

DL. March 9,
26. 2021

F.M.A.T. 512 of 2018

Mr. Rabindra Nath Mahata,
...for the appellants.

This appeal has arisen out of an order dated January 10, 2018 passed by the learned Additional District Judge, Thirteenth Court at Alipore, South 24-Parganas, in Title Appeal No. 70 of 2005, by which the suit was remanded along with the petition under Order VI Rule 17 of the Code of Civil Procedure filed by the defendants/respondents no. 1 to 8 and the written objection thereto filed by the plaintiffs/appellants with a direction upon the court below to hear the said amendment petition and thereafter to allow both the parties to adduce evidence, if any. That order is assailed before us.

We find from the impugned order that during pendency of the title appeal, an application has been filed under Order XLI Rule 27 of the Code of Civil Procedure along with a photostat copy of registered deed of partition claiming that partition was held amongst Bharat, Sarat and Bhusan in which the entire suit property was allotted to Bharat. At the same time, the appellants before the first appellate court below also filed a petition under Order VI Rule 17 of the Code with a prayer to allow them to amend the written statement used in the suit. The necessity to file the said application arose by reason of the death of Bharat and on a claim made by the appellants before the appellate court below that during the pendency of the appeal, they obtained a registered deed of partition, a photostat certified copy of the same has been filed before the appellate court below along with two petitions from their side under

Order VI Rule 17 of the Code and another under Order XLI Rule 27 of the Code.

Moreso the necessity to adduce further evidence and to allow the application under Order XLI Rule 27 of the Code seems to be that Bharat sold his share to the plaintiffs on March 5, 1929 and went to his father in law's house, and that after death of Bharat the legal heirs of Bharat requested the plaintiffs to reside in the suit property to prove that the plaintiffs were in the possession of the suit property. However, there was no document to show that Bharat sold the suit property to the plaintiffs. This factor along with the discovery of the registered deed of partition prompted the parties to approach the court below with the necessary prayers.

It is submitted by Mr. Rabindra Nath Mahata, learned advocate appearing on behalf of the appellants herein that the application under Order VI Rule 17 of the Code of Civil Procedure filed by the defendants no. 1 to 8 contains materials, which are not germane to the issue and may completely change the nature and character of the defence, originally claimed. It is submitted that if the said amendment is allowed it will be contrary to the amended provisions of Order VI Rule 17 of the Code.

The appellate court was of the view that if the registered deed of partition was allowed to be taken into consideration and could be proved, the plaintiffs would have no right in the suit property and, as such, the suit must failed.

It is also important to note that the learned judge in the trial court only declared one-third share of the plaintiffs in the suit property but remained silent regarding the rests two-third share in

the suit property.

On such consideration, we do not find any objective reasons to interfere with the discretion, exercised by the appellate court below in remanding the suit along with the petition under Order VI Rule 17 of the Code, filed by the defendants no. 1 to 8 and the written objection thereto filed by the plaintiffs with the directions contained in the said order.

Neither by us, nor the appellate court has decided the merits of the claim and the counter claim of the parties involved in the suit. The suit was remanded to the trial court to decide the said application along with the written objection. The merits of proposed amendment was not decided. Accordingly the apprehension, expressed by Mr. Mahata that the proposed amendment concerns matters beyond the scope of the suit or withdrawal of admission or inconsistent, in our view, fails.

Since the matter is pending for quite long time, we request the learned Civil Judge (Senior Division), Seventh Court at Alipore, South 24-Parganas, to dispose of the issue on remand as expeditiously as possible without granting any unnecessary adjournment to either of the parties.

The appeal is, thus, summarily dismissed under Order XLI Rule 11 of the Code of Civil Procedure.

There will be no order as to costs.

(Soumen Sen, J.)

dns

(Subhasis Dasgupta, J.)