

S/L 18
17.4.2023
Court No.652
SD

CO 2188 of 2021

Mainul Hoque @ Mainul Islam
Vs.
Abdul Hannan Sekh & Ors.

Mr. Partha Pratim Roy
Mr. Sarbananda Sanyal
Ms. Poulami Chakraborty

...for the Petitioner.

Affidavit of service filed by the petitioner in court today be kept with the record.

Opposite parties are not represented in spite of service.

This is an application under Article 227 of the Constitution of India at the instance of the defendant/petitioner against Order No.24 dated 07.7.2021 passed by the learned Civil Judge (Junior Division), 2nd Court at Lalbagh, Murshidabad in Partition Suit No.37 of 2019.

The petitioner contended that the opposite party nos.1 and 2 herein as plaintiffs filed aforesaid suit for partition against the present petitioner and the proforma opposite parties. The petitioner is contesting the said suit by filing written statement and he has also denied all material allegations made in the plaint.

In the said suit, an application praying for injunction was filed by the plaintiffs and the court below was pleased to grant injunction order in respect of the suit property. Thereafter, the petitioner herein filed an application under Section 151 of the Code of Civil Procedure praying for

repairing of their house in the suit property which is old and dilapidated and has become unsafe for human habitation. The opposite parties herein filed written objection but learned court below after hearing both the parties was pleased to reject the said application on the ground that the defendant filed petition for repairing only under Section 151 of the Code of Civil Procedure and the said application does not include the provision of Order XXXIX Rule 4 of the Code of Civil Procedure with further observation that Section 151 of the Code can be exercised by the court to redress such grievance for which no remedies provided under the Code and as such, court below concluded, when an order of injunction is already in force, so defendant/petitioner should have sought for application under Order XXXIX Rule 4 and in the absence of the same, application under Section 151 was rejected on “technical error”.

Having considered the facts and circumstances of the case, I find that aforesaid ‘technical error’ is the only ground for rejecting the aforesaid application. Merely because a wrong provision of law is quoted by the petitioner in making application to the court, the legal right which he has, cannot be ignored or denied. Law is well settled that it is the business of the court to know the law and it is only incumbent upon litigant to come before the court and state the facts in respect of which he seeks the remedy. There is no obligation on him to inform the courts under which statute or rule he is entitled to claim those remedies. If the applicant does not state the statute or the rule or if he states a wrong

statute or wrong section, that is no way relieves the court of the obligation of relief applying the appropriate rule or section.

In view of the above, liberty is given to the petitioner to file an application afresh under Order XXXIX Rule 4, read with Section 151 of the Code of Civil Procedure making self-same prayer before court below within a period of four weeks from the date of communication of the order and in the event of filing such application by the petitioner herein, the court below will give an opportunity to opposite party herein to file objection, if any, within two weeks thereafter and shall dispose of the said prayer afresh within a period of four weeks thereafter without being influenced by any observation made herein.

Portion of the impugned order no. 24 dated 7.7.2021 passed in Partition suit no. 37 of 2019 which relates to petitioner's application under Section 151 of the Code is hereby set aside. In the absence of filing such application by the petitioner, the order impugned shall revive.

Accordingly, CO 2188 of 2021 is disposed of.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Ajoy Kumar Mukherjee, J.)