant or not by framing fresh Issues on this point. Therefore, this questions are to be agitated by the parties before the Trial Court and the controversy between the parties regarding the transfer cannot be decided by this Court in this Appeal case. It is a matter which is for the Trial Court to consider.

Having regard to the controversy between the parties and also the facts and circumstances appearing from the materials before this Court, I am of the opinion that the application for amendment of the plaint filed by the appellant/plaintiff in this Court is required to be allowed in the interest of justice. Accordingly, the amendment is allowed and let the plaint be amended as per schedule of the application under Order 6 Rule 17 read with 151 of C.P.C.

Plaintiff/appellant has filed another application under Section 151 of CPC for amendment of injunction application as per schedule of the application on the self-same ground as stated in the application under Order 6 Rule 17 of CPC.

Written objection was filed by respondent No.3 stating same facts as stated by him in his written objection filed against the application under Order 6 Rule 17 of CPC.

As the matter relates to the same subject, I am of the opinion that the injunction application is required to be allowed as per the schedule of the amendment of the application under Section 151 of CPC and the same be disposed of by the Ld Court below afresh on merit after giving an opportunity to the other side to file Written Objection.

(Now the application under Order 39 Rule 4 read with 151 of CPC filed by respondent No.4 & 5 is taken up for passing order.)

By filing the application the above respondents have prayed for vacating the order dated 15.03.14 passed in this Appeal on the ground that the order dated 15.03.14 was allowed ex parte and the said interim order passed on 05.06.12 was extended till disposal of the present Appeal. The said ex parte order was obtained by misleading the Court on facts as it will appear from the plaint that the plaintiff has no case on merits and the entire case has been made out on the basis of a purported Power of Attorney. Plaintiff/Appellant has neither got any title nor he is in possession in the property. On the contrary, these applicants have purchased the suit property on 05.04.13 and are in possession. A person cannot enjoy an order of

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Order No. 67
dated 17.08.19 (contd.)

injunction who is neither the owner in accordance with law and also not in possession and the suit is barred by law of limitation and also by Section 34 of Specific Relief Act. The Appellant has not been able to prove a prima facie case and also a balance of convenience is also not in favour of the appellant and he will not suffer any irreparable loss or injury, at best, he can claim damages, if at all, against the respondent Nos.1, 2 & 3.

The appellant has contested by filing written objection wherein he stated that the injunction order passed by the Ld District Judge's Court and by this Court was duly informed to the Urban Development in writing and the appellant was called upon for hearing on 14.09.10 and 27.09.10. Subsequently on 05.09.13 the appellant served one legal notice to the Urban Development. In the mean time, there has been transactions in between Respondent No.1, 2 & 3 and after getting the whole share of the suit property when respondent No.1 went to mutated her name, the Urban Development Department stated to her that mutation is dependent upon the result of T.S. No.205 of 2010. Subsequently on 05.04.13 the suit property was transferred to respondent No.4 and 5 by executing a deed of assignment/ deed of lease by respondent No.1. The original respondents never filed any such petition against the Order of injunction and all of a sudden these respondents have come up with an application which is illegal and baseless. They have got no local standi in the subject matter of the instant suit under Appeal. A Misc.case has already been filed under Order 39 Rule 2A read with Section 151 of CPC being No.125 of 2018 regarding the transfer made while the order of injunction was still in force and well within the knowledge of the respondents. With all these the appellant has prayed for rejection of the application with cost.

Perused the materials on record, the application and the objection .

From the record it reveals that on 05.06.12 Ld District Judge, North 24 Pgs was pleased to pass an ad- interim order of injunction against the respondent No.1 to 3 and the said ad- interim order was duly extended and lastly on 15.03.14 this Court was pleased to extent the said Order till disposal of the Appeal. It is an admitted fact that respondent No.4 and 5 had purchased the property on 05.04.13 when the ad-interim order of injunction was prevailing and they were not in the picture when the order was passed on 05.06.12. These respondents have stepped into the shoes of respondent No.1 to 3 and so, they are binded by the said order of ad-interim injunction. After a

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lapse of more than 4 ½ years respondents No.4 & 5 cannot come up with this petition praying for vacating the said order as they had already stepped into the shoes of other respondents. After considering all the facts and circumstances, the said order was passed and nothing new fact has cropped up regarding the status of the appellant which is required to be considered and the order of ad-interim injunction dated 05.06.12 be vacated. Accordingly, the application filed by respondent No.4 & 5 under Order 39 Rule 4 read with Section 151 of CPC is rejected.

Thus the Appeal is allowed on contest.

Therefore, the original suit is required to be sent back to the Trial Court on open remand and the Ld Trial Court will dispose of the suit afresh along with injunction application after framing Issues on the point of the prayer of the appellant/plaintiff.

Let the records of Title Suit No.205 of 2010 together with the application under Order 6 Rule 17 read with Section 151 of CPC and the application under Section 151 of CPC filed by the plaintiff/appellant in this Court on 28.08.17 be sent down to the Trial Court at once along with a copy of this Order.

Dict.& corrected by me,

Ruv
3rd Addl. District Judge

Ruv
3rd Addl. District Judge
Barasat

Additional District Judge
3rd Court, Barasat
North 24-Parganas

*Sending Order
along with dcr
of SLS-205/10
vide NO. 278
dt-17.08.19*

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District Month 24 Parganas.

In the Court of Lt. Jnd A.D.J at Barisal

T.A 36/12 -

Tarun Kumar Das. -

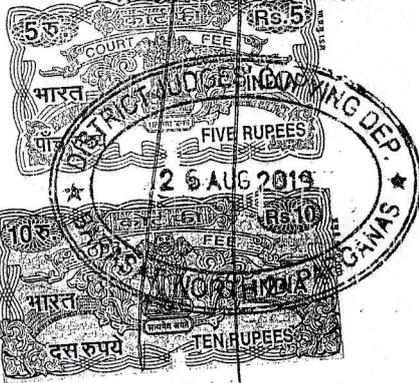
- vs -

Anati Dey s. ors -

Petitioner - 11774 <

Dated - 21-8-19 <

Assessment - 26-8-19 -



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TS.205/10

18/24.04.12

Plaintiff files hajira.

The record is taken up for passing order.

This is a suit for declaration and injunction valued at Rs. 69,000/-.

The plaintiff's case is that the suit property was the jointly owned property of the defendant no.1 and her husband Bishnu Pada Das. On the death of Bishnu Pada Das his share devolved upon the defendants who are his widow and children.

In order to make further construction above the existing one storied residential building the defendant no.1 contacted the plaintiff and executed an agreement to this effect. It was agreed that the plaintiff would pay the defendant Rs.13,60,000/- as security deposit and thereafter the defendants after receiving necessary permission from the competent authority would execute necessary documents in favour of the plaintiff. In part compliance of the agreement dated 11.4.02 the plaintiff paid Rs. 9,26,000/- to the defendants on different dates and also began raising construction upon the suit property.

According to the plaintiff the defendant no.1 started creating obstruction to the construction work of the plaintiff and some criminal cases and a civil litigation was instituted between the parties. The civil litigation was dismissed for non-prosecution on amicable settlement arrived at between the parties. The plaintiff claims that the defendant no.1 and 2 in terms terms of the compromise petition filed in the civil litigation executed a power of attorney dated 16.4.08 permitting the plaintiff to proceed with the work of construction but the plaintiff has recently come to know that the defendants are trying to transfer the suit property to a 3rd party and the plaintiff filed this suit for declaration and injunction.

The defendants did not appear to contest after having received the summons and the matter was taken up for exparte hearing.

The plaintiff was examined as P.W.1 and some documents were exhibited in favour of the plaintiff. Exhibit -2 is the agreement for nomination and assignment on the basis of which the plaintiff claims to have acquired right,title and interest in respect of the suit property.

On perusal of the said document it appears that this is an agreement for assignment of immovable property and under the Stamp

Checked by

TS.205/10

Act should be written on paper equivalent to the market value of the property to be transferred. That apart according to the Registration Act any agreement in respect of transfer which creates an interest in immovable property is to be registered and as the documents does not fulfill both the conditions it can be safely be concluded that no right actually accrues to to the plaintiff on the basis of the document and the plaintiff can not rely on the same.

From the pleadings of the plaintiff and evidence on record it apparently appears that the dispute between the parties is in respect of the construction of the suit property and this was admittedly resolved in T.S.103/03 by a compromise petition after which the suit was dismissed for non-prosecution. However the orders in respect of T.S.103/03 has not been submitted in this Court.

On perusal of the documents and pleadings of the parties it appears to this Court that the proper relief for the plaintiff would have been in a decree for Specific performance of Contract and not for declaration.

According to the provisions of Section 34 of the Specific Relief Act under the proviso thereon a decree of declaration is prohibited where the plaintiff being entitled to seek further relief fails to do so. The further relief in the instant suit would not be an injunction but Specific Performance.

That apart according to the provisions of Section 41 of Specific Relief Act the relief of injunction is also barred where the plaintiff entitled to equally efficacious relief fails to seek for one. It also appears from the case of the plaintiff that the plaintiff can be adequately compensated by damage but as the plaintiff fails to seek damages no relief can be granted to the plaintiff.

Court fees paid is correct.

Hence, it is,

Ordered

that the suit be and the same is dismissed exparte without cost.

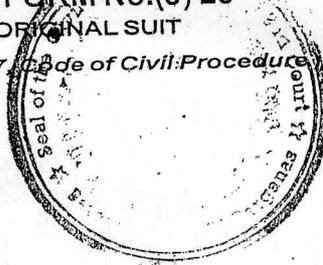
C.J.(Sp.Divn.)
2nd Court, Barasat

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HIGH COURT FORM No. (J) 25

DECREE IN ORIGINAL SUIT

(Order 20, Rules 6 and 7, Code of Civil Procedure)



DISTRICT North 24 Parganas

In the 2nd Court of Lt. Civil Judge (Sr. Divn) at Barasat.

Title. SUIT NO. 205 OF 2010

Tanus Kumar Das, Son of Lt. Smriti Ranjan Das.
 of M/S Art land, residing at FF/13/B, Salt Lake City
 Sector - II, Kolkata - 700091, under P. S. - Bidhanmugar (East) Plaintiff(s)
 in the Dist. North 24 Parganas having its office earlier
 at CD-295 Salt Lake City, Sector - 1, Kolkata - 700064
 and presently at CD-30, Salt Lake City, Sector - 11 Kal-97

Versus

1. Smt. Abati Das, wife of Lt. Bishmupada Das
 Earlier residing at EC-130, Salt Lake City, Sector-1
 Kolkata - 64, Dist. North 24 Parganas, now residing
 at 23-D, Bade Raipur Road, P.S. - Indrapur, Kal-32.
2. Smt. Anjana Chanda, w/o Dr. Bikash Chanda and
 daughter of Lt. Bishmupada Das residing at 23-D Bade Defendant (s)
 Raipur Road, P.S. Indrapur, Kal-32.
3. Amit Kumar Das, Son of Lt. Bishmupada Das.
 Earlier residing at FC-130, Salt Lake City, Sector-1
 Kolkata - 700064, North 24 Parganas and also at 49
 Swi Lane, P.S. - Muchipura, Kolkata - 700014.

CLAIM : Suit for declaration and injunction valued
 at Rs. 63,000/- for declaration and Rs. 1000/- for
 injunction.

Checked by

This suit coming on this day for final disposal before the 2nd Ld Civil Judge
(Sr. Divn) Bawabat, North 24 Parganas in the presence of Smt. Malissa Gurusung.

Tasuk Mukherjee, Adv. for the plaintiff.

and of

for the Defendant

It is ordered and decreed that

Ordered

That the suit be and the same is dismissed ex parte
without cost.

Checked by

SCHEDULE

(5)

All that the said free land measuring 4.2395 Cottahs being the land a little more or less together with the paddy build one storied Building situated in plot No.130 in Block EC, Sector-1 Salt Lake City under Police Station Bidhanagar North 24 Parganas, Sub-registration office at Bidhanagar in the District of North 24 Parganas butted and bounded by :

- On the North : Plot No. 24 (5K), 25 (5K) and 129 (4K) in Block EC.
- On the South : Plot No. 131 (4K) in Block EC & Type VI Road.
- On the East : Plot No. 129 (4K) in Block EC & Type VI Road.
- On the West : Plot No. 24 (5K) and 131 (4K) in Block EC.

and that the sum of Rs.
be paid by the

to the

on account of the costs of this suits, with interest thereon at the rate of
percent, per annum from this date to date of realisation.

Given under my hand and the seal of this court, this* 24th

day of April

2012

*Enter here the date
of the judgement.

The address given above are the
address given by the parties for
Service.

Sanjay Basu
Deputy Assistant

Judge.

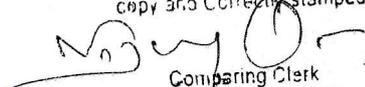
N.B.— The Judge shall make on autograph note stating the date, Month and Year and the Court is
signed and initial the corrections or alterations, if any

2nd. Court, Barisal,
North 24 Parganas

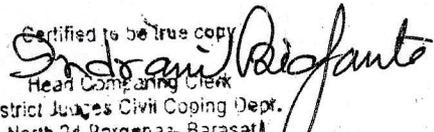
Checked by



Compared and found to be true
copy and correctly stamped


Comparing Clerk
District Judges Court
North 24 Parganas, Barasat
26/8/19
g/c

Certified to be true copy
Heard Comparing Clerk
District Judges Civil Copying Dept.
North 24 Parganas, Barasat


26/08/19

District: North 24 Parganas
In The High Court at Calcutta
Civil Appellate Jurisdiction
Memorandum of Appeal from Original Order
Appellate Side
FMAT No. 944 of 2019

Birendra Kumar Chopra & Anr.

....Appellants

-Versus-

Tarun Kumar Das & Ors.

...Respondents

MEMORANDUM OF APPEAL

ABHISHEK BANERJEE
ADVOCATE
7C, K. S. ROY ROAD
HASTINGS CHAMBER
3RD FLOOR
KOLKATA-700001
PHONE NO. - 033-2242 8829