

Ct.
No.
652

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13.07
2023

C.O. 1457 of 2018
Smt. Arati Singh & Ors.
-Versus-
Gauranga Saha & Ors.

Ms. Shila Sarkar
Mr. Tanmay Mukherjee
Mr. K.R. Ahmed
Mr. Rudranil Das **...For the Petitioners**

Mr. Partha Pratim Roy
Mr. Dyutiman Banerjee **...For the Opposite Parties**

Affidavit-of-service filed by the petitioner is taken on record.

Being aggrieved by and dissatisfied with the order No. 14 dated 29th March, 2018 passed by the learned Civil Judge (Junior Division), 1st Court at Malda, in Title Suit No. 152 of 2016, present application has been preferred by the petitioners.

The plaintiffs / opposite parties brought the aforesaid suit against the defendants / petitioner, inter alia, for declaration of title and permanent injunction. The petitioner thereafter appeared in the suit and contested by filing written statement. Ultimately, on 19th January, 2017 the Court below was pleased to dismiss the suit for default.

The plaintiffs / opposite parties thereafter made an application under Order IX, Rule 9 of the Code of Civil Procedure seeking restoration of the suit along with an application under Section 5 of the Limitation Act.

Learned Court below allowed the said application under Section 5 of the Limitation Act, inter alia, holding that the defendants / petitioners failed to bring a strict proof to substantiate the plea taken in the petitioner but considering

the principle of natural justice and factual circumstances the said application has merit and accordingly allowed.

Petitioner herein contended that the plaintiffs / opposite parties failed to make out a case that they have sufficient cause for making the application within the statutory period. Furthermore, from the order it appears in connection with the application, that no notice was served upon the petitioner and no opportunity of hearing was given to state the case of the petitioners. Accordingly the petitioners prayed for setting aside the order impugned, which was passed in absence of the present petitioners / defendants.

Mr. Partha Pratim Roy, learned Counsel appearing for the opposite parties submits that the petitioners have preferred the said application long after passing the said order of dismissal and as such the order impugned does not call for any interference and present application is liable to be rejected.

I have considered the submissions made by both the parties.

On perusal of the order impugned dated 29th March, 2018, it appears that the Court below has recorded that both the parties have filed *hazira*. But by subsequent order No. 24 dated 1st February, 2020, the Court below recorded that due to inadvertence in the order dated 29th March, 2018 it was recorded that both the parties have filed *hazira*. In fact the hearing was made only in the presence of plaintiffs / opposite parties.

Accordingly, from the order itself it is clear that the defendants / petitioners herein did not get opportunity to

contest the said application and as such the basic principle of “Audi Alteram Partem” was not followed by the court below while passing the order impugned , specially when it is not the case of plaintiff that the petitioners/defendants were intentionally avoiding the court, when the matter was taken up for hearing.

In view of the above, the order impugned dated 29th March, 2018 is hereby set aside. The Court below is directed to give an opportunity to the defendants / petitioners to file written objection, if any, against the plaintiffs’ application under Section 5 of the Limitation Act within a period of four weeks from the date of communication of this order. The Court below then will dispose of the application under Section 5 of the Limitation Act filed by the plaintiffs within a period of six weeks thereafter, giving opportunity to both the parties to contest the Application.

The revisional application, being C.O. 1457 of 2018 is thus disposed of.

Urgent photostat certified copy of this order, if applied for, be supplied to the petitioner, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)