
(2010) 07 CAL CK 0094

In the Calcutta High Court

Case No : C.O. No. 185 of 2009 and C.A.N. 2987 of 2010

Motilal Rakshit

APPELLANT

Vs

Tarasundari Rakshit (Since Deceased) and Another

RESPONDENT

Date of Decision : 09-07-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Constitution of India, 1950 — Article 227

Citation : (2010) 07 CAL CK 0094

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : Sardar Amzad Ali, Sardar Shahin Imam and Ipsita Chowdhury, for the Appellant; Soumen Sen and Siddhartha Sankar Ray, for the Respondent

Judgement

Jyotirmay Bhattacharya, J.—In this application the plaintiff/petitioner has prayed for recording the death of the opposite party No. 1 with the noting that the legal representative of the said opposite party No. 1 is already on record as opposite party No. 2.

2. The opposite party No. 1 died intestate on 28th February, 2010. A death certificate has also been enclosed to this application. Since the legal representative of the said opposite party is already on record as opposite party No. 2 therein, no formal application for substitution is required to be filed. Accordingly, the application filed by the petitioner for recording the death of the opposite party No. 1, stands allowed. Let the death of the opposite party No. 1 be recorded with a note that the only legal representative of the said opposite is already on record as opposite party No. 2 in the instant revisional application.

Re: - C.O. No. 185 of 2009.

3. This application under Article 227 of the Constitution of India is directed against an order dated 26th September, 2008 passed by the learned Additional District Judge, Fast Track Court-2, Howrah, in Miscellaneous Appeal No. 108 of

2006, by which the order of appointment of receiver over the "C" Schedule properties at Jajpur, Orissa, passed by the learned Trial Judge, was affirmed in appeal. The plaintiff is aggrieved by the said order. Hence the plaintiff has come before this Court with this application under Article 227 of the India.

4. Heard the learned Advocates of the parties. Considered the materials on record including the order impugned.

5. Let me now consider as to how far the learned Appeal Court was justified in passing the impugned order in the facts of the instant case.

6. The plaintiff filed a suit for partition against the defendant in respect of various joint properties as mentioned in schedules "A" and "B" of the plaint. The properties at Jajpur, which is mentioned in schedule "C" of the plaint did not find any place in the plaint, at the time when the defendants filed an application for appointment of receiver upon the said properties at Jajpur before the learned Trial Judge.

7. However, the learned Trial Judge was pleased to allow the defendant's said application and appointed the plaintiff and the defendant No. 2 as joined receivers over the said properties at Jajpur with a direction upon the receivers to collect the rent from the tenants therein jointly and to submit a report of the income of the said property month by month in this suit.

8. The plaintiff was aggrieved by the said order. Hence the plaintiff preferred an appeal before the learned Appeal Court. The learned Appeal Court was pleased to set aside the said order and remitted the defendant's said application to the learned Trial Judge for reconsideration. The learned Appeal Court held that since the property at Jajpur over which joint receivers were appointed, was not the subject matter of the said partition suit, receiver ought not to have been appointed in respect of the said property.

9. Though the plaintiff claimed that the said Jajpur property was his exclusive property as the said property was given to the plaintiff in an amicable partition made between the predecessor-in-interest of the defendant and the plaintiff, but the learned Appeal Court was of the view that the said property should be brought within the hotchpotch of this partition suit and accordingly the learned Appeal Court, while disposing of the said appeal, directed the parties to take steps for inclusion of the said Jajpur property in the hotchpotch of the said partition suit.

10. Both the plaintiffs and the defendants filed their applications under Order 6 Rule 17 of the CPC for amending their respective pleadings in the light of the direction passed by the learned Appeal Court. Accordingly, the plaint was amended and a new schedule being Schedule "C" was incorporated therein by including the Jajpur property in the plaint.

11. Even though the said Jajpur property was included in Schedule "C" of the plaint but still then the plaintiff maintained his original stand that the said Jajpur

property was his exclusive property as the same was allotted to him exclusively in an amicable partition held between the plaintiff and the predecessor-in-interest of the defendant. The plaintiff thus, made it abundantly clear in the amended plaint that he is not claiming any partition of the said Jajpur property mentioned in the Schedule "C" of the plaint.

12. After such remand, the learned Trial Judge again considered the defendant's said application for appointment of receiver afresh but while considering the said application, the learned Trial Judge instead of considering the merit of the said application, practically disposed of the same mechanically on assumption that as if the said Jajpur property has now been included in the hotchpotch of the partition suit, without appreciating properly the context in which such inclusion was made by the plaintiff and also without taking note of the fact that the reliefs claimed in the suit even after such amendment remains unaltered as Jajpur property was still kept beyond the hotchpotch of the partition suit.

13. The learned Trial Judge held that since the other part of the findings which were arrived at by the learned Trial Judge while disposing of the defendant's application for appointment of receiver before the remand, were not disturbed by the learned Appeal Court while remanding the said application back to the Trial Court for reconsideration, the learned Trial Court is not required to consider the merit of the said application afresh. As such, after such remand the learned Trial Judge did not make any effort to consider as to whether the ingredients, which are required to be fulfilled for appointment of a receiver over the said Jajpur property, are satisfied in the instant case or not.

14. The plaintiff was aggrieved by the said order. Accordingly the plaintiff again filed an appeal challenging the said order of the learned Trial Judge before the Appeal Court. The said appeal was rejected by the learned Appeal Court by affirming the order of the learned Trial Judge.

15. On perusal of the order of the learned Appeal Court, this Court finds that the learned Appeal Court also proceeded on the basis that as if the other ingredients which are required to be fulfilled for appointment of receiver over the suit properties, are not required to be considered afresh as the findings which were arrived at by the learned Trial Judge in this regard initially before remand, remained undisturbed in earlier appeal. In fact, the learned Appeal Court maintained the said order of the learned Trial Judge on total misconception of fact by taking it as granted that the "C" Schedule property is admittedly the joint property of the parties.

16. On perusal of the pleadings of the plaintiff regarding the said "C" Scheduled property, this Court finds that the plaintiff never admitted that the said "C" Schedule property is the joint property of the parties and the said "C" Schedule property is still available for partition amongst the co-sharers. On the contrary, this Court finds that the plaintiff all throughout maintained his stand that the plaintiff was the exclusive owner of the "C" Schedule property as the said "C"

Schedule property was exclusively allotted to him in an amicable partition held between the plaintiff and the predecessor-in-interest of the defendant. Thus, this Court holds that the plaintiff never admitted that the said "C" Schedule property is a joint property and the same is still available for partition amongst the co-sharers.

17. Nothing has been produced before the Courts below or even before this Court to show that the said "C" Schedule property is still the joint property of the parties and the same is still available for partition.

18. Mr. Sen, learned Counsel, appearing for the opposite parties, drew my and the predecessor-in-interest of the defendant jointly against their tenant wherein they described themselves as the owners of the suit property and they also jointly prayed for eviction of their tenant therefrom. Mr. Sen thus, submits that the plaint of the said suit which was filed in the Court of the Subordinate Judge at Jajpur, indicates that the Jajpur property is the joint property of the parties and the same is still available for partition. He thus, supported the impugned order, as according to him, appointment of receiver over the said property was necessary for its proper preservation as the said property is now in medio.

19. I have carefully gone through the plaint of the eviction suit filed in the Court of Subordinate Judge at Jajpur. On perusal of the schedule of the said plaint, this Court finds that the schedule of the suit premises as described in the plaint of the said suit does not tally with the suit property which is mentioned in Schedule "C" of the plaint of the partition suit. In the eviction suit, filed in Orissa Court, the suit property was described as a portion of the plot No. 5742 under Touzi No. 537 Khatian No. 2 Khasra No. 32 in the town of Jajpur, District Cuttak, but the "C" Schedule property in respect of which receivers were appointed by the courts below comprises of three plots namely Plot Nos. 476, 477 and 481 within the mouza Kadampur of District Jajpur, Orissa. Thus, even by looking at the plaint of the eviction suit which is pending before the Subordinate Judge at Jajpur and the schedule "C" of the plaint of the present suit, this Court cannot hold that the "C" Schedule property is admittedly the joint property of the parties. Since the defendant have failed to prove their prima facie title in respect of the "C" Schedule property, this Court holds that the receiver cannot be appointed over the said property, even if the said property is found to be in medio.

20. Accordingly, the impugned order stands set aside.

21. However, this Court feels that justice will be sub-served in the facts of the instant case and the interest of the parties will also be protected, if the transfer and/or alienation and/or creation of any third party interest in the said property is restricted.

22. Accordingly, the plaintiff is restrained from transferring the "C" schedule property and/or creating any third party interest therein and/or changing the nature and character thereof during the pendency of the said suit. It is also made clear that in the even any existing tenant surrenders his tenancy and/or is

evicted from his tenancy from any portion of "C" schedule property, such portion will not be re-let by the plaintiff without the leave of the Court. The plaintiff is also required to maintain the accounts for the collection and expenditure in respect of "C" Schedule property and will submit such account periodically every six months before the learned Trial Judge.

23. The revisional application is, thus, disposed of with the above directions.

24. Urgent xerox certified copy of this order, if applied for, be given to the parties as expeditiously as possible.