

A.F.R

IN THE HIGH COURT OF ORISSA AT CUTTACK

C.M.P. No.364 of 2022

Girish Chandra Jagadev & Ors.

Petitioner(s)

Mr. S. Rath,
Advocate

-versus-

Siris Chandra Jagadev & Ors.

Opposite Party(s)

Mr. S.S. Mohanty,
Advocate

**CORAM:
JUSTICE BISWANATH RATH**

**ORDER
10.05.2022**

Order No.

02.

1. Heard Mr. Rath, learned counsel for the Petitioners and Mr. Mohanty, learned counsel for the contesting Opposite Parties appearing through caveat.

2. This C.M.P. involves rejection of an application U/o.XXIII rule 1 read with Section 151 of C.P.C for withdrawal of the suit filed by the plaintiffs along with rejection of an application U/o.1 Rule 10 of C.P.C. at the instance of the defendants to transpose it as plaintiffs.

3. Short background involved in this case is that the Plaintiffs filed suit making the present Opposite Parties as defendants, seeking the following relief:-

“[a] Pass a preliminary decree of partition declaring ½ share of the plaintiffs over the suit land.

[b] Pass necessary direction to the defendants to effect partition of the suit land amicably by metes and bounds and to allot the share of the plaintiffs as per aforesaid share within the period

stipulated by this Hon'ble court as permissible under law failing which the same may be done through the process of court.

[c] Pass a decree for the cost of the suit and Pass such other relief(s) which the plaintiff is entitled to get and this Hon'ble court deems just and proper under the circumstances of the case."

4. Undisputedly the suit is for partition. There is no denial by the Opposite Parties herein to the claim of the plaintiffs-Petitioners that these Opposite Parties as defendants have come up with written statement completely denial to the claim of partition and further these defendants have also different case altogether. Taking this Court to the grounds taken in the application considered in the impugned order and the reasons assigned therein, Mr. Rath, learned counsel for the Petitioners submitted that looking to the stage of the proceeding there may be some issues in allowing withdrawal of the suit, but looking to the specific claim of the defendants the plaintiffs did not want to proceed further. In this contingency taking this Court to the decision of the Rajasthan High Court relied on by the trial court in the case of *Manohar Singh Vs. Mst. Sardar Bai And Ors.* : AIR 1987 Raj. 177, a claim is also made by Mr. Rath, learned counsel for the Petitioners that the decision does not fit to the fact and circumstance of the case. The decision can only be applied; where both the plaintiffs and defendants in partition suit continue as plaintiffs. Since there is wrong application of the decision of the Rajasthan High Court and for the mechanical disposal of the application U/o.1 Rule 10 of C.P.C involved by the trial court, a claim is made by the Petitioners to allow the C.M.P. by interfering in the impugned order so far it relates to rejection of an application U/o.1 Rule 10 of C.P.C.

5. Mr. Mohanty, learned counsel for the contesting Opposite Parties though did not dispute that there is complete opposition to

the suit for partition, even taking up a dispute to the maintainability of the suit, it is however on the premises that there has been some development involving the issue inasmuch as pendency of an application U/o.39 Rule 2(A) of C.P.C. for consideration, Mr. Mohanty, learned counsel for the Opposite Parties submitted that if the suit is taken away, the allegation and efforts through the application U/o.39 Rule 2(A) of C.P.C. may be innocuous. Further for the Petitioners taking steps for withdrawal of the suit the defendants become justified in applying for transposition. For there is consideration of the claim of the defendants to transpose them to the position of the Plaintiffs, Mr. Mohanty, learned counsel contended that there is right decision by the trial court through the impugned order and it needs no interference of this Court.

6. Considering the rival contentions of the parties, this Court finds, there is no dispute in Bar that in the suit involving partition as against the defendants, the defendants filed written statement clearly denying the claim for partition by the plaintiffs and not only that the defendants have also made disputes on the maintainability of the suit involving a claim of partition. For the flat denial and the nature of the dispute involving the written statement, it is just impossible for the defendants to step into the shoe of the plaintiffs to carry further the suit for partition. For the opinion of this Court, once defendants have altogether different stand than the Plaintiffs, transposition of defendants in the event of withdrawal of suit, the defendants cannot put a different case than their case in the written statement. It is, in this view of the matter and looking to the written statement involved herein this Court finds, the application for transposition would not have been entertained by the trial court. This Court here also observes, in the event the defendants are still interested in partition,

as they have a complete different case, nothing prevents the defendants to bring a fresh partition suit.

7. So far as the claim of Mr. Mohanty, learned counsel for the Opposite Parties on the continuity of the suit for the involvement of the interim protection involved therein is concerned, this Court observes, in the event the defendants file fresh suit, there is also scope for obtaining injunction. It is not necessary to continue with the injunction in the suit where the plaintiffs do not want to proceed further. So far as the petition U/o.39 Rule 2(A) of the C.P.C. already involved is concerned, law is fairly well settled holding continuance of such petition even after disposal of the suit. But such pendency cannot force a party to continue with suit. So far as the application of the decision of the Rajasthan High Court by the trial court is concerned; this Court finds, there is complete difference in the fact position involving the suit at hand and the case decided by the Rajasthan High Court and as such there is wrong application of the decision of the Rajasthan High Court by the trial court. At this stage considering the application of the Petitioners for withdrawal of the suit, this Court though finds a reason for withdrawing the suit, however, looking to the stage of moving of such petition and bringing an attempt to the trial court in withdrawing the suit, there is definite prejudice to the defendants for a belated attempt by the plaintiff. This Court while allowing the application U/o.XXIII Rule 1 read with Section 151 of C.P.C moved in 2022 in a suit of the year 2013 and in setting aside the impugned order so far it relates to consideration of application U/o.23 Rule 1 read with Section 151 of C.P.C. and confirming the order in rejecting the application for transposition, however, keeping in view the suffering of the defendants for forcing them to continue with a litigation for over 9

years, this Court grants cost and quantifies the same to a sum of Rs.10,000/- (rupees ten thousand) to be paid to the defendants in the trial court within a period of ten days hence. Upon payment of cost and filing of a receipt before the trial court, the trial court shall deem the suit to have been withdrawn at the instance of the plaintiffs.

8. The C.M.P. stands disposed of with the above direction.

(Biswanath Rath)
Judge

Ayaskanta Jena

