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26.07.2021
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CO No.1212 of 2021

Shri Anandamoy Das @ Ananda Mohan Das
Vs.
Shri Tarakeshwar Gupta and others

Mr. Ayan Banerjee,
Mr. Soumo Chaudhury

.... for petitioner

Mr. Prosenjit Mukherjee

.... for the opposite party no.1

It is seen from the records that the first opposite party was the sole contesting party in the court below and the other opposite parties were co-plaintiffs in the suit, whose interest is sufficiently represented through the opposite party no.1.

Affidavit-of-service filed in court today be kept on record.

Learned counsel for the petitioner, while challenging an order passed by the court below rejecting an application for setting aside a compromise decree on the ground that the same was barred by limitation, submits that the trial court proceeded on a primary misconception of law in holding that the said

application under Order XXIII of the Code of Civil Procedure was barred by limitation and not accompanied by any application under Section 5 of the Limitation Act, 1963 (for brevity “the 1963 Act”).

It is pointed out by learned counsel for the petitioner that the trial court acted on the premise that the starting point of limitation for filing of such application starts from the date of the compromise decree, although the law is that such starting point is the date of knowledge of the applicants about the decree.

Learned counsel appearing for the opposite party no.1 contends, by handing over a photocopy of the compromise decree sought to be set aside, that both the plaintiffs and the defendants in the suit were examined in person while passing such compromise decree, as reflected from the decree itself.

That apart, the oral evidence adduced in connection with the suit, it is submitted, records that the petitioner’s predecessor-in-interest had granted consent to the compromise decree and a ‘solenama’ petition (compromise petition) was filed, duly signed by both the parties to the suit.

As such, it is argued, the revisionist petitioner is not entitled to an order under Order XXIII of the Code

of Civil Procedure, on the ground that the compromise decree was fraudulently obtained, even on merits.

In reply, learned counsel for the petitioner submits, by placing reliance on the averments made in the application before the trial court, that the petitioner had categorically contended that the petitioner learnt about the purported compromise decree only when the existence of the same was disclosed much later.

That apart, the petitioner has specifically complained in the said application under Order XXIII Rule 3, proviso, read with Section 151, of the Code of Civil Procedure that although it was recorded that the parties were examined in person in the purported compromise decree, no such evidence can actually be found on the record. It is further alleged in the application that the papers that some blank demy/conquest papers used for filing of the compromise petition allegedly on behalf of the petitioner, had been handed over to the advocate appearing for the petitioner for a different purpose but was fraudulently converted into a solenama and presented in the court below by the learned junior advocate, who had been representing the petitioner's predecessor-in-interest as well as the opposite parties.

Upon perusing the order impugned herein, it is evident that the court below took into consideration the recording appearing in the compromise decree as regards the parties having been examined in person. However, in view of the specific allegations made in the application under Order XXIII Rule 3, proviso of the Code, the court below ought to have examined the allegations on merits upon giving opportunity of hearing and adduction of evidence to both the parties.

That apart, the trial court held that proper service of the summons was not effected subsequently on the defendants in the suit, which also led to the trial court finding that the contention made by the opposite party no.1 regarding service of summons could not be relied upon.

However, the Trial Judge, despite arriving at such finding, ultimately rejected the petition for setting aside the compromise decree only on the ground of limitation, on the mistaken notion of law that the limitation period commences from the date of the decree, whereas Article 59 of the 1963 Act categorically provides that the starting point of limitation for such applications is the date of knowledge of the applicants regarding the compromise decree.

In the present case, in view of the specific allegations and counter-allegations raised by the parties and as found by the trial court in the earlier part of the impugned order, the matter required a detailed hearing.

The ground attributed to dismissal of the application at the outset, that is, the same being time-barred, is *ex facie* without jurisdiction and *de hors* the law and, as such, cannot be accepted.

Accordingly, CO No.1212 of 2021 is allowed, thereby setting aside the impugned order bearing Order No.169 dated January 7, 2020 passed by the Civil Judge (Junior Division), Second Court at Burdwan, District: Purba Bardhaman.

The court below shall hear the application under Order XXIII Rule 3 (proviso) of the Code of Civil Procedure, bearing Miscellaneous Case No.46 of 2000, afresh on its own merits upon giving further opportunity of producing evidence, if necessary, to both the parties and decide the matter on merits as expeditiously as possible, positively within three months from the date of communication of this order to the court below.

It is made clear that this court has not gone into the merits of the respective contentions of the parties in the said miscellaneous case and it will be open to

the court below to hear the matter and decide the same afresh independently and in accordance with law on its own merits, without being influenced by any of the observations made herein.

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.)