

S/L 10
18.05.2023
Court. No. 12
Suwayan

**CO 3007 of 2022
With
CAN 1 of 2023**

**Kutubuddin Biswas & Ors.
Vs.
Mostt. Emamunnesa @ Emarun Begam & Ors.**

*Mr. Sourav Sen
Mr. Adrisnata Chakraborty*

...for the petitioners.

*Mr. Sukanta Chakrabarty
Ms. Anindya Halder*

...for the O.P. Nos. 5, 6, 11, 12 & 22..

1. Both the petitioners and the opposite party Nos. 5, 6, 11, 12 and 22 are represented by their respective learned Advocates.
2. Heard the learned Advocate for the petitioners and the learned Advocate for the opposite party Nos. 5, 6, 11, 12 and 22 at length.
3. Perused the entire materials as placed before this Court including the certified copy of the impugned order.
4. The present revisional application is now taken up for passing appropriate order.
5. By filing the instant revisional application under Article 227 of the Constitution of India the plaintiffs/petitioners have challenged the Order No. 253 dated 02.08.2022 as passed by learned Civil Judge (Junior Division), 3rd Court, Serampore, Hooghly in Title Suit No. 89 of 2005 whereby and whereunder the learned Trial Court in a suit for declaration and permanent injunction

has been pleased to reject the plaintiffs' application under Order 39 Rule 7 of the Code of Civil Procedure for local inspection as well as the application under Section 151 of the Code of Civil Procedure as filed by the plaintiffs for repairing of the suit property.

6. In course of his argument, Mr. Sen, learned Advocate for the plaintiffs/revisionists at the very outset draws attention of this Court to the impugned order. Attention of this Court is also drawn to the copy of the petition under Order 39 Rule 7 of the Code of Civil Procedure and the petition under Section 151 of the Code of Civil Procedure whereby and whereunder the plaintiffs/revisionists have prayed for repairing of the suit property before the learned Trial Court. It is contended by Mr. Sen that while disposing the aforementioned two petitions, the learned Trial Court has committed serious error of law as well as of fact in holding that since similar such application for repair was previously rejected by the self-same Court in the self-same suit, as made by the plaintiffs, the plaintiffs' application for repairing is liable to be rejected. It is contended further that the learned Trial Court also wrongfully held that the petition for repair as well as the petition for commission have been filed for delaying the proceeding of Title Suit No. 89 of 2005 as pending before the learned Trial Court.

Drawing attention to the photocopies of the aforementioned two applications it is contended that in the said two applications it has been specifically mentioned that the suit property has been seriously damaged due to natural calamity and the same is urgently required to be repaired and, thus, in the said two applications the plaintiffs have given the details of the portions which are to be repaired by the plaintiffs at their own cost and in the petition for commission it has also been mentioned that on what points the commissioner is required to inspect and submit its report in order to help the learned Trial Court to assess the quantum of damages as occurred in the suit premises.

7. It is further argued by Mr. Sen that since filing of successive repairing petitions depends upon continuing cause of actions there cannot be any *res judicata* in filing successive applications for petition for repairing. Mr. Sen, learned Advocate for the plaintiffs/revisionists, thus, submits before this Court that the present revisional application may be allowed by setting aside the impugned order.
8. *Per contra*, Mr. Chakraborty, learned Advocate for the opposite party Nos. 5, 6, 11, 12 and 22 also draws attention of this Court to the copies of the application for commission and the copies of the application for repairing as filed by the plaintiffs

before the learned Trial Court. It is contended by Mr. Chakraborty that learned Trial Court is absolutely justified in rejecting both the applications since sufficient materials are there before the learned Trial Court to substantiate that the plaintiffs have filed two petitions only to drag the proceeding of the said suit. It is further contended by Mr. Chakraborty that since the schedule of repair in the petition under 151 of the Code of Civil Procedure is vague and the schedule of work as proposed to be done by the commissioner is equally vague, learned Trial Court is very much justified in passing the impugned order. Mr. Chakraborty, thus, submits before this Court that it is a fit case for dismissal of the instant revisional application.

9. On perusal of the entire materials as placed before this Court and after hearing the learned Advocates for the contending parties it appears to this Court that learned Trial Court is not all justified in holding that since a similar application for repairing was previously rejected by the said Court, the plaintiffs' subsequent application for self-same prayer, that is, prayer for the repairing of suit premises is liable to be rejected. It is settled position of law that since causes of action for repair may arise on successive occasions during the pendency of the suit, there cannot be any *res judicata* in filing successive application for

repairing. However, if such subsequent application is filed, it is definitely to be looked into whether such petition for repair has got any merit at all or not.

10. On perusal of the entire materials as placed before this Court especially the copy of the petition for repair as filed under Section 151 of the Code of Civil Procedure before the learned Trial Court as well as the copy of the application for commission as filed under Order 39 Rule 7 of the Code of Civil Procedure, it reveals to this Court that the plaintiffs in the aforementioned two applications have given a vivid description of the requirement of repairing of the suit premises and he has also given the particulars of such repair in page No. 5 of the said application under Section 151 of the Code of Civil Procedure. From page Nos. 6 and 7 of the said application for repair it also reveals that the plaintiffs have given the details of materials which are required for the purpose of repairing the suit property.
11. In view of such specific description, under no stretch of imagination it can be said that the application for repair and/or the schedule of repairing is vague one.
12. At this juncture, if I look to page No. 8 of the application for commission as filed under Order 39 Rule 7 of the Code of Civil Procedure it reveals that the plaintiffs have given the schedule of proposed

work to be done in course of commission and in considered view of this Court the said schedule of work is very much related to the proposed work of repairing which the plaintiffs intends to carry out at his own cost that too without seeking any equity.

13. In view of such, this Court considers that there cannot be any justification on the part of the learned Trial Court to disallow both the applications, that is, the application for commission and the application for repairing conjointly.
14. Consequently, the impugned Order No. 253 dated 02.08.2022 as passed by learned Civil Judge (Junior Division), 3rd Court, Serampore, Hooghly in Title Suit No. 89 of 2005 is hereby set aside.
15. Consequently, the plaintiffs application under Order 39 Rule 7 of the Code of Civil Procedure is hereby allowed on contest.
16. Learned Trial Court is hereby directed to assess the cost of commission positively within a week from the date of communication of this order and the plaintiffs are directed to deposit the cost of commission as assessed by the learned Trial Court within three days from the date of assessment by the learned Trial Court. Learned Trial Court is further directed to issue writ of commission in the name of a suitable Advocate Commissioner with a direction to the said learned Advocate Commissioner to hold commission within two

specified dates and time which are to be fixed by the learned Trial Court and learned Advocate Commissioner shall hold commission on the said dates and time and there is no further requirement on the part of the learned Advocate Commissioner to inform the said dates and time either to the parties to the Title Suit No. 89 of 2005 or to their learned Advocates.

17. Learned Trial Court is, however, directed to announce the dates and time of holding of the commission work in the cause list which will tantamount to the notice upon the parties.
18. After receipt of the report of the learned Advocate Commissioner, learned Trial Court is directed to hear out and dispose of the petition for repair as filed under Section 151 of the Code of Civil Procedure for repairing of the suit property as filed by the plaintiffs within a fortnight from the receipt of the report of the Commissioner without being influenced by its earlier Order No. 253 dated 02.08.2022 as well as the observation made hereinabove.
19. It is made clear that the time limit as filed by this Court is mandatorily to be followed by the learned Trial Court as well as by the learned Advocate Commissioner.
20. Accordingly, the instant revisional application being CO 3007 of 2022 and the interim application being CAN 1 of 2023 are hereby disposed of.

21. Parties to act on the server copies of this order.
22. Urgent photostat certified copies of this order, if applied for, be supplied to the parties upon compliance with all the necessary formalities.

(Partha Sarathi Sen, J.)