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26.07.2021
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**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

**C.O. No. 1086 of 2020
(Via video conference)**

**Sunil Krishna Thakur & Ors.
-Vs.-
Angur Biswas & Ors.**

Mr. Prantick Ghosh
...for the petitioners

Mr. Malay Bhattacharyya
...for the opposite parties

An interesting question has been raised in the present revisional application. Learned counsel appearing for the petitioners contends that, in respect of the suit property, a previous suit for partition, bearing Title Suit No. 275 of 1961, was instituted by one Harashit Chandra Sadhu Thakur. A preliminary decree was passed therein. Thereafter, during pendency of the suit at the final decree proceedings stage, the said Harashit Chandra Sadhu Thakur (since deceased), transferred the suit property in favour of the predecessors-in-interest of the present

petitioners and, subsequently, met his unfortunate demise.

When the petitioners filed the current partition suit, that is, Title Suit No. 83 of 2019, and prayed for an ad interim injunction before the trial court, the same was refused. That order was affirmed by the appellate court, against which an appeal was preferred. The appellate court refused to grant an ad interim order of injunction in connection with the said appeal, against which the present revisional application has been preferred.

Learned counsel for the petitioners contends that both the courts below proceeded on the premise that the present suit was barred by *res judicata* and thus ad interim injunction since no *prima facie* case had been made out.

However, since the previous suit, bearing Title Suit No. 275 of 1961, was pending at the juncture when the plaintiff therein expired, the same automatically abated by operation of Order XXII Rule 9 of the Code of Civil Procedure on the expiry of ninety days after the demise of such plaintiff in Title Suit No. 275 of 1961.

Subsequently, the petitioners' current suit was preferred, also for partition, and, in view of

abatement of the earlier suit, the earlier preliminary decree cannot operate as *res judicata*.

Learned counsel appearing for the opposite parties, on the other hand, contends that Rule 10, and not 9, of Order XXII of the Code of Civil Procedure is applicable in the present case, since the revisionist petitioners claim through Harashit Chandra Sadhu Thakur by virtue of a transfer deed.

That apart, it is contended that the preliminary decree would operate as *res judicata* in the present suit, even if the previous suit had abated.

Upon considering the submissions made by learned counsel of both sides, it is clear that admittedly Harashit Chandra Sadhu Thakur, the plaintiff in Title Suit No. 275 of 1961, died during pendency of the partition suit at the stage of final decree proceedings. However, even if the suit could be held to have abated on the expiry of ninety days after such death, the preliminary decree finally decided the issue regarding title of the parties and, in view of the same having attained finality in the absence of any challenge thereto by any of the parties, the same operates

as *res judicata* in a subsequent suit, where the question of title of the parties is also involved.

Although the cause of action of a partition suit continues *de die in diem*, the previous preliminary decree passed in Title Suit No. 275 of 1961 operates as *res judicata* as well as issue estoppel as far as the respective right, title and interest of the parties are concerned. Since, declaration of the respective title and shares of the parties is a prerequisite of passing a preliminary decree in a partition suit, the present suit was correctly held to be *prima facie* non-maintainable in view of the previous preliminary decree operating as *res judicata*.

However, it is still open to the revisionist petitioners to take out an application under Order XXII Rule 10 of the Code of Civil Procedure in Title Suit No. 275 of 1961, subject to availability of the records of the said case and/or upon seeking reconstruction of the pleadings and relevant documents therein, which, if filed, shall be decided by the court below where the said suit is pending, upon hearing both sides and in accordance with law.

C.O. No. 1086 of 2020 is, thus, disposed of without interfering with the order impugned

herein, in the light of the observations made above.

It is made clear that the observations made herein shall not affect the rights and contentions of the parties in the application, if filed, under Order XXII Rule 10 of the Code of Civil procedure in Title Suit No. 275 of 1961.

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 of all necessary formalities.

(Sabyasachi Bhattacharyya, J.)