

21.06.2022
(D/L-20)
Ct.-18
(Susanta)

C.O. 3415 of 2019

Manik Chandra Ruidas
Vs.
Ganesh Bouri & Ors.

Ms. Sudeshna Basu Thakur,
Ms. Upanita Das,
.....For the Petitioner.

None appears on behalf of the opposite parties
on call.

The petitioner is the plaintiff of title Suit no. 173
of 2009.

The petitioner filed the suit before the 1st
Court of learned Civil Judge(Junior Division) at
Asansol, District-Paschim Bardhaman for a decree of
declaration of his right, title and interest over the suit
property and also for a decree of permanent
injunction.

The defendants appeared in the suit and in their
written statement questioned the maintainability of
the said suit on the ground that the suit property is
the joint property of the plaintiff and the defendant
unless the shares of the parties in the suit property
is partitioned the suit is not maintainable.

The plaintiff realizing the said defect of the suit
filed an application under Order XXIII Rule 1 of the
Code of Civil Procedure praying leave to withdraw
the said suit with liberty to file afresh in respect of
the self-same subject matter.

The learned Trial Judge by the order impugned has dismissed the said application holding that omission to file a proper suit cannot be termed as formal defect envisaged under Order XXIII Rule 1 of the Code.

A suit for declaration simplicitor in respect of a joint property would come within the mischief of proviso to Section 34 of the Specific Relief Act, 1963, as such, the said suit would fail for the said defect consequently such defect is coming within the purview of formal defect envisaged under Order XXI Rule 3(a) of the Code.

The order impugned, therefore, is set aside.

The application filed by the petitioner under Order XXIII Rule 1 of the Code is allowed.

The petitioner is at liberty to withdraw the Title Suit No. 123 of 2004 with the liberty to file a fresh suit in respect of self-same subject matter.

C.O.3415 of 2019 is allowed with the above terms without any order as to costs.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Biswajit Basu, J.)