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01.08.2022

C.O. No. 3941 of 2019

**Sk. Abdul Roup @ Sk. Abdul Rouf
Vs.
Gautam Mandal & Ors.**

Mr. Talay Masud Siddiqui,
Mr. Sandip Das ... For the petitioner.

Mr. Mukteswar Maity,
Mr. Abdul Hamid Molla,
Mr. Badal Saha,
Mr. J. K. Chaurasia ... For the O.P. No. 13.

The revisional application under Article 227 of the Constitution of India is at the instance of the plaintiff in a suit for declaration and is directed against Order No. 97 dated August 26, 2019 passed by the 2nd Additional Court of learned Civil Judge (Junior Division) at Diamond Harbour, District – 24 Parganas (South) in Title Suit No. 91 of 2006.

The learned Trial Judge by the order impugned has dismissed an application filed by the petitioner seeking permission to repair a shop room situated within the suit property on the ground that the possession of the petitioner over the said shop room is disputed.

Mr. Talay Masud Siddiqui, learned advocate for the petitioner submits that in the suit an ad interim order of injunction was passed on a finding that the petitioner is in possession of the said shop room and subsequently the said ad interim order of injunction was made absolute till the disposal of the suit but the

learned Trial Judge while dismissing the application for repair had failed to consider the said order.

Mr. Mukteswar Maity, learned advocate for the opposite party no. 13 on the other hand submits that there is a subsisting order of injunction passed in the suit, besides, a criminal case is pending against a petitioner for his attempt to take forcible possession of the said shop room by breaking open the door of it.

Mr. Siddique refuting the said allegation submits that similar criminal case is also pending against the client of Mr. Maity.

Be that as it may, the suit being a suit for partition, a co-sharer in possession of a portion of the joint property is entitled to enjoy it; nonetheless the co-sharer has to prove his possession over such portion of the joint property.

The petitioner is claiming his exclusive possession over the said shop room, to get a permission of repair of it, the petitioner is required to prove his such exclusive possession.

The application for repair therefore requires a fresh consideration to afford an opportunity to the petitioner to prove his exclusive possession over the said shop room.

The subsisting order of injunction passed in the suit directing the parties to maintain status quo with regard to the nature and character of the suit property cannot stand in the way of allowing the prayer of the

petitioner for repair of the said shop room inasmuch as by repairing, the nature and character of the said shop room would not be changed.

The order impugned, therefore, is set aside. C.O. 3941 of 2019 is disposed of by requesting the learned Trial Judge to decide the said application for repair afresh in accordance with law. In view of the nature of relief sought for in the said application, it is desired that the learned Trial Judge shall make all endeavour to dispose of the said application as expeditiously as possible.

There shall no 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.)