

December 5, 2023
Sl. No.14
Court No.19
s.biswas

CO 2712 of 2022

Kalpana Chakraborty and another
vs.
Sri Kanai Chakraborty alias Sri Kanai Lal
Chakraborty and others

Ms. Somashree Saha

... for the petitioners

Mr. Siddhartha Banerjee

Mr. Mainak Chandra

... for the opposite party nos.1 & 3

Mr. Rajdeep Bhattacharya

Mr. Arpayan Mukherjee

... for the opposite party no.2

This revisional application has been filed challenging an order dated July 20, 2022 passed by the learned Civil Judge (Senior Division), 5th Court, Alipore in Title Suit No.92 of 2007.

This court is not required to go into the merits of the case and claims or counter claims of the parties. The petitioner has challenged the order on the ground that an application was filed for withdrawal of the suit with liberty to file afresh, but instead, the said suit was dismissed for non-prosecution.

This court finds that the prayers in the application for withdrawal of the suit and the order passed by the learned court are inconsistent. There are discrepancies.

Although, the petitioners filed an application under Section 151 of the Code of Civil Procedure, this court is of the view that the nomenclature of the

said application was not a bar to move the said application as an application under Order 23 Rule 1 of the Code of Civil Procedure.

Mr. Banerjee, learned advocate for the opposite party nos.1 and 3 submits that the court had rightly dismissed the suit for non-prosecution. A submission was made that the plaintiffs did not want to proceed with the suit on account of several defects. Mr. Banerjee further points out that liberty to withdraw the suit and to file afresh on the self-same cause of action, could not be granted by the learned court. According to Mr. Banerjee, the cause of action as per the plaint case, arose in March 2007. Thus, on the self-same cause of action, another suit would not be maintainable in law on the ground of limitation. Understanding such a situation, the learned court below rightly dismissed the suit for non-prosecution.

Mr. Bhattacharya, learned advocate for the opposite party no.2, submits that the plaintiffs tried to improve their cause of action and cure the defects by filing an application for amendment, which was dismissed on contest. A revisional application was filed before the High Court, challenging such order, which was also dismissed for default.

Thus, according to Mr. Bhattacharya, those issues which were decided against the petitioner,

could not be once again incorporated by filing a fresh suit as the principle of res judicata would apply.

Be that as it may, this court finds that the plaintiffs prayed for withdrawal of the suit with liberty to file afresh on the self-same cause of action, whereas, the learned court dismissed the suit for non-prosecution by recording the submission made on behalf of the plaintiffs, that the plaintiffs wanted to withdraw the suit, without any liberty.

Under such circumstances, as per the settled principles of law, if the plaintiffs/petitioners are aggrieved by any incorrect recording of the submissions made by the court, the proper procedure would be to approach the learned court below which recorded such submissions, allegedly contrary to the submissions made on behalf of the petitioners, by praying for recalling of the said order.

If any application is filed, the learned court below shall decide the same in accordance with law, upon granting an opportunity of hearing to the opposite parties. The application for recalling shall be heard on merits and disposed of accordingly, within a period of three months from the date of filing of the same. The fact that the petitioner was proceeding before this court, would be adequate ground for condonation of delay in filing the recalling application.

The revisional application is disposed of accordingly.

There shall be no order as to costs.

Urgent Photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Shampa Sarkar, J.)