

21.11.2025
286
BD.
Ct. 29

C.O. 3773 of 2024

Kanailal Shaw & Ors.
Vs.
Dilip Shaw & Ors.

Mr. Subhadeep Banerjee
Ms. Puja Sonkar
Mr. Sayon Nath
Ms. Shreya Banerjee ...for the petitioners.

In spite of service opposite parties are not represented.

The petitioners herein have preferred the instant application being aggrieved by the order dated 08.07.2024 by which the petitioners/plaintiffs prayer under Order XXIII Rule 1 of the Code of Civil Procedure was rejected by the court below. The petitioners herein as plaintiffs filed a Title Suit No. 647 of 2016 for declaration and injunction. Defendants appeared in the said suit and filed application under Order VII Rule 11 on 02.01.2019 for rejection of plaint contending that the property involved in the suit is Thika property and the Civil Judge (Junior Division) has got no jurisdiction to try the suit. The petitioners herein/ plaintiffs filed written objection against the said application. However, the plaintiffs/petitioners herein thereafter filed one application under Order XXIII Rule 1 read with section 151 of CPC with a prayer to withdraw the suit

with liberty to file afresh before the appropriate forum. Learned trial court had taken up both the applications but by the impugned order he only rejected the plaintiffs/petitioners prayer under Order XXIII Rule 1 of the CPC on the ground that the plaintiffs filed the instant application for withdrawal of the suit long after defendants application under Order VII Rule 1 CPC challenging jurisdiction of the court. Therefore, the court below found that the prayer of the plaintiffs/petitioners is malicious and thereby he rejected the same.

Having heard learned counsel appearing on behalf of the petitioners and also on perusal of the order impugned it appears that both the parties have admitted that the property in question is Thika Tenancy property and as such the civil court has got no jurisdiction to try the suit.

In such circumstances, the order of the court below that the plaintiffs filed the application long after filing of defendants application under Order VII Rule 11 and therefore it is malicious does not hold water. If it is admitted position that the suit is triable by the authority constituted under the Thika Tenancy Act, then the court below ought to have allowed the plaintiffs/petitioners prayer for withdrawal giving them liberty to file it before the appropriate forum.

Sub-rule (3) of Rule 1 Order XXIII of CPC permits the plaintiff to withdraw the suit or a part thereof with the leave of the Court to institute a fresh suit on the same cause of action, and the court can grant such leave if the court satisfied that (i) a suit will fail by reason of some formal defect or (ii) there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or a part of a claim. The expression “formal defect” has not been defined in the Code but the term “formal defect” should be interpreted liberally to include every kind of defect, not affecting the merit of the case. Here in view of admission made by both the parties that the suit property is a Thika Tenancy prospect, the defect of the suit only pertains to jurisdiction of civil court in view of latest amendment of the act and does not involve any defect affecting merit of the case. Furthermore, Clause (b) of sub-rule (2) Order XXIII, Rule 1 confers wider discretion on the court to allow plaintiff to withdraw the suit with permission to file afresh on the same cause of action on “other sufficient grounds”, where the interest of justice demands it.

In such circumstance C.O. 3773 of 2024 is allowed.

Title Suit No. 647 of 2016 is hereby withdrawn from the file of court below on the basis of the prayer

made by the plaintiff/petitioner herein, with liberty to the plaintiff/petitioner to file afresh on self-same cause of action before appropriate forum having jurisdiction to try the suit subject to other provisions of law.

The impugned order dated 08.07.2024 in respect of which the court below has rejected the plaintiffs prayer for withdrawal of the suit with liberty to file afresh is hereby set aside.

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

(Dr. Ajoy Kumar Mukherjee, J.)