

27.6.2023
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Ct. no. 652
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CO 1382 of 2019

**Sri Amal Majumder
Vs.
Sri Amaresh Banerjee**

Mr. Ayan Banerjee
Ms. Debasree Dhamali
Ms. Riya Ghosh ...for the Petitioner

Mr. Tapas Kumar Manna
Ms. Anindita Majunder ...for the Opposite party

Being aggrieved and dissatisfied with the order no. 67 dated 7.3.2019 passed by the learned Judge, 8th Bench, City Civil Court, Calcutta in Misc. Case no. 3803 of 2016, present application under Article 227 of the Constitution of India has been preferred.

The petitioner contended that the opposite party herein as plaintiff instituted a suit inter alia for declaration, injunction and damages against the petitioner being Title Suit no. 1706 of 2009. The petitioner herein as defendant appeared in the said suit and filed written statement denying all material allegations made in the plaint.

The petitioner alleged that from the very beginning, plaintiff was reluctant in carrying on the proceeding of the said suit as he had failed to obtain any interim order from the court below and he was repeatedly seeking adjournments without any valid reason and for which he

was directed to file show cause as to why the suit should not be dismissed for non-prosecution. On 26.4.2013, the plaintiff filed show cause and the suit was again taken up on 29.4.2013, when the plaintiff again sought for time and the learned court below imposed cost of Rs. 2,000/- On the next date, i.e. on 20th May, 2013, the plaintiff was again absent without taking any step and in view of the said conduct, the court below was pleased to dismiss the said suit for default.

The erstwhile plaintiff/opposite party filed Misc. Case under Order IX rule 9 of the Code of Civil Procedure which was registered as Misc. Case no. 1142 of 2014. Erstwhile plaintiff/petitioner also filed an application under Section 5 of the Limitation Act for condonation of delay of 276 days. The petitioner herein filed a written objection against the said restoration application. On 4th November, 2016, the said Misc. Case for restoration was taken up for hearing and in the said Misc. Case also the petitioner/opposite party herein failed to appear. Due to such conduct, the said Misc. Case was dismissed for default.

Opposite party herein filed another Misc. Case under Order IX rule 9 for restoration of previous Misc. Case and the second Misc. Case was registered as Misc. case no. 3803 of 2016.

Learned court below had taken up the said second Misc. Case being Misc. Case no. 3803 of 2016 filed under

Order IX rule 9 of the Code for hearing and after hearing the submissions of the parties, the court below was pleased to allow both the Misc. cases i.e. Misc. case no. 3803 of 2016 which was filed for restoration of Misc. case no. 1142 of 2014 as well as Misc. Case no. 1142 of 2014 which was filed for restoration of the suit.

Learned counsel for the petitioner submits that the court below had failed to exercise its jurisdiction vested upon him and by the self-same order, he has allowed both the Misc. Cases though on that day only the second Misc. case being Misc. Case no. 3803 of 2016 was posted for hearing. In fact, by the impugned order, the court below had mechanically allowed application under Section 5 of the Limitation Act filed in connection with Misc. case no 1142 of 2019 without appreciating that the conduct of the plaintiff was negligent for a long time and said fact cannot be ignored as it is apparent from the face of the order sheets. In fact, the court below committed gross error of law by taking up application which was not fixed for hearing on board on that date and as such, the defendant/petitioner did not get any opportunity to address the said issue before the court below which has caused prejudice to the petitioner/defendant.

Learned counsel for the opposite party submits that in order to avoid delay in disposal of main suit, the court below was justified in disposing both the applications by exercising his power under Section 151 of the Code. He

further submits that due to such restoration, the suit will be disposed of on merit and if the said suit is disposed of on merit after contested hearing, the defendant/petitioner herein will have no cause to prejudice and accordingly, the order impugned does not call for any interference.

I have considered the submissions made by both the parties. The court below while passing the order impugned, was pleased to observe that since all the disputes between the parties should be adjudicated in a single suit, the right which has been already accrued in favour of the opposite party, can be compensated by cost and further, he observed that it would be just and proper if both the Misc. cases are disposed of together invoking the inherent power of the court for minimising the litigation and avoiding the delay. Since the subject matter of both the cases are same, so further hearing of Misc. case no. 1142 of 2014 is not required.

The first Misc. case being Misc. case no. 1142 of 2014 was filed along with the application under Section 5 of the Limitation Act wherein the prayer for condonation of delay in filing the said application for 276 days, were prayed. In support of the said prayer for condonation of delay, I am told that the plaintiff/opposite party herein filed an affidavit-in-chief though it was not tendered. Learned counsel for the petitioner/defendant submits that the court below, while passing the said impugned order, was pleased to observe that the affidavit in support

of the application under Section 5 of the Limitation Act was allowed whereby delay was condoned. The main grievance of the defendant/petitioner is that he did not get any opportunity to cross examine on the point of the affidavit-in-chief filed in support of the application under Section 5 of the Limitation Act and allowed by the court below by the impugned order. The learned court below, while passing the order has exercised his power under Section 151 of the Code, but inherent jurisdiction of the court must be exercised subject to the rule that if the code does not contain specific provisions which would meet the necessities of the case, Section 151 of the Code should be invoked.

In view of such matter, the learned court below is directed to hear the application filed under Section 5 of the Limitation Act by giving an opportunity to the opposite party/plaintiff to tender his affidavit-in-chief and the petitioner/defendant to cross examine and after taking any other evidence to be adduced on behalf of the parties and after hearing both the parties, the court below will dispose of opposite party's application under Section 5 of the Limitation Act filed in connection with Misc. case being Misc. case no. 1142 of 2014 within a period of four weeks from the date of communication of the order, without granting any unnecessary adjournment to either of the parties. However, the impugned order passed by the court below in connection with the disposal of Misc.

case no. 3803 of 2016 stands affirmed, since said portion of the order has not been assailed during hearing of the present application.

C.O. 1382 of 2019 is accordingly disposed of.

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.)