

12.12.2023  
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Ct. no. 652  
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**CO 2435 of 2019**

**Shree Sanyeeji Steel & Power Limited & Ors.  
Vs.  
The Official Liquidator, High Court & Ors.**

Ms. Jayati Chowdhury  
Mr. Shashwat Nayak  
Ms. Mandobi Chowdhury  
Ms. Sucheta Mitra ...for the Petitioners

Mr. Soumya Roy  
Ms. Benazir Kazi  
Mr. Sontosh Mahato ...for the O.P. nos. 2, 3 & 4

This application under Article 227 of the Constitution of India has been preferred against order no. 30 dated 9.4.2019 passed by the learned Civil Judge (Senior Division), Additional Court, Bankura in M.S. case no. 49 of 2017. By the impugned order, the learned court below has rejected plaintiff's application under Order XXIII rule 1 and by the self-same order allowed defendant's application under Order VII, rule 11 of the Code of Civil Procedure (CPC).

On perusal of the order impugned, it appears that the defendant in the said suit filed an application under Order VII rule 11 of the CPC pointing out various defects of the suit. It also reflects from the order impugned that after passing two years of filing of the suit and when the defendants have completed their arguments in respect of the petition under Order VII rule 11 of the CPC by

pointing out series of defects, the plaintiff then came out with the aforesaid application under Order XXIII Rule 1 of the CPC.

Learned counsel for the Petitioners pointed out that by the impugned order, the court below rejected the plaintiff's application under Order XXIII rule 1(3) seeking withdrawal of plaint first and in the later part of the same order, he allowed the defendant's petition for rejection of the plaint under Order VII rule 11 of the CPC. Accordingly, he submits that the first part of the order passed while disposing of the application under Order XXIII rule 1(3) of the Code, is not revisable and whereas the later part of the order by which the court below allowed the defendant's application for rejection of plaint under Order VII rule 11 of the Code is appealable. Accordingly, the self-same impugned order contains a portion which is appealable and the other portion which is not appealable.

I am further apprised by both the parties that being aggrieved by the portion of the order passed in connection with Order VII rule 11 of the CPC, the plaintiff has already preferred an appeal which is pending for disposal before this Court. Petitioners further submit that since the order in connection with Order XXIII rule 1(3) is not appealable, he has preferred this application before this court under Article 227 of the Constitution of India challenging that part of the order.

However, Ms. Chowdhury on behalf of petitioners submits that the court below has erred in taking up both the applications simultaneously and to dispose of both the applications by passing a single order. She further contended that the application under Order VII rule 11 of the Code was filed much earlier and as such the court below ought to have disposed of the application filed under Order VII rule 11 of the Code first and then if situation demanded, he ought to have taken up the plaintiff's application under Order XXIII rule 1(3) which was filed later. The court below has done material irregularity in taking up plaintiff's application under Order XXIII rule 1(3) first. Accordingly, he has prayed for setting aside the order which was passed by the court below under Order XXIII rule 1 of the Code since while passing that order, he has exercised his jurisdiction, which is not vested upon it.

Learned counsel for the opposite parties submits that being aggrieved by the order passed under Order VII rule 11 of the Code, plaintiffs have preferred appeal before this Court which is pending for disposal and he also concedes that the application filed by the defendant under Order VII rule 11 of the Code was much earlier one and the court below ought to have disposed of the said application first.

I have considered the submissions made by both the parties. In view of the facts and circumstances of the

case, it is not clear, when the application under Order VII rule 11 of the CPC was filed earlier and when the application under Order XXIII rule 1 was filed by the plaintiff on the verge of completion of the hearing of the said application under Order VII rule 11 of the Code, what prompted the court below to take up plaintiff's application first for disposal. Since the hearing of plaintiff's application filed for withdrawal of suit is dependent upon the fate of defendants' application seeking rejection of plaint, then he ought to have disposed of defendant's application seeking rejection of plaint first as said application was filed much earlier and also because fate of said application has direct impact upon the other applications.

In such view of the matter, the observations made by Trial court while disposing application under Order XXIII Rule 1 is uncalled for and unnecessarily created present set of litigation. There is other aspect of the matter, if the plaintiff ultimately succeeds in the aforesaid appeal, then such uncalled for observation made while disposing withdrawal application may cause prejudice to the petitioners/plaintiffs. Since court below proceeded for rejection of plaint, plaintiff's prayer for withdrawal of plaint had become redundant and does not call for enquiry on merit.

In such view of the matter, C.O. 2435 of 2019 is allowed in part. The observation in the order impugned

dated 9.4.2019 so far it relates to the plaintiff's application under Order 23 Rule 1(3) of the Code is hereby set aside.

Since this court is not gone into the merits of the order passed by the court below in respect of the petition under Order VII rule 11 of the Code, the parties will be at liberty to agitate all the points in the proceeding preferred in connection with the application under Order VII rule 11 of the Code before the appropriate forum.

C.O. 2435 of 2019 is accordingly allowed in part.

Urgent Photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

**(Ajoy Kumar Mukherjee, J.)**