

29.11.2022
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Ct. no. 652
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C.O. 3909 of 2016

**Sri Durga Prasanna Mukherjee
Vs.
Sri Sambit Banerjee & Anr.**

Mr. Sukanta Chakraborty
Mr. Anindya Halder ...for the Petitioner

Mr. Rajnil Mukherjee
Ms. Debolina Sarkar ...for the O.P. nos. 1 & 2

Being aggrieved and dissatisfied with the order dated 31.8.2016 passed by the learned Civil Judge (Junior Division), 2nd Court, Serampore in Misc. case no. 5 of 2014 in connection with Title suit no. 152 of 2012, present application has been preferred.

The petitioner contended that the petitioner as plaintiff filed Title suit no. 152 of 2012 before the learned Civil Judge (Junior Division), 2nd Court, Serampore, Hooghly for declaration of plaintiff's title in the suit property and also for permanent injunction. During pendency of the suit, the petitioner amended the plaint of said title suit no. 152 of 2012 incorporating the prayer for granting a decree of mandatory injunction thereby directing the opposite party no. 1 to vacate the suit property and hand over possession to the petitioner. The petitioner submits that the summon of the suit was duly served upon the opposite party and they appeared before

the trial court on 14.8.2012 and prayed time for filing written statement but thereafter they did not appear before the trial court nor did they take any step to file written statement and as such the suit was decreed ex parte against the opposite parties herein on 19.12.2013 thereby declaring that the opposite party no. 2 is a mere name lender in respect of the suit property and it is also declared that the opposite party no. 1 has no right, title or interest in respect of the suit property by virtue of the impugned deed dated 19.6.2012 and by virtue of said ex parte decree, the Trial court restrained opposite party no. 1 from interfering with peaceful possession of the suit property by the petitioner but the trial court refused to grant any mandatory injunction against opposite party No. 1. In fact learned trial court failed to consider that during pendency of the suit, opposite party No. 1 dispossessed petitioner from the suit property and for which plaintiff/petitioner amended the plaint and incorporated prayer for mandatory injunction.

Being aggrieved and dissatisfied, the petitioner preferred appeal being title appeal no. 26 of 2014 and during pendency of the said appeal, the opposite party herein filed an application under Order IX Rule 13 of the Code of Civil Procedure before the learned Civil Judge (Junior Division), 2nd Court, Serampore being Misc. case no. 5 of 2014 in connection with setting aside ex parte decree passed in aforesaid title suit no. 152 of 2014.

Meanwhile said appeal also came up for hearing before the appellate court and learned appellate court was pleased to dispose of the said appeal thereby setting aside the aforesaid ex parte judgment and decree dated 19.12.2013 passed in title suit no. 152 of 2014 and remanded the matter to the court below with a direction upon the trial court to frame issue and take further evidence with regard to the refusal/grant of mandatory injunction.

Mr. Chakraborty learned advocate for the petitioner submits that the remand order passed by the learned appellate court was limited remand for further consideration of the learned trial court only on the point, as to whether the petitioner is entitled to a decree for mandatory injunction or not and as such the scope of consideration of the learned trial court is very limited.

Surprisingly on 18.7.2016, the opposite parties filed a written statement along with counter claim before the said court in the aforesaid title suit no. 152 of 2012 and against which the petitioner filed written objection to the prayer for acceptance of written statement but the learned trial court accepted the said written statement vide impugned order dated 31.8.2016. He further submits that the learned trial Judge should have considered that the matter has been remanded by the Appellate Court with a direction upon the learned court to frame issue and take further evidence with regard to

the refusal/grant of mandatory injunction and it was a limited remand only to decide on a particular point and learned trial court should have considered that provision under Order VIII rule 1 of the Code, cannot be stretched for the aid of unscrupulous litigants and their past conduct cannot be overlooked. He further submits that until and unless the application under Order IX rule 13 of the Code is allowed, the opposite parties cannot be permitted to file written statement in connection with the aforesaid suit which has already been decreed. By the impugned order, the learned trial court virtually allowed the application under Order IX Rule 13 of the Code without considering the merit of the Misc. case.

Learned advocate for the opposite party submits that he has filed an application under Order IX rule 13 with a prayer to setting aside the ex parte decree passed by the court and as such said misc. case is required to be disposed of at an early date.

Considered the submissions made by both the parties, it appears that the learned first appellate court while disposing the title appeal no. 26 of 2014 might have overlooked that an application for setting aside the ex parte decree is pending before the trial court.

When defendant has sought for setting aside the ex parte decree, passed by the trial court and it has been registered as Misc. case no. 5 of 2014, then in my considered opinion, the said Misc. case under Order IX

Rule 13 is required to be disposed of first. If defendant succeeds in the said Misc. case under Order IX rule 13 of the Code, only then the question of acceptance of written statement or counter claim will arise. The impugned order suffers from material irregularity to that extent that without disposing the said Misc. case under Order IX rule 13 of the Code, the court below has accepted the written statement cum counter claim filed by the defendant and posted the case for peremptory hearing.

In view of above, Learned Civil Judge (Junior Division), 2nd Court, Serampore is directed to dispose of the Misc. case no. 5 of 2014 filed by the defendant/opposite party under Order IX Rule 13 of the Code within a period of six months from the date of the communication of the order. Till then the order impugned passed in T.A. 26/2014 shall be kept in abeyance. If the defendant/opposite party does not succeed in aforesaid Misc. Case No. 5/2014, the impugned order passed in T.A. 26/2014 will survive but if the defendant /opposite party succeeds in aforesaid Misc. Case 5/2014 the Trial Court will decide all the issues involved in the suit afresh after giving opportunity to both the parties to adduce evidence including the issue of granting/refusing mandatory injunction as prayed in the plaint.

C.O. 3909 of 2016 is accordingly disposed of.

Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)