04.12.2023
sayandeep
Sl. No. 11
Ct. No. 04

FMA 640 of 2023
with
CAN 1 of 2023

Md. Zahid
-Versus-
Asia Khatoon & Ors.

Mr. Kushal Chatterjee
Mr. Shibjit Mitra
..... for the appellant

Mr. Tarique Quasinuddin
Mrs. Zainab Tahur
....for the respondent No. 1

The instant appeal arises from an order dated 11.05.223 passed by the Civil Judge (Senior Division) Sealdah in title suit No. 86 of 2020 by which an application for appointment of receiver filed by the respondents is allowed.

Undeniably, there is a subsisting order of injunction directing the parties to maintain *status quo* in respect of the subject property with regard to the nature, character, possession of the same and also not to create any third party interest therein. The suit is filed for partition and separation of share in respect of the property which was admittedly constructed over the land jointly owned by the parties.

An agreement was entered into on 8th June, 2010 containing a stipulation that the appellant shall provide an accommodation of 118 sq.ft. in a habitable

condition on the 3rd floor of the proposed building to the respondents. It further provides that in case the Kolkata Municipal Corporation sanctioned an excess FAR then in such event the respondents allocation would be enhanced in accordance with law. Previously, the respondent took the stand that the agreement provides for allocation of 118 sq. ft. area in each floor of the proposed building for which we directed the agreement entered into by and between the parties to be produced before us. The said agreement has been filed and the clinching issue discerned therefrom is indicated herein above. It is the specific stand of the appellant that in terms of the said agreement, an area measuring 118 sq.ft. has been given to the respondents on the third floor which is disputed by the respondents that the area which is provided is much less than what was intended and/or agreed upon. Be that as it may, it is a matter to be decided in the suit to which we do not make any observations.

We are basically concerned with the impugned order by which the trial court appointed the joint receiver to collect the rent from the tenants and to discharge the various statutory obligations in relation thereto. The trial court appointed the joint receivers solely on the ground that the object and purpose for appointment of the receiver under Order 40 Rule 1 of the Code is to protect, preserve, manage and

administer the property or any usufruct therefrom and, therefore, the moment defendants have agreed that the plaintiff/ respondent has an undivided share in the property, it is desirable that the joint receiver should be appointed.

It is no longer *res integra* that the appointment of receiver in respect of an immovable property is an equitable relief tracing his history from the common law. The power to grant equitable relief impose greater responsibilities upon the Court who should proceed with care and caution and must take into account all the attending factors discerned from the stands of the parties and their pleadings. Such discretion is to be exercised bearing in mind the common interest of the parties in order to prevent any misuse from the hands of an unscrupulous litigant. The Court should also bear in mind not only the establishment of a prima facie title but the subject property being put in danger or amenable to be dissipated in the hands of one of the parties.

An argument is sought to be advanced by the respondents that if the order appointing receiver does not cause any prejudice to either of the parties, the appellate court should not interfere with the order appointing receiver by placing reliance upon the Single Bench decision of this Court in case of **Amna Bibi @ Begum @ Arma Begum vs. Khurshid Parveen** reported in **AIR 2019 Calcutta 229.** We

cannot countenance to the propositions laid down in the said report as the sprit and soul of the provisions incorporated under Order 40 Rule 1 of the Code envisages that the receiver can only be appointed if the Court finds its just and convenient. The justiciability and the convenience is to be adjudged on the basis of the pleadings of the parties and the susceptibility of the property being put in danger or the act which would cause an irreparable injury which can not be remedied later.

The celebrated Judgment of the Madras High Court rendered in case of **T. Krishnaswamy Chetty vs. C. Thangavelu Chetty & ors.** reported in **AIR 1955 Mad 430** is required to be pressed in action to understand the ingredients required while dealing with an application for appointment of the receiver. The Court coined a phrase and propagated five principles as "panch sadachar" in the following :

"17. The five principles which can be described as the 'panch sadachar' of our Courts exercising equity jurisdiction in appointing receivers are as follows:

(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding: — 'Mathusri v. Mathusri,' 19 Mad 120 (PC) (Z5); — 'Sivagnanathammal v. Arunachallam Pillai', 21 Mad LJ 821 (Z6); — 'Habibullah v. Abtiakallah', AIR 1918 Cal 882 (Z7); — 'Tirath Singh v. Shromani Gurudvvara Prabandhak Committee', AIR 1931 Lah 688 (Z8); —

'Ghanasham v. Moraba', 18 Bom 474 (Z9); — 'Jagat Tarini Dasi v. Nabagopal Chaki', 34 Cal 305 (Z10); — 'Sivaji Raja Sahib v. Aiswariyanandaji', AIR 1915 Mad 926 (Z11); — 'Prasanno Moyi Devi v. Beni Madhab Rai', 5 All 556 (Z12); — 'Sidheswari Dabi v. Abhayeswari Dabi', 15 Cal 818 (Z13); — 'Shromani Gurudwara Prabandhak Committee, Amritsar v. Dharam Das', AIR 1925 Lah 349 (Z14); — 'Bhupendra Nath v. Manohar Mukerjee', AIR 1924 Cal 456 (Z15).

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie; he has very excellent chance of succeeding in the S. suit. — 'Dhumi v. Nawab Sajjad Ali Khan', AIR 1923 Lah 623 (Z16); — 'Firm of Raghubir Singh Jaswant v. Narinjan Singh', AIR 1923 Lah 48 (Z17); — 'Siaram Das v. Mohabir Das', 27 Cal 279 (Z18); — 'Muhammad Kasim v. Nagaraja Moopanar', AIR 1928 Mad 813 (Z19); — 'Banwarilal Chowdhury v. Motilal', AIR 1922 Pat 493 (Z20).

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm. — 'Manghanmal Tarachand v. Mikanbai', AIR 1933 Sind 231 (Z21); — 'Bidurramji v. Keshoramji', AIR 1939 Oudh 61 (Z22); — 'Sheoambar Ban v. Mohan Ban', AIR 1941 Oudh 328 (Z23).

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or

less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver. — 'Nilambar Das v. Mabal Behari', AIR 1927 Pat 220 (Z24); — 'Alkama Bibi v. Syed Istak Hussain', AIR 1925 Cal 970 (Z25); — 'Mathuria Debya v. Shibdayal Singh', 14 Cal WN 252 (Z26); — 'Bhubaneswar Prasad v. Rajeshwar Prasad', AIR 1948 Pat 195 (Z27). Otherwise a receiver should not be appointed in supersession of a bone fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred.

(5) The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc."

The law enunciated in the above report leaves no ambiguity that the Court should not appoint a receiver merely on the ground that it will do no harm for the simple reason that the appointment receiver is one of the harshest remedies which the law provides for enforcement of the rights and, therefore, more circumspection is required before the Court embarked its journey on the difficult terrain of Order 40 Rule 1 of the Code. The appointment of receiver is inevitable in the event the Court finds the property in medio. The conduct of the parties and the claim in the litigation has to be meticulously examined before the Court uprooted the person from the settled possession.

In the instant case, the parties agreed to construct a building over the land jointly owned by them and the respondents have agreed to get 118

sq.ft. accommodation in a habitable condition on the third floor with the rider that in the event the excess FAR is sanctioned by the Kolkata Municipal Corporation, the area of accommodation would be enhanced accordingly. She is admittedly occupying an accommodation though according to her less than what is agreed upon and, therefore, cannot claim any other area until it is proved that an excess FAR is sanctioned by the KMC and she is entitled to more area in commensurate with the said agreement.

Furthermore, an order of status quo with regard to creation of a third party interest is operative and if any violation is alleged, the Court is not denuded of any power to implement its own order by passing a suitable orders in this regard. The tenet of the agreement is laudable that apart from the area mentioned in clause 3 thereof, the other accommodation at the proposed building shall be enjoyed by the appellants and, therefore, any dispossession from the other area on appointing a receiver is undesirable and unwarranted.

We thus do not find that the trial court was justified in appointing the receiver. The order impugned is thus set aside.

This order shall not prevent the respondents to take an appropriate steps in the event the order of injunction is violated by the appellant and if such steps are taken, the Court shall decide the same

irrespective of the fact that this Court does not find that the appointment of receiver is appropriate.

With these observations, both appeal and application are disposed of.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)