

Ct. No. 652
89
akb

12.9
2023

C.O. 1606 of 2019

Smt. Babita De
-Versus-
Sri Rupen Dey

Mr. Parth Chakraborty
Ms. Poulomi Dutta
Ms. Kaushani Majumdar **...For the Petitioner**

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

Despite service of notice, opposite party is not represented.

This application under Article 227 of the Constitution of India has been filed by the petitioner contending that the opposite party herein as plaintiff filed a suit for declaration and permanent injunction being Title Suit No. 206 of 2011, before learned Civil Judge (Junior Division) at Sealdah, with a prayer for passing a decree of permanent injunction restraining the defendant and her men, agents and servants from obstructing and/or disturbing the free access of the car of the plaintiff to and from the suit property and also restraining them from dispossessing disturbing and/or interfering in any manner whatsoever in peaceful physical possession of the plaintiff at the suit property and/or from changing nature and character of the suit property.

The petitioner herein submits that they did not receive the summon of the suit and for which initially they could not appear in the suit and the Court below was pleased to fix the suit for ex parte hearing. However, on 16th February, 2018 the defendant after coming to know about pendency of the suit, appeared in the said suit and

challenging maintainability of the suit filed a petition praying for dismissal of the suit, on the ground stated in the said application dated 16th February, 2018. The cause which made the petitioner aggrieved herein is that the court below without framing preliminary issue as to whether the suit is maintainable or not on the basis of defendant's aforesaid application had gone for recording evidence of the plaintiff and on that very date the Court below recorded the evidence of the PW. 1 and discharged him.

It is further contended that subsequently the plaintiff / opposite party herein also filed an application for injunction under Section 151 of the Code of Civil Procedure and the Court below fixed to hear the said application under Section 151 of the Code by the impugned orders without paying any heed to the petitioner's prayer for hearing the petition challenging maintainability of the suit.

The word "shall" used in Rule 2 of Order XIV has been replaced by the word "may" in the amended Rule and as such now it is discretion of the Court to decide the issue of law as a preliminary issue or to decide it along with the other issues. But when the defendant on the very first day of his appearance came out with the application challenging maintainability of the suit on certain grounds, the trial Court instead of deciding whether it can be framed as preliminary issue, proceeded with the trial of the suit and has also fixed dates for hearing plaintiffs other applications as if such application of defendant has got no existence in the record. Such approach and/or method adopted by the trial Court was not proper. He ought to have decided whether he will hear the same as preliminary issue or along with other issues. He cannot ignore the application by not fixing any date for hearing.

Having considered the facts and circumstances of the case, C.O. 1606 of 2019 is hereby disposed of with a direction upon the Court below to hear and dispose of the defendant / petitioner's application dated 16th February, 2018 after giving opportunity to both the parties to contest, preferably within a period of six weeks from the date of communication of this order, without being influenced by any observation made herein.

There shall be no order as to costs

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.)