
(1993) 09 CAL CK 0029
In the Calcutta High Court
Case No : C.O. No. 2764 of 1991

Sahadeb Kundu and Another	Vs	APPELLANT
Jogesh Shekhar Mukhopadhyay and Others		RESPONDENT

Date of Decision : 02-09-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), 105, 151

Citation : (1994) 1 CALLT 274 : 98 CWN 158 : (1994) 1 ILR (Cal) 565

Hon'ble Judges : Samir Kumar Mookherjee, J;Nripendra Kumar Bhattacharyya, J

Bench : Division Bench

Advocate : Anath Nath Mondal, for the Appellant; B. Mitra and Rani Srimal, for the Respondent

Judgement

Samir Kumar Mookherjee, J.—This revisional application is directed against the impugned order, No. 334 dated 15.5.91, passed by the learned 3rd Assistant District Judge, Howrah, in Title suit No. 55/1992, rejecting the application of the petitioners herein, under Order 1 Rule 10(2) read with Section 151 of the Code of Civil Procedure, praying for adding them as parties in the said Title Suit and for directing the Advocate Survey Commissioner to demarcate the portions of the properties of the applicants.

2. In a brief profile, the fact of the case, as delineated in the present revisional application, is that in a partition suit by Sri Jogesh Shekhar Mukhopadhyay and Sri Sasanka Sekhar Mukhopadhyay, opposite parties No. 1 and 2 herein, against their elder brother, Ashesh Shekhar Mukhopadhyay, in respect of "Ka" and "Kha" schedule immovable properties and "ga" schedule movable properties to the plaintiff, in the Court of 3rd Assistant District Judge, Howrah, which was registered as Title Suit No. 55 of 1992 in that Court, a preliminary decree was passed, on compromise, on 30th January, 1968, declaring that the plaintiff No. 2, Sasanka Shekhar Mukhopadhyay had share in "ka" and "ga" schedule properties, and plaintiff No. 1, Sri Jogesh Sekhar Mukhopadhyay, and the defendant Sri Ashesh Sekhar Mukhopadhyay each had i share in "ka" schedule properties and 1/3 in

"kha" and "ga" schedule properties.

3. During the pendency of the suit, Ashesh Sekhar Mukhopadhyay died sometime in 1980, leaving behind him his widow Smt. Prativa Mukhopadhyay as his sole surviving heir and legal representatives.

4. The said Sri Sasanka Sekhar Mukhopadhyay, during the pendency of the suit, sold his 1/3 share in "ka" schedule, Calcutta property to one Sri Jiban Krishna Bose, sometime in 1973, by a registered deed of conveyance, and upon an application for pre-emption of the said "ka" schedule, Calcutta property, a decree was passed on 11.2.83, allotting the said property to plaintiff No. 1, Jogesh Shekhar Mukhopadhyay, and defendant No. 1, Smt. Prativa Mukhopadhyay.

5. Schedule "ka" property comprised holding Nos. 1, 3 & 7 Onkarmall Jethia Road, P.S. Shibpur, District Howrah, and 8 annas share of the same was declared in favour of the plaintiff No. 2, Sasanka Sekhar Mukhopadhyay.

6. Long after the passing of the preliminary decree in the partition suit, Sri Sasanka Sekhar Mukhopadhyay sold a portion of holding No. 1, Onkarmall Jethia Road, P.S. Shibpur, District Howrah, to petitioner No. 2 herein, Smt. Rina Porel, by a registered deed of conveyance, dated 25.7.84. He also sold his 8 annas share in holding No. 7, Onkarmall Jethia Road and rest 8 annas share in holding No. 1, Onkarmall Jethia Road to petitioner No. 1, Sri Sahadeb Kundu, by a registered deed of conveyance dated 25.7.84 and delivered possession of the said properties to the said two petitioners.

7. Sri Jogesh Shekhar Mukhopadhyay, plaintiff No. 1, made an application in the said partition suit on 12.2.90, praying for passing the final decree and for appointing a fresh Survey Commissioner.

8. The petitioners, on coming to know of that fact sometime in the 1st week of August, 1990, caused an inspection of the record and found that, on that application of plaintiff No. 1, an Advocate Survey¹ Commissioner was appointed on 21.3.90 for partition of the "ka" schedule property, by metes and bounds.

9. Thereafter, the present petitioner in that suit filed, on 14.8.90, one application each under Order 1 Rule 10(2) of the Code of Civil Procedure, praying for adding them as parties in that suit.

10. In the meantime, the partition Commissioner submitted his report in Court on 23rd March, 1991.

11. The said applications ultimately came up for hearing on 15.8.91 along with the application filed by the plaintiff No. 1, Sri Jogesh Sekhar Mukhopadhyay, and after hearing the parties concerned the learned Court below, by the impugned order, was pleased to reject the said applications of the petitioners observing that "Though the parties purchased a portion of the suit property from Sasanka Sekhar Mukhopadhyay in the year, 1984 but filed the petition in the year 1990. However, they will get their respective share from Sasanka Sekhar

Mukhopadhyay till the same is allotted to the share of Sasanka Sekhar Mukherjee, I do not consider to make the parties at this late stage". The learned Assistant District Judge by the self same order passed the final decree, after allowing the application, of plaintiff No. 1.

12. Appearing for the petitioners the learned Advocate Mr. Anath Nath Mondal contended that unless the petitioners are added as parties in the suit they will be without any remedy and they would not be allowed to challenge the final decree.

13. He further contended that for ends of justice, the petitioner should be added as parties in the suit.

14. Mr. Bijit Mitra, the learned Advocate for the opposite party No. 1 contended, on the other hand, that the order passed by the learned Assistant District Judge is not revisable but an appealable one u/s 105 of the CPC as the order is of a composite nature, passing the final decree after rejecting the prayer of the petitioners for adding them as parties in the suit and accordingly, the order per takes the character of a final order or decree as contemplated under sub-section (2) of Section 2 of the Code of Civil Procedure.

15. In the next place he contended that assuming, but not admitting, that the order is a revisable order even then the order should not be interfered with as there is no jurisdictional error.

16. In the background of the aforesaid facts, we have carefully considered the submissions made by the learned Advocates for the contesting parties. In view of the ratio propounded by the Supreme Court governing the prayers for addition, of parties in the case, of Razia Begum Vs. Sahebzadi Anwar Begum and Others, the adjudication of the propriety of the impugned order has not presented any difficulty to us. In the said case the Supreme Court has classified the parties proposed to be added as necessary parties and proper parties. In the absence of a necessary party, the suit itself is defeated, a proper party, however, is one whose addition is made for the purpose of making the adjudication complete and final. The applicants, in the instant case, even assuming for the sake of argument, are not necessary parties, do certainly fall in the category of proper parties and as such they ought to be added as defendants before passing of the final decree. The relevant observation of the Supreme Court which is a part of "Clause 3" in paragraph 13 of the said judgment may be quoted as follows :-

"Where the Court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy".

Applying the aforesaid test, the present petitioners must be deemed to be, if not having a direct interest relating to the property, at least, an interest which justifies their addition as proper parties."

17. Accordingly, we hold that the impugned Order refusing such addition is an instance of illegal and irregular exercise of jurisdiction resulting in serious prejudice to the applicants and we, therefore set aside the same. We allow the

Revisional Application by directing addition of the petitioners as parties/defendants to the suit before passing of the final decree, which also stands set aside. The suit is, therefore, remanded back to the Trial Court for being proceeded with according to law for the purpose of culminating with a final decree.

18. The above conclusion of ours will not be complete without reference to 3 cases, which apparently may have some bearing on the same. The said cases have been reported in Deputy Commr., Hardoi, in charge Court of Wards, Bharawan Estate Vs. Rama Krishna Narain and Others, Narayan Chandra Garai and Others Vs. Matri Bhandar Pvt. Ltd. and Another, and Pranakrushna and Others Vs. Umakanta Panda and Others, We have considered the ratios propounded therein. In our view all the 3 cases are distinguishable on facts. In the Supreme Court case the Act in question contemplated affording opportunities to the persons, who might have been affected, and adjudication of their claims before the litigation could be proceeded with; in the Calcutta decision the persons proposed to be added were prospective purchasers and the transaction itself was yet to be completed and as such they did not have any effective right on the relevant date; the Orissa. case followed the Calcutta decision but the question to be adjudicated there was of such a nature that the transferees *lis pendens* could not be said to have been affected by such adjudication. In the instant case, there was possibility of prejudice to the transferees after preliminary decree by steps for effecting partition by metes and bounds and actual allotment.

19. Before parting with the matter, we would like to keep on record that since the petitioners were not permitted to be added as parties the question of an appeal from the final decree at their instance does not arise and as such in our view the other contention of Mr. Mitra about non-maintainability of the Revisional Application does not have any substance.

There will be no Order as to cost.

Let xerox copies of this order be delivered to the learned advocates for the parties on their usual undertakings to apply for and obtain urgent certified copies.