

July 17, 2023
Sl. No.17
Court No.19
s.biswas

CO 1487 of 2023

Gopal Das and another
vs.
Sri Swapan Malik and others

Mr. Sayan Sinha
Mr. Steven S. Biswas

... for the petitioners

Mr. Sanjib Seth

... for the opposite party nos.1 to 4

The revisional application has been filed by the defendant nos.5 and 6, challenging the orders dated March 31, 2023 and April 4, 2023, passed by the learned Civil Judge (Senior Division), 1st Court at Howrah in Title Suit No.3 of 2013.

By the order dated March 31, 2023, the learned court rejected the application under Section 151 of the Code of Civil Procedure, by which the petitioners had prayed before the court for determination of a preliminary issue, with regard to maintainability of the suit.

By the order dated April 4, 2023, the prayer for cross-examination of PW1 made by the defendant nos.5 and 6, had been refused.

Mr. Sinha, learned advocate appearing on behalf of the petitioners submits that an order was passed by the learned trial court, inter alia, holding that the application for rejection of the plaint filed by the petitioners shall be decided at the trial. Such order was challenged before this court. The learned

Judge, sitting in co-ordinate jurisdiction, held that the order passed by the learned trial judge did not call for any interference as there was no doubt that the trial court would frame a preliminary issue as to the maintainability.

On the strength of such order, the application under Section 151 of the Code of Civil Procedure was filed, requesting the learned court to frame a preliminary issue as regards maintainability. The preliminary issue sought to be raised and framed, was not spelt out but support was drawn from the order passed by this court in which an opinion was expressed that issue of maintainability may be framed as a preliminary issue.

From the application filed before this court, it appears that the grounds on which the Order 7 Rule 11 of the Code of Civil Procedure had been filed for rejection of the plaint were reiterated in the application under Section 151 of the Code of Civil Procedure. The learned trial judge, upon going through the application under Order 7 Rule 11 of the Code of Civil Procedure for rejection of the plaint, had come to the decision earlier that the said application would be decided at the trial. Meaning thereby, the learned court was of the view that the plaint should not be rejected at its initial stages.

Such order was not interfered with by His Lordship. His Lordship held that the preliminary issue with regard to maintainability could be framed. However, by the time the application under Section 151 of the Code of Civil Procedure was filed, the issues had already been framed and evidence had started. Moreover, the application did not disclose any specific question of law, which was raised by the defendant nos.5 and 6, to be decided as a preliminary issue.

Thus, the learned court did not err in rejecting the said application. Issue of maintainability shall be decided as one of the first issues in the suit. However, for the ends of justice, last chance should be given to the defendant nos.5 and 6 to cross-examine the PW1. The order impugned dated March 31, 2023 does not call for interference. The order impugned in April 4, 2023 is set aside. The learned court below shall fix a date for cross-examination of PW1. It is made clear that the cross-examination of PW1 shall be completed on that date. The court below shall proceed with the suit and dispose of the same within a period of four months from the date of communication of this order.

The revisional application is thus disposed of.

All the parties are directed to act on the basis of the server copy of the order.

(Shampa Sarkar, J.)

