

D/L.19.
February 25, 2025.
MNS.

FMA No. 160 of 2025
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CAN 1 of 2024
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CAN 2 of 2025

Rabindra Kumar Singh
Vs.
Shankar Singh and others

Mr. Kamalesh Jha,
Mr. Biswajit Tiwari

... for the appellant.

Mr. Avishek Prasad,
Ms. Ankita Dey

...for the respondent nos. 1, 2 and 4.

Re : CAN 2 of 2025 (substitution application)

1. Supplementary affidavit filed in Court today be kept on record.
2. Upon hearing learned counsel for the parties, we find that the application has been made in time.
3. It is submitted by learned counsel for the appellant that the heirs and legal representatives of the deceased respondent no. 3, who died on January 14, 2025 during pendency of the appeal, are major and *sui juris*.
4. Accordingly, CAN 2 of 2025 is allowed, thereby directing substitution of the heirs and legal representatives of the deceased respondent no. 3, namely, Murari Singh @ Murari Prasad Singh as mentioned in paragraph 5 of the application,

instead and place of the said deceased as respondents in the appeal.

5. The necessary consequential amendments to the cause title of the Memorandum of Appeal shall be carried out by the learned Advocate-on-record for the appellant during the course of the day.
6. There will be no order as to costs.

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CAN 1 of 2024

7. In view of certain arguable grounds having been made out, the appeal is admitted and will be heard on the grounds as taken in the Memorandum of Appeal.
8. On consent of the parties and in view of the short conspectus of the appeal, the same is taken up for hearing along with the application by dispensing with formal preparation of paper books and calling for the records.
9. The learned Trial Judge dismissed the injunction application of the plaintiff/appellant primarily on the ground of suppression of an earlier consent decree of partition. In the opinion of the learned Trial Judge, a part of the present suit property was also included in the schedule of the previous consent decree.

10. Learned counsel for the appellant argues on the basis of the consent decree, which is also annexed to the said application filed with the present appeal, that although the subject matter of the present suit was a part of the subject matter of the previous suit as well, the present suit property was kept joint whereas the other joint properties were partitioned between the predecessors of the parties by virtue of such consent decree.

11. As such, the present partition suit is maintainable, which ought to have been considered by the learned Trial Judge.

12. Learned counsel appearing for the respondents points out that the plaint of the present suit, as originally filed, did not contain any averment to that effect and only upon the defendants/respondents pointing out in their written objection to the injunction application that there was a previous partition decree, an amendment application was filed, that too, after the passing of the impugned order of the dismissal of the injunction application.

13. We find that the appellant has made out a *prima facie* case as regards the subject matter of the present suit, although a part of the subject matter of the previous suit, having been kept joint and the other portions of the subject matter

of the previous suit, which were also joint properties, being partitioned by metes and bounds by the said consent decree, thereby keeping it open to the plaintiff/appellant to seek a fresh partition in respect of the present suit property, which was retained as joint property.

14. Yet, such pleading was not before the learned Trial Judge at the time of passing the impugned order. In fact, the amendment to the plaint to that effect was sought by the plaintiff/appellant only after passing of the impugned order. Thus, the learned Trial Judge cannot be faulted for dismissing the injunction application in the absence of any averment to that effect in the plaint at that juncture.

15. However, we are of the opinion, upon a careful consideration of the facts of the case, that a fresh opportunity ought to be given to the plaintiff/appellant to file a second injunction application on such new facts, upon the amendment application of the plaintiff/appellant being heard, if the said amendment is allowed.

16. Accordingly, FMA No. 160 of 2025 is disposed of without interfering with the impugned order but granting the plaintiff/appellant liberty to file a fresh injunction application on the premise of the amended plaint, if and only if the amendment

application of the plaintiff is allowed by the learned Trial Judge.

17. For such purpose, the learned Trial Judge shall decide the pending application at the behest of the plaintiff for amendment of the plaint of the present suit as expeditiously as possible, preferably within four weeks from the date of communication of this order to the court below.

18. Upon the disposal of such amendment application and if the same is allowed, the plaintiff/appellant will be at liberty to file a fresh injunction application on the premise of such amended plaint.

19. If so filed, the learned Trial Judge shall give an opportunity of hearing to both sides and permit the respondents to file their written objection to the same and thereafter decide the said injunction application afresh on the basis of the amended plaint, without being influenced by the present impugned order.

20. CAN 1 of 2024 filed in connection with the appeal also stands disposed of accordingly.

21. There will be no order as to costs.

(Uday Kumar, J.)

(Sabyasachi Bhattacharyya, J.)