

10.01.2025
(D/L-17)
Ct. No.236
(B.K.N.)

C.O. 3912 of 2023

Sri Prafulla Kumar Mondal & Ors.
Vs.
Sri Dilip Kumar Jha & Ors.

Mr. Sibasish Ghosh,
Mr. Dwarika Nath Mukherjee
...for the Petitioner

Mr. Kamal Krishna Pathak,
Mr. Souvik Maji
...for the Opposite Party no. 1

Learned advocate for the petitioner and learned
advocate for the opposite party no. 1 are present.

Heard learned advocates for the parties.

This application under Article 227 of the
Constitution of India is instituted against the order
dated 16th August, 2023 passed by Learned Civil
Judge, Senior Division, 1st Court, Malda in
Partition Suit No. 41 of 2021.

The petitioner being aggrieved by order dated
16th August, 2023 has come up with the instant
application.

Learned advocate for the petitioner submits
that the Learned Trial Court upon considering that
the parties in Partition Suit No. 25 of 2021 and
Partition Suit No. 41 of 2021 are not same and
dismissed the application under Section 10 of Code
of Civil Procedure.

Learned advocate for the petitioner relies upon a decision of this Court in the case of ***Amrita Bazar Patrika Pvt. Ltd. & Ors. -Vs.- Jayanta Sengupta & Ors.*** reported in ***2010(4) CHN (CAL) 909***. This Hon'ble Court in the said judgment was pleased to observe as follows:

“34. For the purpose of operation of section 10 it is also not necessary that all the parties on either side should be the same in both the suits. It is enough if there is substantial identity of the parties as held in *Shorab Merwanji Modi vs. Mansata Film Distributors (supra)*, cited by Mr. Mitra. The view has been reaffirmed in *A. G. Industries Ltd. Vs. Risabh Manufacturers (supra)*.”

It further appears from the order impugned passed by the Learned Trial Court that the Learned Trial Court has also made observation that Partition Suit No. 25 of 2021 is filed for partition against defendant nos. 1, 2 and 3 and declaration of no right to transfer by defendant no. 1, 2 and 3 vide deed no. 4920 and 4921 dated 3rd May, 2012 whereas Partition Suit No. 41 of 2021 is filed for partition against defendant no. 1 to 9 and 18 and 19 and permanent injunction against defendant no. 10 to 17.

Thus it cannot be said that the matter in issue of this subsequent suit is directly and substantially in issue in previously instituted suit between the same parties or between parties under whom or any of them claimed litigating under the same title.

Upon considering the submission of the learned advocates and relying upon the decision of this Hon'ble Court in the case of ***Amrita Bazar Patrika Pvt. Ltd. & Ors. (supra)*** this Court is of the view that as it is necessary that in order to attract Section 10 of the Code of Civil Procedure substantial identity of the parties should be the same, this question cannot be decided without framing issue and without holding regular trial.

Thus this Court does not find any error in the order passed by the Learned Trial Court. However, in order to come to such findings as to whether the issues of both the sides are directly and substantially same there should be analogous hearing of both the suits.

Thus this application under Article 227 of the Constitution of India is disposed by remitting the matter back to the Trial Court to consider and decide the issues of Section 10 of the Code of Civil Procedure after framing of the issues and if necessary, after commencement of trial, however, both Partition Suit No. 41 of 2021 and Partition Suit No. 25 of 2021 should be heard and tried analogously in order to come to a finding.

Thus this application under Article 227 of the Constitution of India is disposed of.

It is hereby made clear that this Court has not gone into merits of the case and all points are left open.

(Biswaroop Chowdhury, J.)