
(1984) 06 CAL CK 0019

In the Calcutta High Court

Case No : Civil Rule No"s. 2228 and 2354 of 1979

Banshidhar Polley

APPELLANT

Vs

Sm. Kiran Bala Roy

RESPONDENT

Date of Decision : 07-06-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, Order 22 Rule 4, 115, 151

Citation : AIR 1984 Cal 359

Hon'ble Judges : Mukul Gopal Mukherji, J;Chittatosh Mookerjee, J

Bench : Division Bench

Advocate : S.B. Bhunia and A.K. Maity, for the Appellant; Tarun Kumar Chatterjee, for the Respondent

Judgement

C. Mookerjee, J.—Sm. Kiran Bala Roy, the plaintiff-respondent herein, had instituted Title Suit No. 66 of 1962 in the 4th Court of the Subordinate Judge, Alipore, against her father, Srikrishna Polley and her brother, the petitioner, Sri Banshidhar Policy, as defendants 1 and 2, inter alia, for declaration that she had half share in Premises No. 5B, Ananda Banerjee Lane, P. S. Bhowanipore, and the two defendants jointly had the remaining half share, for partition by metes and bounds of the suit property and for permanent injunction to restrain the defendants from interfering with her possession. In her plaint Kiran Bala had stated that on 23rd July, 1962 her father Srikrishna Polley had purported to execute a fraudulent and collusive Deed of Gift in favour of his son, Banshidhar, in respect of half share of the suit property. But she did not pray for any relief in respect of the said deed in Banshidhar"s favour.

2. Srikrishan Polley, the defendant No. 1, had filed a written statement in the said suit claiming that her daughter, the plaintiff, was his Benamdar. Srikrishnu claimed that he was the 16 annas owner of the suit premises. He also had stated in his written statement that out of his 16 annas interest he had made gift of the half share of the suit property in favour of his son. Banshidhar Polley, the present petitioner.

3. Banshidhar, the defendant No. 2 had also filed a separate written statement in the said suit, inter alia, supporting the case of the defendant No. 1 and also claiming that his father, the defendant No. 1, had validly gifted in his favour half share of the suit property. But he did not further contest the suit.

4. The learned Subordinate Judge, 4th Court, Alipore, did not frame any issue as to whether or not the aforesaid Deed of Gift by Srikrishna Polley, the defendant No. 1, in favour of his son, Banshidhar Polley, the defendant No. 2, was acted upon and was valid. On 14th December, 1966, the learned Subordinate Judge decreed the Title Suit No. 66 of 1962 in preliminary form and, inter alia, declared that the plaintiff, Kiran Bala Roy, had half share in the suit property. The learned Subordinate Judge rejected the claims of Srikrishna, the defendant No. 1, that her daughter, Kiran Bala, was his Benamdar and that he was the full owner of the suit premises. The learned Judge did not record any finding as regards the validity of the purported Deed of Gift by Srikrishna, the defendant No. 1, in favour of his son, Banshidhar the defendant No. 2.

5. On 22nd December, 1966 Srikrishan Polley, the defendant No. 1, in the said suit, died intestate leaving as his heirs and legal representatives : (1) Sm. Sila Polley (since deceased). (2) Sm. Kiran Bala (daughter, the plaintiff). (3) Mihidana (daughter) and (4) Banshidhar Polley (son). Banshidhar, as one of the heirs and legal representatives of his father, presented Appeal from Original Decree No. 66 of 1968 against the said preliminary decree dated 14th December, 1966 passed by the learned Subordinate Judge, 4th Court, Alipore, in Title Suit No. 66 of 1962. Sm. Sila Polley, the widow of Srikrishna and Mihidana Polley (daughter) were made pro forma respondents in the said Memorandum of Appeal. Subsequently, Sm. Sila Polley died and upon an application of the appellant, in the Memorandum of Appeal it was noted that her son, Banshidhar and her two daughters, Kiran Bala and Mihidana were heirs of deceased Sila Polley. On 24th May 1977, M. M. Dutt and R. K. Sharma, JJ., dismissed the said F. A. No. 66 of 1968 and affirmed the judgment and decree of the learned Subordinate Judge. The Division Bench in the said case had rejected the appellant's case that Kiran Bala was a Benamdar of her father, Srikrishna and upheld her case that she was the owner of half share of the suit premises and was entitled to get a decree for partition of her said undivided share. The Division Bench also did not record any finding as to whether the Deed of Gift by Srikrishna Polley transferring half of his right, title and interest in the suit property in favour of his son, Banshidhar was valid or not.

6. Pending the hearing of F. A. No. 66 of 1968, this court had made the connected Civil Rule No. 2160 (F) of 1969 absolute and had only stayed the drawing up of the final decree in Title Suit No. 66 of 1962. Upon the prayer made by Kiran Bala, the respondent No. 1, the suit records were sent down to the trial court. While the said First Appeal was pending, at the instance of the plaintiff, Kiran Bala, the learned Subordinate Judge, 4th Court, Alipore, had appointed Sri N. Guha Thakurata, as the Pleader Commissioner to effect partition of the suit

property. On 6th February, 1971, the plaintiff, Kiran Bala, filed a petition before the trial court for noting the death of the defendant No. 1, Srikrishna Policy and the names of the legal representatives of Srikrishna. On 6th February, 1971 the trial court ordered that the names of the legal representatives of the defendant No. 1 be noted and also ordered the learned Pleader Commissioner to submit his report by 31st March, 1971. Thereafter from time to time the trial court had extended the time for submission of the Commissioner's report.

7. On 3rd November, 1971 the plaintiff, Kiran Bala, filed another petition before the learned Subordinate Judge. 4th Court, Alipore, inter alia, stating that on the death of Srikrishna Policy his four heirs, including the plaintiff, had jointly inherited his 8 annas interest in the suit property. The plaintiff further claimed that by the said devolution of the interest of the defendant No. 1, her share in the suit property had become 10 annas, i.e., 8 annas under the Preliminary Decree and 2 annas by inheritance as one of the heirs of her deceased father. The plaintiff prayed for directing the learned Pleader Commissioner to allot to her 10 annas share of the suit property.

8. Mihidana Polley, the other daughter of the deceased defendant No. 1, had first prayed before the trial court for making in her favour separate allotment of 2 annas interest which had allegedly devolved upon her. Subsequently, she had prayed for dismissing her said petition.

9. On 15th November, 1971, the learned Subordinate Judge had fixed 3rd December, 1971 "for steps". On 3rd December, 1971 Mihidana filed another petition inter alia stating that she was one of the heirs of her father. On the said date the learned Subordinate Judge also passed the following order No. 116:

"Heard, Plaintiff has now 10 annas share in the suit property. Pleader Commissioner to allot 10 annas share to the plaintiff. To 20-12-71 for Commissioner's report".

As already stated, on 24th May, 1977 this court had dismissed the F. A. No. 66 of 1968 and had affirmed the preliminary decree passed by the learned Subordinate Judge, 4th Court, Alipore, inter alia, declaring that the plaintiff, Kiran Bala Roy, had eight annas undivided interest in the suit property.

10. On 6th March. 1972 the learned Pleader Commissioner submitted his report. Subsequently, the plaintiff had prayed before the learned Subordinate Judge for appointing another Pleader Commissioner for carrying out the remaining works and for recording the death of Sila Polley, the widow of Srikrishna Polley. The matter was several times adjourned by the trial court. Banshidhar had filed an objection against the plaintiffs said petition. On 1st July. 1978 Banshidhar filed in the trial court an application u/s 151 of the Code for reconsideration of the trial court's order dated 3rd December, 1971 passed in Title Suit No. 66 of 1962 directing the Pleader Commissioner to allot to the plaintiff 10 annas share of the suit property. The petitioner had inter alia stated in his said application that neither the trial court nor the High Court had decided whether the defendant No.

1 Srikrishna's Deed of Gift in favour of his son. Banshidhar, was valid and legal. On 20th June, 1978 the defendant No. 2 had come to know about the orders Dt. 4th November 1971. 15th November, 1971 and the order Dt. 3rd December, 1971. No copy of the plaintiffs petition claiming additional 2 annas share was served upon the defendant No. 2's lawyer Mr. Surendra Nath Biswas and he was not heard before passing of the order Dt. 3rd December, 1971. The copy of the plaintiff's said petition was served only upon Sri Kunja Behari Bose, the lawyer for Mihidana Polley. The defendant No. 2 submitted that in view of the aforesaid Deed of Gift by his father, Srikrishna Polley, in his favour, the order Dt. 3rd December, 1971 ought to be set aside and recalled.

11. The plaintiff filed an objection to the said petition of the defendant No. 2, Banshidhar, for recalling the court's order Dt. 3rd December, 1971. She claimed that the Deed of Gift in favour of the defendant No. 2 was collusive and fraudulent. She also contended that Banshidhar did not even claim title on the basis of the said Deed of Gift and had throughout proceeded as one of the heirs of his father. He was now estopped from claiming that according to the said Deed of Gift he had 8 annas interest in the suit property.

12. On 4th April, 1979 the learned Subordinate Judge, 4th Court Alipore dismissed the defendant No. 2's application u/s 151 of the Code on the ground that the same could not be entertained because the order Dt. 3rd December, 1971 varying the defendant's share amounted to decree and the same was appealable.

13. Banshidhar Polley, who was the defendant No. 2 and also one of the heirs of Srikrishna Polley, the defendant No. 1. in Title Suit No. 66 of 1962, has presented F. A. T. No. 1889 of 1979 against the order Dt. 3rd December, 1971 passed by the learned Subordinate Judge, 4th Court, Alipore. The Subordinate Judge by his said judgment held that on the death of Srikrishna Polley, the plaintiff, Sm. Kiran Bala had 10 annas share of the suit property. The learned Subordinate Judge directed the learned Pleader Commissioner to allot 10 annas share to her. The Stamp Reporter of this Court reported that the said Memorandum of Appeal had been presented 7 years 3 months and 29 days beyond the last date for filing the appeal. The appellant, Banshidhar, filed an application u/s 5 read with Section 14 of the Limitation Act, 1963 for condonation of the delay in filing the said appeal. Anil Kumar Sen and B. C. Chakraborty, JJ. were pleased to issue Civil Rule No. 2356 (F) of 1979.

14. Banshidhar Polley had also filed in the 4th Court of the Subordinate Judge. Alipore an application u/s 151 read with Sections 152 and 153 of the Code for recalling and/or setting aside the aforesaid order Dt. 3rd December, 1971 in the Title Suit No. 66 of 1962 passed by the learned Subordinate Judge, 4th Court, Alipore, holding that the plaintiff, Kiran Bala, had now 10 annas share in the suit property. The learned Subordinate Judge by his order No. 149 DA 4th April, 1979 has dismissed the application on contest.

15. Being aggrieved, thereby Banshidhar filed a revisional application u/s 115 of the Civil P. C. and Anil Kumar Sen and B. C. Chakraborty, JJ., have been pleased to issue Civil Rule No. 2228 of 1979.

16. We have heard both the aforesaid Civil Rules Nos. 2228 of 1979 and 2345 (F) of 1979. In our view, the Civil "Rule No. 2228 and 1979 ought to be made absolute because the learned Subordinate Judge had committed a jurisdictional error by rejecting the aforesaid application under S. 151 of the Code filed by the petitioner for reconsideration of the order DA 3rd December, 1971 passed in Title Suit No. 66 of 1962. Therefore, it would not be necessary to decide whether or not the delay in filing the aforesaid first appeal ought to be condoned.

17. We hold that the order No. 116 D/-3rd December, 1971 passed in Title Suit No. 66 of 1962 was patently illegal and without jurisdiction and the learned Subordinate Judge has, therefore, acted illegally and with material irregularity in the exercise of his jurisdiction in dismissing as not maintainable, the defendant No. 2 petitioner's application under S. 151 of the Code for setting aside the said order D/- 3rd December, 1971.

18. We have already observed that the learned Subordinate Judge 4th Court, Alipore by his judgment and decree dated 14th December 1966 passed in Title Suit No. 66 of 1962 had only declared that the plaintiff Kiran Bala had half share in the suit property and did not further determine the extent of the shares of the defendants 1 and 2 and whether by virtue of the purported Deed of Gift executed by Srikrishna, the defendant No. 2. Banshidhar had acquired any right, title or interest in the suit property. Thus, the said preliminary decree passed in Title Suit No. 66 of 1962 did not declare the extent of the shares of the defendants 1 and 2.

19. Srikrishna, the defendant No. 1. died after passing of the said preliminary decree and Banshidhar (the petitioner), as one of his heirs and legal representatives had presented F. A. No. 66 of 1968. At this stage we may point out that Srikrishna by the said alleged Deed of Gift had purported to transfer in favour of his son. Banshidhar, half of his interest in the suit property. In case the said Deed of Gift was valid and was acted upon, then upon the death of Srikrishna only his remaining undisposed of interest in the suit property was liable to devolve upon his heirs and legal representatives, i.e. his widow. Sm. Sila Polley his son, Banshidhar Policy and his two daughters. Kiran Bala and Mihidana. But in the event the said Deed of Gift was not valid and was not acted upon, Shrikrishna's half share in the entire suit property would pass on to the heirs of Srikrishna. Banshidhar as one of the legal representatives of his father had presented F. A. No. 66 of 1968. He is not prima facie estopped from now setting up on the basis of the aforesaid Deed of Gift his claim to the half of Srikrishna's interest in the suit property. In F. A. No. 66 of 1968 Banshidhar as his father's legal representative, was entitled to raise only those defences against the plaintiff's claim which were appropriate to his character as such legal representative (vide Order 22 Rule 4 (2), Civil P. C). In F. A. 66 of 1968 on the

basis of the purported gift in his favour Banshidhar, therefore, could not have set up a new and independent and personal right to the suit property or part thereof (vide Jagdish Chander Chatterjee and Others Vs. Shri Kishan and Another,).

20. When the Subordinate Judge himself has not yet decided the question, we in revision do not ourselves propose to consider whether the said Deed of Gift by Srikrishna in favour of his son. Banshidhar (the petitioner) was valid or was acted upon. In her plaint in Title Suit No. 66 of 1962 the plaintiff Kiran Bala had herself mentioned about Srikrishna's said gift in favour of Banshidhar, who was made defendant No. 2. Srikrishna in his written statement had inter alia averred that he had validly executed the said deed. Banshidhar the defendant No. 2, filed a written statement asserting title as a donee of his father. But the trial court did not frame any issue as regards the validity of the said Deed of Gift by Srikrishna in favour of Banshidhar. At the trial about the validity of the said deed no evidence was adduced either by the plaintiff or by the defendant No. 1.

21. We have already observed that the learned Subordinate Judge in his judgment and decree Dt. 14th December, 1966 did not make any determination about the validity of the said Deed of Gift in favour of Banshidhar and did not declare the extent of the share or shares of the defendants 1 and 2. Pending the disposal of the F. A. 66 of 1968, this Court stayed the drawing up of the final decree in Title Suit No. 66 of 1962. At the plaintiff's instance the trial court's records were sent back from this Court only for continuing the works of the Pleader Commissioner. We are not prepared to accept the extreme submission of Mr. Bhunia, learned advocate for the petitioner, that during the pendency of the said First Appeal, the trial court had no jurisdiction to amend, vary or modify the preliminary decree passed by it which was under appeal. But in the facts of this case when the title set up by Kiran Bala was under challenge in appeal before this Court, the learned Subordinate Judge ought not to have directed the Pleader Commissioner to allot Kiran Bala 10 annas share consequent upon the death of the defendant No. 1. The said variation in the quantum of Kiran Bala's share was apparently not brought to the notice of this Court which had subsequently dismissed F. A. No. 66 of 1968 and had affirmed the trial court's preliminary decree declaring that Kiran Bala had 8 annas share in the suit property.

22. The learned Subordinate Judge in his order impugned in the Civil Rule has referred to the decision in the case of Phoolchand and Another Vs. Gopal Lal, . But the said reported decision is of no assistance for deciding the present case. Further, before deciding whether upon Sri Krishna's death the plaintiff's share was augmented by 2 annas, the court ought to first determine whether at the time of the filing of the suit at the time of his death. Srikrishna had 8 annas or any lesser share in the suit property and whether under Shrikrishna's deed of gift D/-23rd July. 1962. Banshidhar had acquired any title to the suit property.

23. Before passing the order D/- 3rd December, 1971 the learned Subordinate Judge did not direct service of any notice upon the defendant No. 2, Banshidhar. or upon his lawyer who was then representing him. The plaintiff Sm. Kiran Bala's

said notice was served upon the learned Pleader Commissioner and the learned lawyer for Mihidana Polley. The learned Subordinate judge did not record any evidence before allowing the said petition and directing the Commissioner to allot her 10 annas share. He did not also record any reason for doing so. We have also observed that the learned Subordinate Judge did not further direct that the preliminary decree be amended declaring the extent of the undivided interest of the deceased defendant No. 1 in the suit property and for making separate allotments in favour of his heirs. The learned Judge by his previous order had fixed 3rd December. 1971 for only taking steps and not for hearing. On 3rd December. 1971 without hearing the defendant No. 2 Banshidhar the learned Subordinate Judge had illegally directed the Pleader Commissioner to allot 10 annas share to Kiran Bala. Thus, by passing the said order D -3rd December. 1971 the learned Subordinate Judge had committed errors apparent on the face of the record.

24. Therefore, after making the Rule absolute, we propose to remand the case for fresh disposal of Kiranbala's aforesaid petition. Before determining whether by death of Srikrishna the plaintiff's share was augmented by two annas of the entire suit property, the court ought to first decide whether Sri Krishna's deed in favour of Banshidhar was valid and was acted upon or not and what was the extent of Srikrishna's share. For this purpose, the court would give opportunities to the parties to adduce evidence and then would decide according to law.

25. Mr. Tarun Kumar Chatterjee, learned advocate for the plaintiff-respondent, has submitted that the trial court's order D/- 3rd December. 1971 amounted to variation or amendment of the preliminary decree and therefore against the said order the defendant No. 2 had another remedy by way of appeal. According to Mr. Chatterjee the defendant No. 2's application u/s 151 of the Code for recall of the said order D/-3rd December. 1971 was not maintainable. We find no substance in the above submissions. Without amending or modifying the preliminary decree passed in Title Suit No. 66 of 1962 the learned Subordinate Judge ex parte directed the learned Pleader Commissioner to allot the plaintiff 10 annas share instead of 8 annas interest in the suit property. Neither at the time of passing of the preliminary decree nor at the time of passing of his order Dt. 3rd December. 1971. the learned Subordinate Judge has determined or declared the extent of the share of the deceased defendant No. 1. Srikrishna Polley in the suit property and therefore, the purported direction upon the learned Commissioner to allot the plaintiff 2 annas additional interest as one of the heirs of the deceased defendant No. 1 was without jurisdiction and illegal.

26. Thus, the trial court itself had committed a mistake apparent on the face of the record which caused serious prejudice and injury to the defendant No. 2. Banshidhar who was not even given any hearing, We have already pointed out that the court below had passed the said order D/-3rd December. 1971 on a date which was fixed only for "taking steps". The learned Subordinate Judge did not record any evidence and his order did not contain any reasoning about the extent

of the share of the plaintiff and the defendants in the estate left by the deceased. Srikrishna. In the above view, an appeal against the order D/- 3rd December, 1971 even if maintainable would be practically illusory when there is no material on record to determine whether Srikrishna's Deed of Gift in favour of his son. Banshidhar, was valid or invalid and at the time of his death what was the extent of Srikrishna's share in the suit property. In the facts of this case, if necessary, this court might have treated the revisional application as one under Article 227 of the Constitution of India for the purpose of correcting the patent error of jurisdiction committed by learned Subordinate Judge in directing the Pleader Commissioner to allot the plaintiff. Kiran Bala. 10 annas share without first determining the extent of deceased defendant No. 1's share in the suit property. It is well settled that in exceptional and extraordinary circumstances, notwithstanding existence of an alternative remedy, the court which had passed an ex parte order without giving opportunities of hearing a party, may in the exercise of its powers u/s 151 of the Code, recall the ex parte order and set down the matter for fresh hearing in accordance with law. P. N. Mookerjee and Laik. JJ.. in the case of Roufannessa Bibi v. Union of India 66 CWN 412, had rejected similar preliminary objection to the maintainability of the Rules under Art. 227 of the Constitution on the ground that appeals lay to this Court u/s 19(1) (f) of the Defence of India Act, 1939. Their Lordships had relied upon the well-known decision of Rankin. C. J. and Pcarson. J. in the case of Manmatha Nath Biswas v. Emperor 37 CWN 201 (A1R 1933 Cal 132) which laid down that the High Court's power of Superintendence u/s 107 of the Government of India Act (corresponding to Article 227 of the Constitution of India) may be exercised to keep the subordinate courts within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. The learned Judges in Manmatha Nath Biswas Vs. Emperor, , further laid down "The limit set to the right of appeal is not a limit to all remedy against usurpation of authority in the shape of conviction without jurisdiction or foundation in the findings. So even where the accused has allowed his right of appeal to become time barred, the High Court will interfere u/s 107 if the case is otherwise a fit one for such interference". In the said reported case, time barred petition of appeal was treated as an application u/s 107 of the Government of India Act and the conviction and sentence imposed upon the accused were set aside. We respectfully follow the decision in the case of Manmatha Nath Biswas v. Emperor (supra), and hold that the order D/-3rd September. 1971 was without jurisdiction and it ought to be set aside and the matter sent down to the court below for fresh determination in accordance with law.

27. For the foregoing reasons, we make the Rule absolute, set aside the order complained of in the revision case and also allow the application u/s 151 of the Civil P. C.

28. We direct the learned Subordinate Judge to again take up the plaintiff's application for allotting her two annas additional interest as an heir of her father, late Srikrishna Policy, defendant No. 1. The defendant-petitioner, Banshidhar, and

also other defendants would be at liberty to file objection to the said application within a period of one month from the date of service of notice of arrival of the records upon their respective learned Advocates in the court below. In case Banshidhar pleads his title under deed of gift, before deciding the plaintiff's application for allotment of two annas additional share, the court below will consider whether the said deed of gift was valid and was acted upon or not and shall thereafter pass necessary orders in accordance with law.

29. It would be, however, open to the plaintiff, Sm. Kiranbala Roy, not to press her aforesaid application for allotting her 2 annas additional interest as an heir of her late father, Srikrishna Policy and to pray that final decree be drawn up in respect of her 8 annas share declared by the preliminary decree. In that event, all questions relating to the extent of share of late Srikrishna Polley in the said properties, validity of the alleged deed of gift in favour of Banshidhar Policy and the quantum of shares inherited by the heirs of Srikrishna would be left open for adjudication in any future litigation between the appropriate parties and in the final decree, no separate allotment need be made in favour of each heir of late Srikrishna Polley. In case, Sm. Kiranbala Roy, the plaintiff, withdraws her aforesaid application for making allotment of 2 annas additional interest, then the court below will consider, as early as possible, the Partition Commissioner's report and draw up the final decree in accordance with law. We, however, express no opinion as to whether the suit property is capable of division by metes and bounds as the said question has not yet been decided by the trial court.

30. As the revision case has succeeded, the appeal and the application u/s 5 of the Limitation Act have become infructuous and the same are disposed of without costs. Let the records be sent down to the court below with a direction to dispose them of expeditiously.

31. In view of the delay on the part of the appellant-petitioner in making the application u/s 151 of the Code, we direct him to pay within two months from this day a sum of Rs. 510/- (five hundred and ten only) as costs to the plaintiff-respondent. In default the respondent will be entitled to execute this order and realise the said cost.

32. Decree need not be drawn up.

Mukul Gopal Mukherji, J.

I agree.