

6.2.2023
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Ct. no. 652
sb

C.O. 38 of 2020

Debasish Mondal
Vs.
Arup Kumar Mondal & Ors.

Mr. Kaushik Dey ...for the petitioner

Mr. Uday Sankar Chatterjee
Mr. Suman Sankar Chatterjee
 ...for the opposite parties

This application under Article 227 of the Constitution of India has been preferred against an order no. 190 dated 5.11.2019, passed by the learned Civil Judge, Senior Division, 2nd Additional Court, Burdwan in Misc. case no. 7 of 2015 arising out of Title Suit no. 150 of 2002.

The petitioners contended that the opposite party nos. 1 to 6 as plaintiffs filed a suit being Title suit no. 191 of 1998/150 of 2002 inter alia praying for partition of the suit property. During pendency of the said suit, as the plaintiffs did not take any step, the trial court by its order dated 19.3.2013 was pleased to dismiss the said suit for default. The opposite party nos. 1 to 6 long after the order of dismissal, on 15.6.2015 filed one Misc. case under Order IX Rule 9 read with Section 151 of the Code of Civil Procedure along with an application under Section 5 of the Limitation Act purportedly affirmed by

the opposite party no. 3 namely, Ramendra Sunder Mondal. The opposite party filed written objection against the application for condonation of delay and also against the Misc. case under order IX Rule 9. In the said Misc. case, Ramendra Sunder Mondal deposed as PW 1 and made statements on oath, which is also absolutely contradictory to the averments made in the original application. PW 2 also made contradictory statement demolishing the contentions made in Order IX Rule 9 but learned court below was pleased to allow the said Misc. case and was pleased to restore the suit in its original file.

Learned counsel for the petitioner submits that the learned court below acted illegally and without jurisdiction by allowing the misc. case without any sufficient cause made out either in the pleading of the Misc. case or in the evidence adduced in connection with the said misc. case. Learned court below acted illegally in rejecting petitioner's prayer, when it is a definite case of the petitioner in the misc. case that in the original suit, the plaintiff no. 2 namely, Arup Kumar Mondal was the only Tadbirkar who used to keep contact with the lawyer but during the evidence it has been stated on oath in contradiction with the pleading that the plaintiff no. 4, Ramendra Sunder Mondal only used to take all steps in the said suit. Accordingly, the petitioner contends that the contradictions are glaring and contradictory and also

demolishes the entire case of the petitioners and as such the order impugned is liable to be set aside.

Learned counsel for the opposite parties submits that a transfer application in connection with aforesaid suit was pending for disposal before the High Court for 11 years and suddenly it appeared before the trial court and they were not informed about the date and accordingly the suit was dismissed. He further submits that they had no intentional laches in dismissing the said suit and as such the court below was justified in restoring the suit in its original file after setting aside the order of dismissal and the impugned order does not call for any interference by this court.

Considered the submissions made by both the parties. It is not in dispute that the plaintiff in the said suit has sought for partition of the suit property. As far as suit for partition is concerned even if it is dismissed for default, there is no bar for filing a fresh suit. Further in order to attract the doctrine of resjudicata, the earlier suit must have been filed and disposed of on merit on the same subject matter and that decision must have become final and rendered by a competent court of jurisdiction. Considering the same and also considering the fact that upon restoration order, the only prejudice that might have been caused to the petitioner is that the suit would be disposed of on merit after hearing the

parties and nothing more, the order impugned cannot be said to be unjustified.

In view of above, even if, the petitioner has raised that there is confusion as to who was the real Tadbirkar in the case and there might be contradiction in evidence as well as pleading but even then considering the nature of the suit and the reasons as discussed above, I find nothing to interfere with the order passed by the court below.

Accordingly, C.O. 38 of 2020 is dismissed.

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.)