

3.11.2022
Court No.652
Item no.7
AD

**C.O 1439 OF 2020
With
CAN 1 of 2022**

**Neelanjan De
Vs.
Jujhar Singh & Ors.**

Mr. Munshi Ashiq Elahi,
Mr. Sahidullah Mridha
..... For the petitioner

Mr. Kamal Krishna Pathak,
Mr. Souvik Maji
..... For the O.P

Affidavit-of-service filed by the petitioner be kept on record.

This is an application under Article 227 of the Constitution of India.

Being aggrieved by and dissatisfied with the order dated 20.02.2020 passed by the learned 5th Civil Judge, Senior Division at Alipore in Title Suit No.80 of 1991 (re-numbered as Title Suit No.20039 of 2014) the present revisional application has been preferred.

It has been contended by the petitioner that during pendency of Title Suit Smt. Geetanjali Majumder died intestate on 03.08.2020. It is further submitted that the plaintiff No. 2(a)/petitioner Neelanjan De even after eviction from the suit premises used to write that he was residing at 172/2, Rash Behari Avenue, Kolkata-700029

as according to him his final right, title and interest has not been adjudicated as yet. During pendency of the Title Suit No.80 of 1991 the defendant no.4, Smt. Chhaya died and her sole heir and successor is already on record i.e. defendant no.5. During pendency of the said Suit Sri Ajit Kumar Sen also died intestate on 25.08.2019. The plaintiff no.2(a)/ petitioner filed an application for substitution praying for substituting his heirs (a) Maya Sen, (b) Sujit Sen and (c) Amit Sen. The defendant no.5 in the Original Suit and opposite party no.3 in the instant application filed a written objection against that application for substitution. In the written objection he submitted that another daughter of late Ajit Kumar Sen, namely, Sujata Sen has been omitted from the application and she further raised objection that the plaintiffs were evicted from premises no.172/2, Rash Behari Avenue through Court on 11.07.2018 vide Execution Case No.180 of 2008 arising out of Title Suit No.29 of 1997 in the Court of 9th Civil Judge (Senior Division) at Alipore, even then the plaintiffs by suppressing their present address have been using their address as 172/2, Rash Behari Avenue, Kolkata-700029 and as such, plaintiffs have sworn false affidavit. Plaintiff no.2(a) i.e., the petitioner herein filed a supplementary application praying for substituting Sujata Sen also as the legal heir of late Ajit Kumar Sen.

The said substitution application came up for hearing

before the Civil Judge, (Senior Division), 5th Court, Alipore on 20.02.2020 and learned Court after hearing the parties dismissed the application for substitution on contest and fixed the suit for hearing on the point of maintainability vide impugned order.

On perusal of the order it appears that the learned trial Court held that the plaintiffs are no more in possession of the suit property as mentioned in premises no.172/2, Rash Behari Avenue, Kolkata – 700029, in view of the report filed by bailiff in the title execution case, and accordingly, the trial Court held that in view of the given circumstances and also in view of the contentions made by both the parties the substitution application is devoid of any merit and requires no further explanation and he was pleased to reject the substitution application in limine.

Mr. Kamal Krishna Pathak learned advocate appearing for the opposite party in his usual fairness submits that he has no objection if the prayer for substitution is allowed. However, he prayed that a direction may be given to the learned trial Court to dispose of the issue of maintainability as has been fixed by him at an early date.

Having considered the rival contentions it appears to me that the ground for rejection of substitution application is not cogent and also not tenable in the eye of law. Since the suit is basically a suit for partition the trial Court is directed to substitute the petition mentioned legal heirs of

Ajit Kumar Sen, since deceased.

Though ordinarily under order XIV, rule 2, preliminary issue involving pure question of law relating to maintainability of suit to be decided at an earlier stage but since court herein at its discretion decided to hear maintainability issue first the trial Court is directed to dispose of the issue of maintainability as fixed by him within a period of six weeks from the date of receipt of the order, after giving opportunity to file written objection, if any and after hearing the parties intending to contest maintainability issue.

Accordingly, the revisional application being C.O 1439 of 2020 is disposed of.

In view of disposal of the revisional application itself, the connected application being CAN 1 of 2022 is also disposed of.

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

(Ajoy Kumar Mukherjee, J.)