

09. 14.07.2022
Ct. No.06
Tanmoy

M.A.T. 721 of 2022

Sri Pranab Kumar Dutta & Anr.
-Versus-
Smt. Gopali Ghosh & Ors.
With
IA No: C.A.N. 1 of 2022
With
IA No: C.A.N. 2 of 2022

Mr. Partha Ghosh, Adv.,
Mr. Amal Kumar Datta, Adv.,
Mr. Debashis Das, Adv.,
Ms. Simran Sureka, Adv.,
Mr. Rahul Agarwala, Adv.,
Ms. Riya Paul, Adv.

...for the appellants.

Mr. Kalyan Kr. Chakraborty, Adv.,
Mr. Kashinath Bhattacharya, Adv.,
Mr. Ashok Halder, Adv.

...for the respondent no.1/writ petitioner.

Mr. Biswajit De, Adv.,
Ms. Rajlakshmi Ghatak, Adv.

...for the State.

Mr. Srijan Nayak, Adv.,
Ms. Rituparna Maitra, Adv.

...for the respondent nos. 3 to 6/
Balurghat Municipality.

Mr. Kalyan Kr. Chakraborty, Adv.,
Mr. Ashok Haldar, Adv.

...for the private respondents.

By consent of the parties, the appeal and the connected applications are taken up together for hearing.

This appeal is directed against a judgment and order dated December 9, 2021 whereby W.P.A. 15060 of

2021 was disposed of by directing the respondent Municipality as follows:-

- “a) An inspection of the premises shall be made. Such inspection shall be held in the presence of the parties, with 48 hours advance notice.*
 - b) The report of the inspection shall be prepared and supplied to the parties.*
 - c) A hearing shall be given to the parties. The parties must also be allowed to make oral submissions as also adduce evidence in support of their contentions.*
 - d) A reasoned order shall be passed and communicated to the parties. On the basis of what transpires at the hearing and during inspection. The proceedings shall be reached to its logical conclusion.*
- The entire exercise shall be completed within a period of four months from the date of communication of this order.”*

The private respondents in the writ petition have come up in appeal against the said order.

The appellants have taken a point of law. They say that the writ application was not maintainable in view of the bar under Order XXIII, Rule 1, sub-rules (3) and (4) of the Code of Civil Procedure, 1908. The said sub-rules of Rule 1 of Order XXIII, C.P.C. read as follows:-

“Order XXIII, Rule 1,

Sub-Rule (3) *Where the Court is satisfied, -*

- (a) that a suit must fail by reason of some formal defect, or*
- (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,*

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

Sub-Rule (4) *Where the plaintiff-*

- (a) abandons any suit or part of claim under sub-rule (1), or*

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.”

The appellants say that the writ petitioners had instituted a civil suit before the learned Civil Judge (Junior Division), Dakshin Dinajpur at Balurghat, being O.C. No. 22 of 2020, praying for the following reliefs:-

- “A) Decree of right, title, interest and possession over 06 decimal land over the plot no- LR 997 with specific boundary of North- Road, South- deceased Mrityunjoy Das, East- Nimai Mahanta & West- Gour Mahanta;*
- B) Decree of permanent Injunction against the original defendants so that the defendants should not disturb the peaceful possession of the plaintiff or shall not encroach the plaintiff’s peaceful demarcated possession or not to cross the boundary of the defendants as mentioned in Boundary of the registered deed vide no- 3179 year- 2004;*
- C) Decree of destruction the part or portion of any structure unlawfully constructed by the original defendants in violation of the Municipal law relating to the boundary & construction by the original defendants;*
- D) Any other relief or Relieves under Law & Equity may be passed in favour of the plaintiff.”*

However, the writ petitioners, who were the plaintiffs in the civil suit, made an application before the learned Civil Court for withdrawal of the suit with liberty to file afresh on the selfsame cause of action. By an order dated September 16, 2021, the learned Civil Judge allowed the plaintiffs in that suit to withdraw the suit but without liberty to file fresh suit on the same cause of action. The suit was dismissed for non-prosecution.

Learned Advocate for the appellants says that the subject-matter of the writ petition and the cause of action as pleaded as also the prayers in the writ petition are substantially the same as the subject-matter and pleaded cause of action in the civil suit as well as the prayer in the civil suit. The Municipality was also made a party-defendant in the civil suit. Hence, the bar under Order XXIII, Rule 1, sub-rule (4) of the Code of Civil Procedure, 1908 would preclude the writ petitioners from maintaining the revision.

We agree with the submission made on behalf of the appellants. We have gone through the plaint filed in the civil suit that the writ petitioners had filed and we have also perused the writ petition. They are substantially the same. The writ petitioners had approached the Civil Court to ventilate their grievance against the defendants in that suit and the Municipality. For reasons which are not relevant, the plaintiffs withdrew such suit without being given the leave to file afresh. Therefore, Order XXIII, Rule 1(4) would preclude the writ petitioners from bringing a fresh legal proceeding on the selfsame cause of action. In this connection, it may be noted that Rule 53 of the Writ Rules of this Court provides that save and except as provided by those Rules, the provisions of the Code of Civil Procedure in regard to suits shall be followed, as far as it can be made applicable, in all proceedings under Article 226 of the Constitution of

India. We uphold the point of non-maintainability of the writ petition urged by the appellants and dismiss the writ petition on that ground after setting aside the order impugned in this appeal.

The appellants have also urged the point of suppression of material facts by the writ petitioners before the learned Single Judge. Since we have already dismissed the writ petition, we deem it unnecessary to go into that point.

However, in the event the appellants herein have, in fact, made unauthorized construction as alleged by the writ petitioners, the same cannot be allowed to stand. We are granting liberty to the writ petitioners to make a fresh representation to the Municipality within three (3) weeks from date ventilating their grievance. If such a representation is made within the time period indicated above, the same shall be disposed of by the Board of Councilors of the Municipality, in accordance with law, by a reasoned order, within two (2) weeks from the date of receipt of the representation, after giving an opportunity of hearing to the writ petitioners and the present appellants and any other party that the Board of Councilors may deem fit and proper. Needless to say, if the Municipality finds truth in the allegations made by the writ petitioners herein, it will take proper remedial action so that any unauthorized construction may be removed.

Since we have set aside the order of the learned Single Judge, any action or decision that may have been taken by the Municipality on the basis of such order, shall also stand set aside and will have no effect.

The appeal being M.A.T. 721 of 2022 and the connected applications being IA No: C.A.N. 1 of 2022 and IA No: C.A.N. 2 of 2022 are accordingly disposed of.

Let urgent Photostat certified copies of this order, if applied for, be made available to the parties upon compliance with all usual formalities.

(Rai Chattopadhyay, J.)

(Arijit Banerjee, J.)