

10.03.2021
Sl. No. 3
srm

C.O. No. 532 of 2021

Sk. Abdul Taher

Vs.

Sharmila Bibi

Mr. Partha Pratim Roy,
Mr. Tanmoy Mukherjee

...for the Petitioner.

Mr. Rahul Karmakar

...for the Opposite Party.

This revisional application has been filed against an order January 27, 2021 passed by the learned Civil Judge (Junior Division), 1st Additional Court at Contai, District Purba Medinipur in Judicial Misc. Case No.79 of 2019. By the order impugned, the learned Court below allowed the prayer of the petitioner for withdrawal of the pre-emption case under Order 23 Rule 1 of the Code of Civil Procedure but disallowed the prayer for liberty to file a fresh suit.

The facts of the case are that the petitioner as a pre-emptor instituted the J. Misc. Case within the period of limitation of one year being a non-notified co-sharer. The registration of the sale of the plot of land which was sought to be pre-empted was completed on October 24, 2019. The pre-motion application was filed on November 2, 2019. The petitioner filed an application praying for leave to deposit the

residual part of the consideration money along with 10% interest. The said prayer of the petitioner was rejected by an order dated October 14, 2020. On October 19, 2020, the petitioner filed the application for withdrawal of the suit with liberty to file afresh. By the order impugned, the said application was partly rejected and partly allowed.

It is the contention of the petitioner that the learned Court below could not have segregated the prayer of the petitioner and rejected one part of the prayer and allowed another part of the prayer.

Reliance has been placed on the decision of *Kandapazha Nadar & Ors. vs. Chitraganiammal & Ors.* reported (2007) 7 SCC 65, wherein the Hon'ble Apex Court held that if the trial Court found no reason to allow a withdrawal the application should be rejected as a whole and the trial Court should proceed with the main suit.

Reliance has also been placed on the decision of *Promotha Nath Pal Choudhuri vs. Saurav Dasi Chaudhurani & Anr.* reported in 1920 CWN 1011 wherein a Division Bench of this Court held that when a plaintiff does not desire to withdraw the suit unless liberty is granted to bring a fresh suit and the Court is of the opinion that the liberty ought not to

have been granted, the proper course of action for the Court would be to simply reject the application.

A similar view was taken by the Himachal Pradesh High Court in the matter of Hans Raj Akrot vs. State of Himachal Pradesh reported in AIR 1989 H P 43, wherein it was held that, it was settled law that where a plaintiff makes a prayer for withdrawal of the suit with liberty to file a fresh suit in respect of the subject matter of the suit, the Court can permit the withdrawal of the suit coupled with the liberty to file a fresh suit. It cannot refuse that liberty to the plaintiff on its own. If the Court feels that, in the circumstances, brought before it, permission to file a suit should not be granted, it can refuse the prayer by rejecting the application. It is not open to the Court to split up the prayer made by the plaintiff by allowing the withdrawal of the suit and refusing the liberty to institute a fresh suit in respect of the same subject matter.

In another decision of Nathji & Anr. vs. Languria & Anr. reported in AIR 1925 All 272, a similar view was taken by the Allahabad High Court and the application was remanded back to the learned trial Judge for re-adjudication on the issue.

In this case, it is urged that the application for pre-emption was filed within the period of limitation but with deficit consideration money.

On the basis of the decision of the Hon'ble Apex Court in the matter of Barasat Eye Hospital & Ors. vs. Kaustabh Mondal reported in (2019) 19 SCC 767, the petitioner made an application in the J.Misc. Case to file the deficit consideration money along with the interest. The said application was rejected on October 14, 2020. The petitioner filed an application for withdrawal on October 19, 2020 with the intention to file a fresh suit along with full consideration money in compliance of the decision of the Barasat Eye Hospital (supra) as the petitioner was still within the period of limitation.

It is urged that once the petitioner realised that the consideration money would have to be paid as a whole and the petitioner was within time as explained in the judgment of the Barasat Eye Hospital in paragraph 35 thereof the application to deposit the consideration money was filed. When the said application was rejected the petitioner thought it wise and proper to withdraw the earlier suit with liberty to file a fresh suit with entire consideration money along with 10% interest in compliance of the judgment of the Hon'ble Apex Court in Barasat Eye Hospital (supra).

Without wasting any time, the petitioner filed the other pre-emption case by depositing the entire consideration money with the second application on October 20, 2020, that is,

after the application for withdrawal was filed. The application for withdrawal came up for hearing before the learned Court below on January 27, 2021, when the petitioner's prayer for withdrawal was allowed, but the liberty was not granted.

According to the first contention of the petitioner, the pre-emption case should have been dismissed with liberty to file afresh. The decisions of the Hon'ble Apex Court as also this Court support such contentions. It is settled law that the Court should not have ventured into the decision on the merits of the suit and then allow an application for withdrawal, but reject the prayer for liberty to file a fresh suit. The prayers could not be split up.

The next point urged is that the second pre-emption case was filed within time, along with the entire consideration money and interest and the said suit should proceed, but due to the order impugned, the petitioner has become non-suited as his present J.Misc. Case has been dismissed as withdrawn but no liberty has been granted, as a result of which the second pre-emption case is in a limbo.

It is urged by Mr. Karmakar learned Advocate for the opposite party that in the decision of the Hon'ble Apex Court in the matter of K.S. Bhoopathy & Ors. vs. Kokila & Ors. reported in (2005) 5 SCC 458 it was held that leave under

Order 23 Rule 1 to file a fresh suit could not be granted at the mere asking but the Court should apply its mind to the facts of the case and satisfy itself that there are sufficient grounds that such a liberty is necessary in the fact situation. According to Mr. Karmakar, when the learned Court below while disposing of the application had categorically come to the finding that the suit was not maintainable in view of the decision of the Barasat Eye Hospital (*supra*), the Court rightly rejected the liberty. He further submitted that the decision was in effect a decision on the maintainability of the suit as a preliminary issue.

In my considered opinion, the Court had the jurisdiction to decide whether the liberty should be granted or not, on the facts of the case and if the Court was of the opinion that under the facts of this case liberty to file a fresh suit could not be granted, the proper course of action for the learned Court below would have been to reject the application as a whole and allow the petitioner to continue with the J. Misc. case on its merits and thereafter pass necessary orders on the merits of the suit. The Court could not have allowed the prayer for withdrawal without the liberty, thereby non-suiting the petitioner and depriving him of his right of appeal etc. as

would be available to him, had the suit been decided on merits.

While making such observations, this Court is not going into the question whether the subsequent pre-emption suit filed by the petitioner is maintainable or permissible or not. This Court only restricts this order to the decision impugned before this Court by which the learned Court below split up the prayers and allowed withdrawal of the suit without liberty. This could not have been done. Either the application should have been rejected as a whole or allowed as a whole.

Under such circumstances, the order impugned is set aside. The matter is remanded back.

The learned Court below is directed to hear out the application for withdrawal of the suit with liberty to file a fresh suit on the selfsame cause of action, afresh. Such decision will be taken within a period of two months from the date of communication of this order. The learned court will decide the application on its own merits.

With the aforementioned observations, this revisional application is disposed of.

There will be, however, no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)