

AD. 155.
August 19, 2021.
MNS.

C. O. No. 3902 of 2006
(Via video conference)

Md. Yousuf and others
Vs.
Sk. Muluk Chand

Mr. Sabir Ahmed,
Mr. Shraman Sarkar

... for the petitioners.

Ms. Rita Patra

...for the opposite party.

Affidavit-of-service filed in Court today be
taken on record.

Heard both sides.

The present revisional application has
been filed against an order, whereby the
appellate court dismissed the petitioners'
application under Order XXIII Rule 1 of the Code
of Civil Procedure for withdrawing the suit at the
appellate stage with leave to file a fresh suit on
the same cause of action.

The appellate court, in the impugned
order, categorically referred to the findings of the
trial court and came to the conclusion that the suit
was dismissed by the trial court on several
grounds, over and above the ground that it was

not maintainable in law. As such, the appellate court refused the prayer of the petitioners.

Learned counsel for the petitioners contends that the appellate court has ample power to look into the erroneous findings of the trial court under Section 107 of the Code of Civil Procedure. That apart, is it argued that since the suit was dismissed primarily on the ground of maintainability, the findings of the trial court would not otherwise operate as *res judicata* and, as such, there was no bar on the appellate court allowing the application of the petitioners.

Learned counsel appearing for the opposite party contends that the trial court did not dismiss the suit merely on technical grounds or on the ground of non-maintainability, but also entered into the merits of the case and, as such, the appellate court was justified in rejecting the prayer of the petitioners at this belated stage.

It is seen from the trial court's judgment, a copy of which is handed over in Court today, which is kept on record, that the trial court, although arriving at the finding that the suit was being dismissed on the ground of maintainability, touched on the merits of the case and also came to certain findings regarding there being no cause

of action for filing of the suit and non-joinder of necessary parties, apart from making the observation that the plaintiffs had failed to prove their case beyond reasonable doubt. The trial court also reflected upon the evidence, as it appears from the judgment itself.

Learned counsel for the petitioners is justified in contending that the appellate court has ample power to set aside even findings of the trial court, in the event, the main appeal is maintainable in so far as the decree went against the appellants.

In the present case, the trial court might have gone overboard in entering into the merits of the case by considering the evidence on record, despite having held that the suit is not maintainable. That apart, the test applied by the trial court, regarding the plaintiffs having failed to establish their case beyond doubt, is contrary to the principle of preponderance of probability, which is the relevant yardstick in civil matters. However, such questions cannot be adjudicated upon by this Court within the limited scope of the present revisional application.

The impugned order was otherwise within the jurisdiction of the appellate court, since, after

suffering dismissal of their suit, it would not be appropriate to grant the plaintiffs the liberty to withdraw the suit with leave to file afresh on the same cause of action at the appellate stage. However, it will be open to the plaintiffs-appellants to canvass the points, as indicated above in the appeal, for consideration of the appellate court whether the findings of the trial court on merits ought to be interfered with by the appellate court in order to prevent such findings operating as *res judicata* subsequently, since the suit was primarily dismissed on a point of maintainability.

C. O. No. 3902 of 2006 is disposed of accordingly, without interfering with the impugned order, but in the light of the above observations.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)