

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL APPLICATION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O.1201 of 2023

Raich Ali Molla and others
Versus
Sri Kanai Lal Panua and others

For the petitioners/plaintiffs.

Mr. Satyajit Mandal,
Mr. Malay Dhar,
Mr. Amit Bikram Mahata

For the opposite parties/defendants.

Mr. Sounak Bhattacharya,
Mr. Sounak Mondal,
Mr. Anirban Saha Ray

Hearing concluded on: 04.03.2024
Judgment on: 19.03.2024

Shampa Sarkar, J.:-

1. The revisional application arises out of an order dated February 6, 2023, passed by the learned Civil Judge (Junior Division) 3rd Court at Diamond Harbour, in Title Suit No.91 of 2007. The petitioners, as plaintiffs, filed the said suit.

2. By the order impugned, the learned court rejected an application dated May 28, 2022, filed in connection with the Title Suit No.91 of 2007. The petitioner prayed for withdrawal of Title Suit No.91 of 2007. The petitioners filed an application for reconsideration of the order dated August 29, 2018, by which Title Suit No.91 of 2007 and Title Suit No.86 of 2010, were being analogously heard. The petitioners also filed another application

for stay of Title Suit No.86 of 2010. All the three applications were taken up together and rejected with cost of Rs.1000/-.

3. Learned Advocate for the petitioners submitted that Title Suit No.91 of 2007 was instituted for declaration of right, title and interest in a share of the suit property and permanent injunction.

4. Defendant Nos.1, 2 and 3 entered appearance in the said suit and filed their written statement. The petitioners filed an application before the learned court on withdrawal of Title Suit no.91 of 2007. The petitioners stated that they had instituted another suit being Title Suit No.94 of 2022, before the learned Civil Judge (Senior Division), Diamond Harbor and had prayed for partition and permanent injunction against the contesting defendants some other reliefs.

5. Learned Advocate for the petitioners submitted that Order 23 Rule 1 of the Code of Civil Procedure permitted the plaintiffs to abandon either, part or whole of the claims, or the suit, against the defendants. Thus, there was no reason as to why the learned court should not have allowed withdrawal of the suit, when the plaintiffs did not want to pursue their reliefs claimed under Title Suit No.91 of 2007. It appears from the record that the defendants had also filed one title suit being Title Suit No.86 of 2010, for declaration of title and permanent injunction.

6. The learned court rejected the application for withdrawal of the suit on the ground that Title Suit No.91 of 2007 was proceeding analogously with Title Suit No.86 of 2010 and the evidence of the PWs had already been concluded. The suit was pending at the stage of DW and the

plaintiffs/petitioners suddenly felt the need to file a partition suit after prolonged 15 years.

7. The learned court held that when Title Suit No.94 of 2022 was filed for partition before the learned Civil Judge (Senior Division), Diamond Harbour, no permission was obtained from the court. The plaintiffs could not be permitted to withdraw the earlier suit after filing the later suit. The intention of the plaintiffs were doubted by the learned court and as such the learned court was of the opinion that the Title Suit No.91 of 2007 could not be allowed to be withdrawn upon recalling the order directing analogous trial of the two suits. The hardship that would be caused to the defendants could not be compensated with money and in the absence of any formal defect, the question of allowing withdrawal of the suit, would not arise.

8. The learned court further found that the plaintiffs wanted to withdraw the suit to cover up a defect or a lacuna, which was not permitted in law.

9. The learned court decided the propriety in filing the partition suit and also the factual aspects. The court found that all the defendants were not even parties to the partition suit being Title Suit No.94 of 2022.

10. Petitioners relied on the decisions of ***M/s Hulas Rai Beij Nath vs. Firm K. B. Bass and Co.***, reported in ***AIR 1968 SC 111***, ***Bank of Rajasthan Ltd. vs. Hajarimal Milap C. Surana and Ors.***, reported in ***(2005) 10 SCC 238***, ***J.B. Patnaik vs. Bennett Coleman & Co. Ltd.***, reported in ***AIR 1990 Orr 107***. The petitioners contented that no vested right in favour of the defendants had come into existence and there was no ground why the court should refuse to allow withdrawal of the suit. The petitioners further contended that the suit for partition was filed in 2022,

during the pendency of the title suit, on a subsequent cause of action. A subsequent suit, on a separate cause of action, would not be barred. Thus, the learned court should not have entered into the merits of the partition suit and arrive at the conclusion that the partition suit was wrongly filed without any permission from the court.

11. Mr. Saunak Bhattacharya, learned Advocate for the contesting defendants/opposite parties, submitted that if the title suit was allowed to be withdrawn, the question of maintainability of the partition suit would not be open to challenge. Moreover, the ground taken for withdrawal was better legal advice and to avoid multiplicity of proceedings. Such grounds were not tenable in law as they were not formal defects for which the suit would fail. The learned court rightly refused to allow withdrawal of the suit.

12. Having considered the rival contentions of the parties, this court is of the view that Order 23 Rule 1 of the Code of Civil Procedure, permits a plaintiff to abandon his suit or a part of his claim in a suit. Thus, there is no impediment in law to prevent withdrawal of the suit. Secondly, the partition suit was filed in 2022 before another court. The learned Judge erred in arriving at a conclusion that the partition suit could not be filed without permission from the court. Such finding was beyond his jurisdiction. The defendants can raise all points with regard to propriety of the partition suit at the appropriate stage, before the appropriate forum.

13. Moreover, the petitioners/plaintiffs did not pray for withdrawal of the suit with liberty to file a fresh. Thus, the observation that in the absence of a formal defect, the suit could not be withdrawn was incorrect. It was simpliciter an application for withdrawal of the suit by recalling the order by

which Title Suit No.91 of 2007 and Title Suit No.86 of 2010 were directed to be heard analogously. What is relevant for consideration is whether the evidence in the suit suits which were being heard analogously were recorded together. There does not appear to be any finding of the court with regard to that. While the plaintiffs/petitioners filed Title Suit No.91 of 2007 for declaration and permanent injunction, Title Suit No.86 of 2010 was filed by the opposite parties for declaration and permanent injunction. Thus, the suits proceeded together and the court found that although there was no order recording analogous hearing, after a certain stage, the suit suits were heard together.

14. Title Suit No.91 of 2007 should have been allowed to be withdrawn, as the plaintiffs therein wanted to abandon their claims and the suit against the defendants. The learned court should have directed the withdrawal of the suit and continuation of Title Suit No.86 of 2010 on its own merits.

15. The learned court however, rightly rejected the application for stay of the Title Suit No.86 of 2010, as the partition suit of 2022 as a later suit.

16. Title Suit No.91 of 2007 is permitted to be withdrawn. Title Suit No.86 of 2010 will proceed in accordance with law. The evidence in both the suits will be kept with the records of Title Suit No.86 of 2010. The parties shall be entitled to rely on such evidence and take advantage thereof.

17. However, it is made clear that the opposite parties' right to raise all points in the partition suit, is reserved. The said suit shall proceed in accordance with law. As this is not a case for withdrawal of the suit, with liberty to file a fresh, the contention of Mr. Bhattacharya, is not accepted.

18. Under such circumstances, the revisional application is partially allowed.
19. The order of the learned court is partially modified.
20. The observations of the learned court with regard to the propriety of the partition suit No.94 of 2022, are expunged.
21. There shall be no order as to costs.
22. Parties are to act on the basis of the server copy of this judgment.

(Shampa Sarkar, J.)