

(2016) 02 CAL CK 0013

In the Calcutta High Court

Case No : F.M.A.T. 168 of 2015 (CAN 1955 of 2015)

Kashi Nath Karmakar & Ors.

APPELLANT

Vs

Mira Rani Karmakar & Ors.

RESPONDENT

Date of Decision : 03-02-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : (2016) 160 AIC 588

Hon'ble Judges : Jyotirmay Bhattacharya;Shib Sadhan Sadhu, JJ.

Bench : Division Bench

Advocate : Mr. Piush Chaturbedi, Mr. B. Basu, Mr. Asit Baran Ghosh, Mr. Kamakshya Prasad Mukhopadhyay, Mr. Bhagbat Chowdhury, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Jyotirmay Bhattacharya, J. - The first miscellaneous appeal is directed against an order passed by the Learned Civil Judge, Senior Division, 1st Court at Howrah on 3rd January, 2014 in Title Suit No. 9 of 2014.

2. By the impugned order, two applications i.e. one application for injunction filed by the plaintiff was allowed by the Learned Trial Judge and the other application for receiver filed by the defendant nos. 2 and 3 was rejected by the Learned Trial Judge.

3. Though the appellants filed the instant appeal challenging the legality of both the aforesaid orders passed by the Learned Trial Judge but in course of hearing of this appeal, Mr. Banerjee, learned advocate appearing for the appellants submits that his clients will not press the appeal so far as it relates to the interim order of injunction passed by the Learned Trial Judge on 3rd January, 2015. Thus, he restricted his submission with regard to the legality of that part of the impugned order by which the prayer for appointment of receiver over the school made by the defendant nos. 2 and 3 was rejected.

Re: The application for appointment of receiver filed by the defendant Nos. 2 and 3 in the suit.

4. We are invited by the learned counsel appearing for the parties for deciding the appeal itself on merit by dispensing with the requirement of filing paper books in this appeal.

5. We are informed by the learned counsel appearing for the parties that all the papers which are relevant for the purpose of disposal of the appeal, are annexed to the stay application and as such, the appeal can be decided on the basis of the materials available before us.

6. On the prayer of the learned counsel appearing for the parties, we have decided to dispose of the appeal itself by dispensing with the requirement by filing paper books and by treating the appeal as on the day's list.

Let us now consider the merit of the instant appeal in the facts of the instant case.

7. The plaintiff/respondent has filed a suit for partition against his brothers and the other sisters. In the said partition suit, several landed properties of various descriptions were mentioned in the schedule of the plaint. Though no relief for partition of the school viz. Pathabhavan was claimed by the plaintiff in the said partition suit but the plaintiff mentioned in paragraph 4 of the plaint that sometime in the year 1998, the plaintiff and the defendants have established a private school viz. Pathabhavan and the said school has several classes from KG to Class IV wherein as good as 700 number of students are studying and the defendant nos. 1 to 3 in collusion and connivance with each other have been misappropriating the income of the said school by depriving the plaintiff herein. Apart from making those assertions about the said school in the plaint of the said suit, the plaintiff has not made any other statement in the plaint wherefrom we can co-relate that the said school is situated on any of the suit properties as mentioned in the schedule of the plaint.

8. On perusal of the schedule of the plaint, we do not find mention of any school viz, Pathabhavan the earning from the school therein. Even no decree for account relating to the earnings of the said school has also been prayed for in the said suit.

9. In such a suit, the defendant nos. 2 and 3 filed an application for appointment of receiver under Order 40, Rule 1 of the Code of Civil Procedure by asserting that the defendant no.2 himself has established a school by utilising his own fund wherein about 800 students are studying. It is also alleged by the said defendant that the defendant no.1 is fetching income from the student without giving any furthering to the defendant nos. 2 and 3. Allegations of misappropriation of the income by the defendant no.1 have also been made in the said application. For the purpose of better management and supervision of the said school and for proper utilisation and distribution of the earning from the said school amongst

the parties, the defendant nos. 2 and 3 filed the said application praying for appointment of receiver with a direction upon the receiver for taking charge of the school.

10. The defendants' said application for appointment of receiver was rejected by the Learned Trial Judge by holding, *inter alia*, that since an application for appointment of receiver having not been filed by the plaintiff such an application is not maintainable.

11. The learned Trial Judge held that prayer for appointment of receiver over the said school cannot be allowed as no allegation of any danger regarding preservation and/or management of the suit property has been made by the defendant nos. 2 and 3 in the said application.

12. We however, cannot agree with the findings of the Learned Trial Judge that an appointment of receiver at the instance of the defendant cannot be entertained.

Order 40, Rule 1 of the Code of Civil Procedure does not provide for any application as it is required in case of injunction under Order 39, Rule 1 and 2. Order 40, Rule 1 of the Code of Civil Procedure says that where it appears to the Court to be just and convenient, the Court may by order appoint a receiver of any property whether before or after the decree.

13. Thus, whenever it is brought to the notice of the Court by any of the parties that for just and convenience, appointment of receiver over the suit property is necessary, the Court may appoint a receiver in suitable cases.

14. Thus, we hold that the rejection of the appellants' prayer for appointment of receiver on the ground that such an application having not been filed by the plaintiff, cannot be entertained, cannot be accepted by us.

15. Let us now consider as to whether any receiver should have been appointed in the facts of the instant case at the instance of the defendants/appellants.

16. We have already indicated above that though in the plaint, the plaintiff has mentioned about the establishment of the school by the plaintiff and the defendants and misappropriation of the income of the said school by the defendants but the school itself has not been brought in the hotchpotch in the partition suit.

17. This conclusion we arrive at as we find that in none of the items of the schedules of the plaint, the school was mentioned.

18. In the application for appointment of receiver by the defendant Nos. 2 and 3 alleged that the school was established by the defendant no. 2 alone by utilising his own fund and the defendant no. 1 is misappropriating the earning of the school.

19. From this averment of the defendant/appellant, we come to the *prima-facie*

finding that even those defendants did not admit that the school was founded by utilising the joint family corpus.

20. The defendant no. 1 who is the respondent no. 4 in this appeal has also filed an affidavit in connection with the application for receiver filed by the appellants in connection with this appeal. In the said affidavit, the defendant no. 1/respondent no. 4 stated that the school was founded by the appellants and the defendant no. 1. Thus, the said defendant also does not claim that the school was founded by utilising the joint family fund and/or the joint family corpus.

21. In these set of facts, we are unable to come to a conclusion that the school is the subject matter of the said partition suit and thus, we hold that receiver cannot be appointed over any property which is not the subject matter of the partition suit.

22. We, thus, conclude by holding that though we do not subscribe the same view as expressed by the learned Trial Judge that the application for receiver cannot be maintained at the instance of the defendant, but we ultimately agree with the ultimate conclusion of the learned Trial Judge regarding dismissal of the defendant's said application.

23. We, however, make it clear that since we have dismissed the appeal by holding that the school is not the subject matter of the partition suit, we make it clear that we have not gone into the merits of the contention of the respective parties regarding requirement of appointment of receiver over the suit property.

25. The appeal is, thus, dismissed.

26. In view of the dismissal of the appeal, no order need be passed on the application. The application being CAN 1955 of 2015 is also deemed to be dismissed. Urgent Photostat certified copy of this order, if applied for, be supplied to the Learned advocate for the appellant immediately.