

11.7.2023
115
Ct. no. 652
sb

CO 879 of 2019

**Bhola Nath Mondal
Vs.
Anima Rani Moulick & Ors.**

Mr. Sovan Mukherjee ...for the Petitioner

Affidavit of service filed by the petitioner is taken on record. In spite of service, opposite parties are not represented.

This is an application assailing the order dated 9th July, 2018 passed by the learned Additional District Judge, 2nd Court, Bongaon in Title Appeal no. 9 of 2015.

The petitioners being plaintiffs filed suit for partition against the opposite parties herein. The opposite party nos. 16,17 and 18 only appeared in the said suit and contested the same by filing written statement. Learned court below after contested hearing, was pleased to dismiss the said suit on 27th March, 2015 on the ground of non-joinder of necessary parties. Learned trial court was pleased to mention in the order that the petitioner herein in spite of having the knowledge of the death of the defendant nos. 4,5,8 and 9 has not sought for substitution of the legal heirs of deceased defendants which has resulted the failure of the suit due to non-joinder of necessary parties. The petitioner

preferred appeal against said judgment and decree and in the appeal, they had filed an application under Order XXII rule 4 read with Order XXII rule 9 of the Code of Civil Procedure along with an application under Section 5 of the Limitation Act. The respondents have also filed objection against the said petitions. Learned court below had taken up said applications for hearing on 9.7.2018 and by the impugned order, has been pleased to reject the said petitions.

Learned counsel for the petitioner submits that though learned trial court was of the opinion that the plaintiff in spite of having knowledge about the death of defendant nos. 4,5,8 and 9, they have not substituted the legal heirs but in fact, the plaintiff/petitioner could not substitute them as they did not have any knowledge about the death of those defendants since their Advocate did not inform the death news of said defendants. In fact, they have stated in details as to what prevented them from substituting the legal heirs of the deceased defendants in time in their applications under Section 5 of the Limitation Act, where he has prayed for condonation of delay. Learned court below without considering the contents of the said petition, filed under Section 5 of the Limitation Act, has been pleased to dismiss the said applications. The petitioner submits that the court below acted arbitrarily and with material

irregularity by passing the order impugned and accordingly, prayed for setting aside the impugned order.

Having considering the facts and circumstances of the case and the order impugned, it appears that the learned court below has recorded in the ordering portion as follows:

“As the petition under Order 22 rule 4 of CPC and under order 22 rule 9 of CPC are rejected. Therefore, petition under section 5 of Limitation Act filed by appellant is also stands rejected.”

From the aforesaid observation of the court below, it appears that the court below did not at all consider the petitioner’s application under Section 5 of the Limitation Act and he has rejected the said application under Section 5 of the Limitation Act since he has already dismissed applications under order XXII rule 9 and order XXII rule 4 of the Code.

Considering the perversity of the aforesaid order, the application being C.O. 879 of 2019 is allowed. The order impugned is hereby set aside. Learned court below is directed to hear both the parties on the petitioner’s application under Section 5 of the Limitation Act read with application under order XXII, rule 9 afresh within a period of eight weeks from the date of communication of the order.

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

(Ajoy Kumar Mukherjee, J.)