

AD-04
Ct No.16
17.11.2025
TN

SA 63 of 2024
IA No: CAN 2 of 2023

Riajuddin Mallik
Vs.
Sri Pranab Mahata and others

Ms. Usha Maity,
Ms. Anita Khatri,
Mr. Sakya Maity

.....for the appellant

Mr. Sukanta Das

....for the respondent nos. 9(a) to
9(f)/caveators

1. The present second appeal has been filed against a judgment and decree whereby the first appellate court reversed the dismissal of a partition suit by the trial court and passed a preliminary decree therein. The said suit was filed by the plaintiffs/respondents.
2. The learned Trial Judge dismissed the suit on several grounds, primarily in view of the suit being barred by the principle of *res judicata*, since in a previous partition suit in respect of the self-same property, the present appellant had obtained a final decree which allegedly had been executed in the year 2000.
3. Secondly, the learned Trial Judge proceeded on the premise that the current suit was barred by Order XXI Rule 99 of the Code of Civil Procedure, in view of the plaintiffs/respondents herein having not raised the

question of their title and sought partition in the execution proceedings of the earlier suit.

4. Thirdly, the suit was dismissed on the ground that the same was barred by limitation.
5. Learned counsel appearing for the appellant argues that the learned first appellate Judge erred in law in reversing the findings of the trial court, despite there being a previous decree of partition which was duly executed.
6. That apart, the present suit, it is argued, is barred by limitation.
7. Learned counsel further seeks to argue that the present suit is bad for non-joinder of necessary parties as well as for non-joinder of all the joint properties between the parties in the hotchpot of the present suit.
8. On a careful consideration of the judgments of both the courts below, we find that the last aforementioned argument was not advanced either before the trial court or before the first appellate court by the defendant no.1/appellant. It was never argued, as is evident from the narrative of the arguments of the defendant no.1/appellant in the trial court's judgment, that the present suit is barred by either non-joinder of necessary parties or non-joinder of all the common properties of the parties. It is trite law that a factual argument or objection cannot be raised for the first time before the second appellate court.

9. As such, we fail to accede to the contention of the appellant that such point should have been considered by both the courts below.
10. Insofar as the merits of the first appellate court's judgment is concerned, we must appreciate the way in which the judgment has been written, taking into consideration all relevant law in the field and advertent to the relevant facts. The learned appellate Judge, quite correctly, came to the finding that since the previous partition suit was bad for non-joinder of all the co-sharers, there is no bar in law for the left-out co-sharers to file a fresh partition suit.
11. Insofar as the point of limitation is concerned, the learned first appellate Judge rightly observed that the said issue does not arise. We agree with such proposition, since in a partition suit, the cause of action is continuing in nature and it cannot be said that at any particular point of time the cause of action froze or crystallized and limitation began to run.
12. Thirdly, since the present suit was filed in the year 2005 and the execution case arising out of the previous suit was concluded in the year 2000, the present suit could not be said to be barred by the provisions of Order XXI Rules 97 to 101 of the Code of Civil Procedure, having been filed subsequent to the conclusion of the execution proceedings and not during pendency of the same.

13. In such view of the matter, we do not find any error, let alone any substantial question of law, to be involved in the matter.
14. Accordingly, SA 63 of 2024 is dismissed under Order XLI Rule 11 of the Code of Civil Procedure. Consequentially, CAN 2 of 2023 is dismissed as well.
15. There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

(Supratim Bhattacharya, J.)