

08.03.2021
Sl. No. 78
srm

C.O. No. 1652 of 2020

Rejjak Ali
Vs.
Kurban Ali & Ors.

Mrs. Susmita Saha Dutta,
Mr. Niladri Saha

...for the Petitioner.

Mr. Ramkrishna Bhattacharya,
Mr. K. Choudhury

...for the Opposite Party No.1.

Supplementary affidavit and affidavit of service are taken on record.

This revisional application arises out of a part of the order dated January 24, 2018 passed by the learned Civil Judge (Junior Division), Raiganj, Uttar Dinajpur in Partition Suit No.147 of 2007.

The petitioner is aggrieved because the learned Court below refused to entertain an application filed by the petitioner/defendant No.1 in the suit, praying that the final decree should not be drawn up in view of the death of some of the defendants even prior to the passing of the ex-parte preliminary decree.

It is submitted that the defendant Nos.5, 6, 8 and 10 died but their heirs were not impleaded. It is also submitted that

some of these defendants died prior to the passing of the preliminary decree. Hence, it was prayed before the learned court that before appointing the Advocate Commissioner to make the partition by metes and bounds and before the final decree is drawn up, the plaintiff be directed to add the heirs of the deceased defendants in the proceedings so that a further preliminary be passed upon hearing the contentions of the heirs of the deceased.

This is a partition suit, in which every party is a plaintiff and a defendant. They have interchangeable roles and as such without following the rules of substitution, the Court in exercise of inherent power can implead the heirs of the deceased defendants and allow them to make appropriate submissions in the suit. Although the preliminary decree has been passed ex-parte yet, in a partition suit there can be more than one preliminary decree. Moreover if the said defendants died prior to the passing of the decree, then decree in the name of dead persons is void and a nullity. These points need adjudication.

Thus, that portion of the order by which the learned Court below rejected the contention of the petitioner not to draw up the final decree by appointing an Advocate Commissioner is set aside. The plaintiff/opposite party No.1 is

directed to file appropriate applications under Order 1 Rule 10(2) of the Code of Civil Procedure with a prayer for adding the heirs of the deceased defendants in the suit. The said added parties shall be at liberty to make their appropriate submissions, file their written statement and lead evidence in support of their cases before the learned Court below. The said parties shall also be at liberty to appear before the mediator appointed by the Court as it appears that the matter has been referred to mediation by the order impugned. That portion of the order remains unaltered. Their shares will be decided on the basis of the outcome of the mediation and if the mediation fails, on the basis of their pleadings, evidence and hearing of the suit afresh.

Upon adjudication of the entire issue, if necessary, a new preliminary decree shall be drawn up declaring the shares of the parties in accordance with the outcome of the hearing. If the said added parties choose not to contest, then the suit shall proceed in their absence from the stage it has reached.

Such application shall be filed by the plaintiff/opposite party No.1 within two weeks from date and the said application shall be considered and disposed of within two weeks thereafter. The defendant No.1 shall supply the

necessary details of the heirs of the deceased defendants if the plaintiff fails to get hold of the same.

With the above observation, the revisional application is disposed of.

There will be, however, no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)