
(2011) 11 CAL CK 0012

In the Calcutta High Court

Case No : G.A. No. 2691 of 2007, G.A. No. 1410 of 2011, G.A. No. 1412 of 2011, G.A. No. 993 of 2011 and C.S. No. 426 of 2001

Sm. Durga Bala Dhur and Others

APPELLANT

Vs

Kalpaha Dhur and Others

RESPONDENT

Date of Decision : 23-11-2011

Acts Referred:

Citation : (2012) 1 CALLT 610 : (2012) 5 CHN 350

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : R.L. Mitra, for the Appellant; Rupak Ghose, Tapas Saha, Subhomoy Dewangi and Mr. Dibrav Deb for the Defendants, for the Respondent

Judgement

I.P. Mukerji, J.—Four applications were heard by me together. The first three were made by the defendant group. This group comprises the heirs of the original defendant Sankar Dhur. These defendants are very unfortunately placed. Defendant No. 1(a) is Sm. Kalpana Dhur. Defendant No. 1(b) and 1(c) are Tamosha Dhur and Rishav Dhur. Kalpana is the widow of Sankar. Tamosha is their daughter and Rishav. son. Sankar died in 2006 of cancer, at the age of about 48 years, going by the medical records annexed to this application. His family is occupying a portion of premises No. 63. Serpentine Lane, Kolkata- 14. They do not want to be displaced from this place. The first application is G.A. 2691 of 2007. It seeks setting aside of the partition decree dated 21st December. 2004.

2. The second is G.A. No. 1410 of 2011. It prays for vacation of the order dated 6th July. 2010 of Sanjib Banerjee J. in G.A. No. 1669 of 2007. I was not taken through the details of the application G.A. 1669 of 2007. The order dated 6th July, 2010 records that it was an application for appointment of a Special Officer for sale of two properties and that although the Court was passing no order, nevertheless liberty was reserved to the applicant plaintiffs to apply for sale of those properties or either of them if they could bring a purchaser.

3. The third application GA No. 1412 of 2001 is for setting aside of the same

order that is 6th July, 2010 in G.A. No. 490 of 2009.1 was not taken also to the contents of the application G.A. 490 of 2009 but the order of 6th July, 2010 records that it was a similar application as G.A. No. 1669 of 2007 for sale, but it was for sale of one of the properties and that it was not passing any order.

4. The fourth application G.A. 993 of 2011 was made by the plaintiffs for sale of the property described as premises No. 63A, Serpentine Lane, Kolkata-14 in favour of Mr. Basudeb Dutta for a consideration -Rs. 80,00,000/-.

5. Many many years earlier, an almost similar partition suit was filed, being Partition Suit No. 451 of 1982 with the only difference that Sankar Dhur was one of the plaintiffs. On 7th October, 1999, the suit seems to have been decreed according to the Terms of Settlement signed by the parties and their advocates filed in Court. The effect of this decree was that the parties did not want to proceed further with partition. But one recording in the Terms of Settlement is of great significance in disposal of this application. It is term No. 6 which is quoted below:

It is recorded that in spite of best efforts by the Joint Receivers for taking possession of the Tea Garden belonging to the parties situate at Goreswar in the State of Assam due to disturbed condition prevailing there."

6. Now, this partition suit was filed sometime in the year 2001. A preliminary partition decree was passed by this court on 21st December, 2004, ex parte.

7. The case of the petitioner defendants in G.A. No. 2691 of 2007 is that during that time till his death in 2006, the original defendant Sankar Dhur used to be critically ill and it was not possible for him or his family to follow up proceedings in Court. It was much after his death in 2006 that his family was able to take steps to challenge the preliminary decree as they do now.

8. There are four main points in the challenge (a) one property numbered as premises No. 91, Phears Lane, Kolkata - 73 was not included in the properties for partition, (b) a tea garden in Assam, Ramgaon tea estate situated at Ramgaon, Assam was also not included, (c) room No. 75 on the 5th Floor at 9, Old China Bazar Street, Kolkata was also left out and (d) so was premises No. 82, Bowbazar Street, Calcutta.

9. There is no substance in the first point because paragraph 18 of the affidavit-in-opposition clearly mentions that this property was sold out long ago. There is also no substance in the allegation of non inclusion of room No. 75 on the 5th Floor at 9, Old China Bazar Street, Kolkata. I am satisfied on perusal of paragraph 18(c) of the affidavit that this property is a tenanted property where a partnership business is run by plaintiff No. 2, 3 and 12. This does not belong to the joint family. I am also satisfied with the explanation of the learned Counsel for the plaintiff that premises No. 82, Bowbazar Street, Calcutta was held jointly by a predecessor-in-interest of the parties with other persons not belonging to the family and hence this could not be the subject matter of a partition suit.

10. But the above terms of settlement clearly records that the tea garden admittedly belongs to the family and that some effort was made by the parties through the Joint Receivers for taking possession of it. Therefore, this property ought to have been included, in spite of Mr. Ranjanlal Mitra's contention that this property has no value.

11. Now in this suit, the Commissioner of Partition has filed a report on 17th January, 2007. The plaintiffs tried to challenge this report by filing the said application G.A. No. 1669 of 2007 and for sale of the properties. I notice from the order dated 6th July, 2010 that this application was disposed of without any order. Therefore, in my opinion, at least at that stage the challenge to the report of the Commissioner of partition failed. I do not for a moment doubt that at the stage of effecting actual partition there might be difficulty in effecting partition according to the report or that even if the partition is sought to be effected, according to the report, it might work injustice to the parties. Therefore, at that stage the question whether partition is to be proceeded with further or the property sold is to be considered. But at this stage the Commissioner of partition is to proceed with partition on the basis of his report.

12. Moreover, as I have noted above, the defendants want partition and want to stay in the premises in question. During arguments, it was submitted that the share of the defendant group would not be more than Rs. 10 lakhs or so, if the property was sold. This group comprises of a widow, her son and daughter, as noted by me, above. It is difficult in my opinion to find accommodation in this city with that amount. Hence, I consider that an order of sale would be unjust for them. Therefore, at the moment there cannot be any sale of the Serpentine Lane property.

13. Therefore, I dismiss G.A. No. 993 of 2011, with liberty to take out an application for sale when the situation warrants. The other three applications are disposed of by directing the preliminary decree dated 21st December, 2004 to be amended by including therein as a schedule, the tea garden, Ramgaon Tea Estate, Ramgaon, Kamrup Assam. Since the earlier Joint Receivers have reported that the property cannot be realised, the defendants are given liberty to engage a suitable person with proper authorisation by them to take steps for realising the property. If the property is retrieved, they will inform the Commissioner of Partition who will take steps for its partition and division in accordance with the preliminary decree. Till such steps are taken by the defendants the Commissioner of partition will proceed in terms of the original schedule of properties in the preliminary decree so that a final decree for partition can be passed as expeditiously as possible. A final report is to be filed by the Commissioner of partition within a year from now positively.

14. This application may be mentioned on behalf of the Commissioner of Partition for his remuneration, from time to time.

15. All the above applications are, accordingly, disposed of. Urgent certified

photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.