

20.3.2024
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Ct. no. 652
sb

CO 261 of 2020

Sri Pratim Ghosh
Vs.
Shivji Sharma

Mr. Partha Pratim Roy
Mr. Anirban Das ...for the Petitioner

Mr. Tarak Nath Halder ...for the Opposite party

The opposite party herein as plaintiff filed a suit for declaration and permanent injunction against the petitioner herein as defendant no. 1 and one Rejesh Sharma, as defendant no. 2 before the court of learned Civil Judge, Junior Division, Sealdah, being Title Suit no. 60 of 2016. In the plaint, the plaintiff contended that he is a thika tenant in respect of the suit property and enjoying the same by using for his business purpose. The defendants are the tenants in respect of their tenanted rooms in the said premises but they are trying to take forcible possession of the vacant land of the plaintiff and also trying to create disturbance to the plaintiff regarding his peaceful possession over the said property.

The defendants were contesting the suit by filing joint written statement cum counter claim denying all material allegations made in the plaint. In the counter-claim, the defendants have prayed for declaration that the suit property with structure has vested to State and

defendants are at present Bharatia under the State of West Bengal and that the plaintiff has no right title and interest over the suit property in question.

During pendency of the aforesaid suit, the defendant no. 2 died on 23rd August, 2018 but the plaintiff did not take any step for substitution of the legal heirs of deceased defendant no. 2 and for which the petitioner contended that the right to sue does not survive. The petitioner herein accordingly filed an application before the court below stating that as cause of action against both the defendants are not separable in respect of filing of the suit, the suit stands abated as a whole.

However, the plaintiff filed an application subsequently under Order XXII rule 2 of the Code of Civil Procedure stating that though the aforesaid suit was filed against both the defendants, but after the death of defendant no. 2, right to sue survives and his heirs are not required to be impleaded and as such, due to the death of defendant no. 2, the suit does not abate as a whole but he prayed for expunging the name of defendant no. 2 from cause title of plaint.

However, learned Trial court by the impugned order, allowed the application of the plaintiff/opposite party holding that the instant suit is a suit for declaration and injunction and not for recovery of possession and therefore, the Court below allowed

plaintiff's prayer for expunging the name of defendant no. 2 from the cause title of the plaint.

Being aggrieved by that order, Mr. Das, learned counsel for the petitioner submits that since both the plaintiff and defendant no. 1 filed joint written statement along with counter claim so with the death of defendant no. 2, the suit abates as a whole and right to sue cannot survive against the defendant no. 1 alone. Learned court below without considering the cause of action for filing instant suit, has passed the order impugned and he did not consider that the declaration if made, would be judgment in rem and therefore, the suit cannot be held to be maintainable solely against the defendant no. 1. Accordingly, he has prayed for setting aside the impugned order.

I have considered the submissions made by the petitioner. On perusal of the plaint, it appears that the plaintiff initially alleged that both the defendants were disturbing his possession in the suit property but thereafter by filing petition under Order XXII rule 2 of the Code, he had submitted before the court below that the other defendants i.e. the legal heirs of deceased defendant no. 2 are not disturbing his possession. On the contrary, in the written statement cum counter claim, both the defendants have filed counter claim contending that one Bikrama Sharma was the actual thika tenant in respect of the suit property and with the

introduction of the new Act of 2001, the property along with structure was vested to the State and the defendants have become Bharatia under the State of West Bengal.

Accordingly, on perusal of both the plaint as well as written statement cum counter claim, it appears that though the plaintiff did not substitute the legal heirs of deceased defendant no. 2, still right to sue against defendant no. 1 and right to proceed with the counter claim by defendant no. 1 still survives.

Considering the facts and circumstances of the case, I do not find any illegality and impropriety in the order impugned and as such, it does not call for interference.

In such view of the matter, C.O. 261 of 2020 stands dismissed.

However, this order will neither preclude the defendant no. 1 to proceed with the counter claim under the principle laid down in Order IX rule 10 of the Code of Civil Procedure nor this order will prevent the defendant no. 1 to pray for adding legal heirs of defendant no. 2 of the suit as plaintiffs of counter claim, subject to other provisions of law.

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

(Ajoy Kumar Mukherjee, J.)