

09.02.2024
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Ct. no. 652
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CO 3737 of 2018

**Sri Bhubon Mohan Dutta
Vs.
Sri Sailendra Nath Bhar & Ors.**

Mr. Tanmoy Chowdhury
Ms. Ritoprita Ghosh ...for the Petitioner

Mr. Debasis Sur
Mr. Angshuman Patra ...for the Opposite parties

This is an application under Article 227 of the Constitution of India, directed against the order dated 14th August, 2018 passed in Title Suit no. 263 of 2016 by the learned Civil Judge (Senior Division), Serampore, Hooghly.

The petitioner herein being the plaintiff filed aforesaid suit for declaration, partition and injunction impleading the opposite parties as defendants. Before filing of the present suit, the present petitioner as plaintiff earlier filed another suit being Title Suit no. 192 of 2010 which was renumbered as Title Suit no. 289 of 2014 but the said suit was dismissed after contested hearing mainly on the ground that all the co-sharers have not been impleaded. In view of the dismissal of the suit, the petitioner filed the present suit impleading all the necessary parties as defendants.

The opposite party herein/defendant no. 1 filed an application on 6.1.2017 under Section 11 read with

Section 151 of the Code of Civil Procedure contending that the suit is barred by *res judicata*. The petitioner herein filed written objection against the said application. The court below after hearing both the parties, was pleased to dismiss the suit being Title Suit no. 263 of 2016 on the ground of *res judicata*.

Being aggrieved by that order, Ms. Ritoprita Ghosh, learned counsel for the petitioner submits that the order impugned is perverse and not sustainable in law. The court below did not apply his judicial mind and he ought to have considered that the principles of *res judicata* as provided in Section 11 of the Code does not apply in a suit for partition. In fact, the parties in the earlier suit are not the same and identical with the present suit and issues are also not the same. Therefore, the question of *res judicata* does not and cannot arise in the present context. Learned trial court has erred in holding that the earlier suit was adjudicated finally and as such the present suit is not maintainable. such observation is also erroneous because the earlier suit was dismissed only on the ground of not pleading all the co-sharers as necessary parties in the suit. Accordingly, she has prayed for setting aside the order impugned.

Mr. Debasis Sur, learned counsel for the opposite parties submits that the earlier suit was dismissed on contest and as such the court below was justified in

passing the order impugned which does not call for interference. Accordingly, he has prayed for rejection of the present application.

I have considered the submissions made by both the parties. On perusal of the order passed in connection with earlier Title Suit no. 289 of 2014, it appears that the court below while disposing the said suit had framed as many as six issues out of which issue no. 3 was whether the suit is bad for defect of the parties and after making lengthy discussion, the court below in the earlier suit came to a conclusion that in the said partition suit, all the co-sharers have not been made parties in the suit, so the suit is bad for defect of the parties. Accordingly, the court below concluded by making following observations:-

“The partition take place among the co-sharers of the suit property but here we have already seen there are some persons who are not yet been proved to be the co-sharers of the suit property and some necessary parties i.e. the co-sharers have not been impleaded as the parties to this suit. Therefore, when the two co-sharers are not the parties and there are some persons made parties of the suit who are not co-sharers the plaintiff cannot get the relief of partition. Thus, I am of the view that plaintiff is not entitled to get the relief of partition which he has prayed for and consequently he is also not entitled to get any other relief or reliefs. Hence, both the issues are decided and answered against the plaintiff”.

In such view of the matter, it is palpably clear that the said suit was not disposed of on merit but solely on the ground that in the said earlier partition suit, all the co-sharers were not made parties and as such the court

below was pleased to dismiss the said partition suit on contest against the defendant no. 1 and ex parte against the rest.

In order to constitute *res judicata*, it is not enough that parties are the same and the prayer for partition of the suit properties was directly and substantially in issue in both the suits, but another important condition is that the matter must have been heard and finally decided on merits in the former suit. For the application of doctrine of *res judicata*, the issue must have been adjudicated in “*stricto sensu*” in earlier litigation i.e. it must have been decided on merit. Here the former suit was dismissed by trial court on the ground of non-joinder and mis-joinder of parties and such decision not being on merit would not attract *res judicata* in a subsequent suit. Apart from that a right to obtain partition is a right inherent in the joint ownership of property. so long as the property remains joint, one of the co-owners has a good cause of action for bringing a fresh suit for partition notwithstanding the dismissal of a previous suit for partition because right to enforce a partition is a continuous right, which derives from legal incident of joint tenancy and which ensures so long as the joint tenancy continues. In the present case it is nobody’s case that the joint tenancy in the property in question is not continuing. Accordingly,

I am of the view that the order impugned passed by the trial court is perverse and liable to be set aside.

In such view of the matter, C.O. 3737 of 2018 is allowed. The order impugned being Order no. 19 dated 14th August, 2018 is hereby set aside. The court below is directed to expedite the hearing of the suit and to conclude the entire proceeding preferably within a period of six months from the date of communication of the order.

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.)