

M/L 25
05.6.2023
Court No.652
SD

CO 952 of 2018

Sri Sreeman Kumar Ghosh & Anr.

Vs.

Smt. Jhuma Ghosh & Anr.

Mr. Siddhartha Lahiri

Mr. Debraj Dutta

...for the Petitioners.

Affidavit of service filed by the petitioners in court today be kept with the record.

In spite of service, opposite parties are not represented.

This application under Article 227 of the Constitution of India has been directed against the Order No.40 dated February 20, 2018 passed by the learned Civil Judge (Senior Division), at Sealdah in Title Suit No.95 of 2012.

By the order impugned, learned court below rejected the petitioners' application under Section 151 of the Code of Civil Procedure wherein the petitioners have prayed for stay of the partition suit being Title Suit No.95 of 2012 till the disposal of the probate suit being OS 25 of 2013.

The petitioners contended that the predecessor of the opposite party No. 1 & 2 herein namely Srijan Ghosh filed aforesaid suit for declaration and partition being Title Suit No.95 of 2012. The petitioners herein filed their separate written statement denying the allegations levelled in the plaint. The predecessor of the opposite parties Amarendra Nath Ghosh being the father of the petitioners herein and also aforesaid late Srijan Ghosh, was the original owner of

the suit premises which he inherited from his mother Labanya Lata Ghosh. Said Amarendranath Ghosh died intestate on June 21, 2003 leaving behind his wife Swarnalata Ghosh, Srijan Ghosh and present petitioners as his legal heirs. Swarnalata Ghosh being the mother of the petitioners and Srijan died on April 21, 2012 and before her death, she had made her last will and testament dated April 26, 2011, and said will is a registered will. In the said registered will, she had bequeathed her undivided 1/4th share in the said premises to the petitioners absolutely and forever. The executors of the will initiated probate proceeding being Probate Case NO.79 of 2012 before learned District Delegate at Sealdah and after getting knowledge of the said probate proceeding, the original plaintiff, filed the said Title Suit No.95 of 2012. Since the said Srijan Ghosh filed objection to the application for grant of probate it become contentious, and renumbered as Original Suit No.29 of 2013 and transferred to the court of learned Additional District Judge, Sealdah where it is now pending for disposal.

On February 20, 2018, the petitioners herein filed an application under Section 151 of the Code of Civil Procedure in the aforesaid Title Suit No.95 of 2012, inter alia, praying that unless Title Suit NO.95 of 2012 (declaration and partition suit) be stayed till disposal of the probate proceeding, the real controversy between the parties would not be resolved, since the opposite parties herein, claiming through their predecessor Srijan Ghosh, has claimed 1/3rd share in the suit property, whereas they are not entitled to

get 1/3rd share, as the mother of the petitioners and Srijan had bequeathed her 1/4th share to the petitioners.

However, learned court below after hearing both the parties was pleased to reject the petitioners aforesaid prayer for stay on the ground that both the suits are not identical and the parties litigating in both the suits are litigating under different capacity and also because stay application has not been filed under the relevant provision of the code.

Learned counsel appearing on behalf of the petitioners submits that the court below failed to exercise its jurisdiction by not applying the settled tests applicable in adjudicating an application filed by the petitioners for granting stay and the order impugned suffers material irregularities and is not sustainable in the eye of law. Learned court below was not justified in holding that the parties to the suits are litigating under different capacity in both the suits and that the main issues of both the suits are not identical. Learned court below failed to appreciate that the decision of the probate case will actually determine the share of the parties which is very much relevant for the partition suit which has been instituted later on. Accordingly, petitioner submits that the order impugned is perverse and liable to be set aside.

He further submits that interest of justice demands that both the suits should be heard simultaneously in order to avoid conflict of judicial decisions.

In this context he also referred a judgment passed by Division Bench of this Court in ***Joy Chowdhury vs.***

Kumkum Ray and Ors. reported in ***2016(1) CHN (CAL) 302.*** (Para-15)

Having considered the facts and circumstances of the case and also considering the point that the issue involved in the earlier instituted probate suit being OS 79 of 2012 has a direct impact upon the issue involved in the later instituted partition suit being Title Suit No.95 of 2012, in terms of share of the parties in the suit property, CO 952 of 2018 is hereby disposed of with a direction upon learned District Judge, South 24 Parganas at Alipur to transfer the Title Suit No.95 of 2012 pending before the court learned Civil Judge (Senior Division) at Sealdah to the court of learned Additional District Judge, Sealdah within a period of three weeks from the date of communication of the order and the learned Additional District Judge, Sealdah will try both the suits simultaneously.

Department is directed to send a copy of this order to the learned District Judge, South 24 Parganas at Alipore and learned Additional District Judge, Sealdah.

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

(Ajoy Kumar Mukherjee, J.)