

(2022) 12 CAL CK 0001
In the Calcutta High Court
Case No : C.O. No. 114 Of 2021

Parna Roy Shah & Anr.

APPELLANT

Vs

Mahendralal Shah & Ors.

RESPONDENT

Date of Decision : 01-12-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151

Citation : (2022) 12 CAL CK 0001

Hon'ble Judges : Ajoy Kumar Mukherjee, J

Bench : Single Bench

Advocate : Siddhartha Banerjee, Aditi Kumar, Kausik Dey, Subhasis Sengupta, K.P. Tiwari

Final Decision : Disposed Of

Judgement

Ajoy Kumar Mukherjee, J

1. Being aggrieved and dissatisfied with the order dated 13th March 2020 passed by the learned 2nd Civil Judge (Senior Division) at Alipore, South 24 Parganas in connection with the disposal of the application under section 151 of the Code of Civil Procedure filed by the plaintiffs, present revisional application has been preferred. By the impugned order plaintiffs'/petitioners' prayer for interim maintenance has been rejected by the court below. Petitioners contended that the petitioners/plaintiffs have instituted a suit for partition and accounts against opposite parties /defendants before the 2nd Civil Judge (Senior Division) Alipore being Title Suit No. 14 of 2017 praying inter alia for passing preliminary as well as final decree of partition declaring their 1/10th share in respect of the suit property and also for the accounts of the suit property. Facts of the case as set out by the petitioners is that Mr. L.P. Shah since deceased and one M.P. Shah were the joint owners as well as partners of the suit properties. The opposite party/ defendant No. 2 is the son of Mr. L.P. Shah and his first wife. Mr. L.P. Shah and his second wife namely Leela Shah got married subsequently and from the said wedlock two sons were born namely Sanjoy Shah, since deceased and Rajib

Saha, opposite party/defendant No. 4 herein. Said Sanjoy Saha died on 10.11.2016 and thereafter his son from the first wife Neha, namely Amit Shah, opposite party /defendant No. 3 became successor and partner of the business along with petitioners/plaintiffs. Subsequently according to their family settlement all the defendants have become the partners and/or joint owners of the suit properties. Petitioner no.1/plaintiff no. 1 was an employee of the said partnership firm namely Shah Automobiles and during her service period an emotional relationship grew up with aforesaid the then director of Shah Automobiles Sanjoy Shah with the plaintiff No. 1 and subsequently said Sanjoy Shah married plaintiff No. 1/petitioner No. 1 herein on 14.02.2000 and started to reside at her paternal residence where marriage was consummated and plaintiff No. 1 got conceived within the said wedlock. Petitioners further case is all on a sudden on 10.07.2000, opposite party No. 4/defendant No. 4 acknowledge herself as first wife of Sanjoy Shah and came to know that Sanjoy had already married to Neha Shah and Amit Shah is their child. Petitioner No. 1 on 05.12.2000 had given birth to a male child, who is petitioner No. 2 herein namely Sahil Shah. Petitioner/plaintiff No. 1 got anxious about the future of their child Sahil, but she got assurance from her husband Sanjay Shah and Sanjay used to pay Rs. 80,000/- per month to the petitioner for incurring family expenses and educational expenses of said son Sahil /petitioner No. 2 herein. Said Sanjoy Shah died on 10.11.2016 the petitioners/plaintiffs state that they are facing extreme financial hardship after death of Sanjoy shah. Now said petitioner No. 2 Sahil Shah is a student and has taken loan of Rs. 8,20,245/- to meet educational and other family expenditure, which are to be paid within stipulated period as motioned in loan agreement. The petitioners further state that for educational purpose of petitioner No. 2 she has to incur huge expenditure , which the petitioner entitled to get from suit property. In spite of repeated request the opposite parties/defendants refused to pay the amount of maintenance of the petitioners/plaintiff. As such, petitioners as plaintiff compelled to file aforesaid suit for partition against opposite parties herein. The opposite party No. 5 had filed an application for maintainability challenging the veracity of the plaint and plaintiff/petitioner had filed written objection thereto. After hearing learned court below rejected defendants said petition.

2. In the said suit petitioner /plaintiffs filed an application for maintenance under section 151 of the code before learned court below on 06.11.2017. Subsequently on 27.11.2019 the petitioner /plaintiff also compeled to file another application for maintenance of Rs.1,50,000/- per month under section 151 of the code due to changed circumstances. Opposite parties/defendants had filed written objection against the said application for maintenance. After hearing both the parties at length learned court below by its impugned order dated 13.03.2020 was pleased to reject aforesaid application for maintenance under section 151 of the code.

3. Mr. Banerjee learned counsel appearing on behalf of the petitioners submits that the trial court acted illegally with material irregularity and arbitrarily passed

the impugned order dated 13.03.2020 without applying its mind and failed to understand that sometimes change in law precedes societal change and is even intended to stimulate it. Learned trial court failed to appreciate the crux of the precedent in 2008 (INSC 1590) where the Apex Court granted interim maintenance to second wife and all major children who were plaintiffs in that suit for partition. He also relied upon the judgment of the Apex Court reported in 2014 (1) SCC 188. He further submits that the trial court has passed impugned order dated 13.03.2020 without going through the judgment reported in AIR 1992 AP 234 where it has been specifically held after demise of father illegitimate son is entitled to equal share of joint family property as legitimate son and kept concubine is also entitled for maintenance and share. Learned court below when passing the impugned order dated 13.03.2020 failed to make comparison of the facts of 1998 (5) AD (Del) 383 with the instant matter that the petitioner/plaintiff no. 2 was minor at the time of filing for maintenance before the trial court and there is no provision for maintenance and residence of minor son and accordingly settlement and/or partition in between the opposite parties/defendants is prima facie unjust and liable to be reopened. The learned Trial Court acted beyond the jurisdiction and arbitrarily passed the impugned order without going through AIR 1992 Del 335 that interim maintenance can be granted in a pending partition suit from the accrued interest of the joint family property. Court below have also failed to appreciate the spirit of the judgment in 2011 SCC (1) 01 while passing impugned order that children born from void or voidable marriages shall be legitimate and they cannot be discriminated and they will be at par with other legitimate children and will be entitled to all the rights in the property of their parents, be it an ancestral or joint family property or self acquired absolute property. Accordingly he prayed for setting aside the impugned order and for passing maintenance order of Rs. 1,50,000/- monthly in favour of petitioners from their share in connection with the properties left by their predecessor Sanjoy Sah.

4. Learned Counsel appearing for the opposite party submits that the self same issue is pending for adjudication before the Hon'ble Supreme Court and as such the issue involved in the present case may be kept in abeyance till the Apex Court decides the issue conclusively.

5. Learned counsel appearing on behalf of the petitioner submits at this stage he is not pressing much in respect of the prayer for interim maintenance for petitioner no. 1 Parna Roy Sah but pressing heavily for petitioner no. 2 considering his future career.

6. Considered the submission made by both the parties. It appears from the birth certificate of petitioner no. 2 that father's name of the petitioner has been recorded as Sanjoy saha in the Kolkata Municipal Corporation register. According to the birth certificate said petitioner no. 2 Sahil Sah was born on 5.12.2000. Accordingly said son has already attained majority in the year of the 2018. However, in the suit the plaintiff no. 2/ petitioner no. 2 contended that he had to

take loan for substantial amount of money to incur his educational expenses. On perusal of the interim order it appears that learned court below was pleased to reject the petitioners prayer for interim maintenance observing that although it is settled principle of law that the maintenance can be allowed to the illegitimate child in a partition suit but since the matter is sub-judice and awaiting for the final decision of the larger bench of the Apex Court, so he refused to allow the interim maintenance to the opposite party no.2. On perusal of the order passed by the Apex Court in aforesaid civil appeal No. 3576 of 2010 it appears that the question which referred before the larger bench is whether illegitimate children are entitled to a share in the coparcenary property. Accordingly, I am of the view that solely on the basis of the aforesaid order passed by the Apex Court in Civil appeal No. 3576 of 2010, the court below ought not to have rejected the prayer for interim maintenance made by petitioner No.2.

7. Considering the facts and circumstances of the case and that the birth certificate prima facie discloses about paternity of petitioner no.2 the revisional application being no. 114/2021 is hereby disposed of with a direction upon the defendants to deposit before the court below a lump sum amount of Rs. 8,00,000/- towards interim maintenance for petitioner no. 2, Sahil Saha from the income of the schedule mentioned suit property. The defendants shall deposit half of the said amount by the 31st January 2023 and remaining half by 31st March, 2023. The plaintiff /petitioner no. 2 will be at liberty to withdraw the same after filing an undertaking before the concerned court that he will return the said amount along with ten percent interest to the defendants, in the event he will not succeed in the suit, in establishing his claim in the suit property.

8. C.O. 114 of 2021 is accordingly disposed of.

However there will be no order as to costs.

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