

Item No. 3
03.07.2023
Court. No. 19
GB

C.O. 256 of 2023

Zahir Mia & Ors.
Vs.
Sultan Mia & Ors.

*Mr. Tanmoy Mukherjee,
Mr. Gour Baran Sau,
Mr. Souvik Das,
Mr. K. Raihan Ahmed,
Mr. Rudranil Das*

...for the Petitioners.

*Mr. Bikash Ranjan Bhattacharyya,
Mr. Jamiruddin Khan,
Ms. Sayanti Sengupta*

...for the Opposite Party.

The petitioners are the legal heirs of the defendant no.30. Defendant no.30 was contesting the Partition Suit No.37 of 1974. It is submitted that without substituting the legal heirs of the defendant no.30, the preliminary decree was passed on September 25, 2000 declaring the share of a deceased defendant. The defendant no.30 died on September 11, 2000, before the decree.

As the parties failed to amicably partition the property, a partition commissioner was appointed. The partition commissioner filed a report. The report of the partition commissioner was accepted. Thereafter, a final decree was passed on December 19, 2016, also in the name of a dead person, that is, the defendant no.30, along with other co-sharers.

It is the specific contention of Mr. Mukherjee that without adding the heirs and legal representatives of the deceased defendant no.30, the preliminary decree was a

nullity and consequentially the final decree was also a nullity and could not be executed.

Hence, an application was filed by the said petitioners as heirs and/or legal representatives of the deceased defendant no.30 for dismissal of the execution proceeding on the ground that the decree was a nullity and inexecutable. Mr. Mukherjee submits that the void decrees in the partition suit declaring the share of a deceased co-sharer cannot be executed and hence, the learned court below was wrong in refusing to stay the execution proceedings, till the disposal of the application under Section 47 of the Code of Civil Procedure.

Mr. Bhattacharyya, learned senior advocate opposes the revisional application and submits that the application filed by the petitioners was only to delay the execution. According to Mr. Bhattacharyya, the share of the deceased defendant no.30 would automatically devolve upon his heirs and legal representatives. Such issue, cannot be a matter for adjudication under Section 47 of the Code. Mr. Bhattacharyya further submits that when the share of the defendant no.30 has been declared, both in the preliminary decree and the final decree, the heirs of the deceased would not suffer any prejudice. That the application was an afterthought and filed only to deprive the decree holders from claiming their legitimate shares.

Having heard the learned advocates for the respective parties, this Court is of the view that both the preliminary decree and the final decree were defective, as the share of a

deceased co-sharer had been declared after the date of her death. The decree was in respect of a dead person. The heirs and legal representatives of the defendant no. 30 should have been added in the proceedings as per the pleadings and cause title in the application under Section 47 of the Code of Civil Procedure. Fresh preliminary decree should have been passed, declaring the shares of the heirs and legal representative of the deceased defendant no.30, in accordance with law. A fresh final decree ought to have been passed by incorporating the same. Until the afore-mentioned exercise is undertaken, the Partition Suit/Execution Case No.08 of 2017 cannot proceed on the basis of a defective final decree.

Only after the preliminary decree is corrected, shares are declared in respect of the heirs of the deceased and the final decree is passed, the parties can put the final decree in execution. The proceeding will be subject to any further order that may be passed by any appellate court. Parties are at liberty to take steps in the learned court below.

Accordingly, the revisional application is disposed of. The order impugned is set aside.

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

(Shampa Sarkar, J.)