

23.11.2022
SL No.3
Court No.8
(gc)

FA 29 of 2019
CAN 1 of 2015 (Old No: CAN 1649 of 2015)

Sri Swarnalikanta Sarkar
Vs.
Sri Samir Kumar Sarkar & Ors.

Mr. Tanmay Samanta,
Mr. Koushik Chatterjee,
Mr. Nilanjan Adhikari,
...for the Appellant.

Mr. Debjyoti Basu,
Mr. Saptarshi Datta,
Mr. Pourush Kanti Pal,
...for the Respondent Nos.1 to 4.

We have heard the learned Counsel for the parties.

The appeal is arising out of an order passed in connection with an application filed under Order 7 Rule 11 of the Code of Civil Procedure. The basis of the order appears to be an earlier order by which the appellant/plaintiff was permitted to withdraw the earlier suit. The learned Counsel appearing on behalf of the respondents in support of the order passed by the learned Trial Court have argued that the suit is barred under Order 23 Rule 1 of the Code of Civil Procedure and has drawn our attention to the application by which the earlier suit was withdrawn.

We have read both the complaints. In the first suit being T.S. No.288 of 2011, the plaintiff has prayed for a declaration that the plaintiff has got 8 annas share and the defendants are the owners to the extent of rest 8 annas share in respect of the "A" Schedule property and

to declare that the “B” Schedule deed is forged, collusive and not binding upon the plaintiff. The plaintiff also prayed for a preliminary decree of partition upon such declaration against the defendants. In the subsequent suit, the plaintiff has prayed for declaration that the plaintiff is the lawful co-owner/co-sharer in respect of the property as mentioned in the Schedule “A” to the extent of 0.58 acres out of total quantum of property as mentioned in the Schedule “B”.

The learned Counsel for the parties have submitted that some of the reliefs claimed in the suit may not be available to the plaintiff as such disputes are required to be decided by the forum established under West Bengal Reforms Act. At the stage of hearing an application under Order 7 Rule 11 of the Code of Civil Procedure the court is not required to decide the matter on merits. The averments made in the plaint are required to be taken as true and correct. The withdrawal of a suit earlier could be a defence put forward at the time of framing of the issues for dismissal of the suit as in deciding the said issue the court would be required to examine the plaint in both the suits and, thereafter to consider whether the order of withdrawal in the previous suit could be a bar for the subsequent suit. We have perused the plaint in both the suits. The earlier suit was withdrawn as the appellant alleged that the suit may be bad for defect of parties as BL and LRO were not made parties in the suit. The learned Counsel for the appellant submits that a civil court is

entitled to decide the basis of entries in the ROR and the subject matter of the suit can only be decided by civil court. The subsequent suit is a suit for partition. The earlier suit was withdrawn as BL and LRO were not made parties. It was one of the grounds on which the earlier suit was allowed to be withdrawn. The cause of action being continuous and recurring in nature the subsequent suit does not prima facie appears to be barred by limitation. The respondents also do not say that the suit is barred by limitation but the objection is based on Order 23 Rule 1 of the Code of Civil Procedure.

The learned Counsel for the parties have also argued that the subsequent suit by reason of the order passed in the earlier suit may operate as res judicata. It is elementary that the question of res judicata is a mixed question of law and fact and can only be decided conveniently at the trial of the suit if such issues are raised. We feel that the issues raised cannot be summarily decided in an application under Order 7 Rule 11 of the Code of Civil Procedure. It is only on that ground, we set aside the order passed by the Trial Court. The suit revives. The Trial Court is directed to expedite the hearing of the suit by passing peremptory directions in respect of procedural matters.

Since no affidavit in opposition is filed in connection with the injunction application, all allegations are deemed to have been denied.

With the aforesaid observation, the appeal and the application are disposed of.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Uday Kumar, J.)

(Soumen Sen, J.)