

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

HEARD ON: 12.03.2024

DELIVERED ON: 12.03.2024

CORAM:

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

C.O. 3457 of 2023

Kamala Biswas

Vs.

Madhabi Ghosh & Anr.

Appearance:-

Mr. Arik Banerjee

Mr. Pujon Chatterjee

Mr. Saprativa Pal

.....for the petitioner

Mr. S. Dutt

Mr. Kajal Mukherjee

Mr. Saptarshi Dutt

.....for the opposite party no.2

Mr. Anshunath Chakrabarty

Mr. Gourab Mukhopadhyay

.....for the opposite party no.1

JUDGMENT

(Judgment of the Court was delivered by HIRANMAY BHATTACHARYYA, J.)

1. This matter was taken up for hearing in the presence of the learned advocates for the petitioner and the opposite party no.2 and an order was dictated in open Court. Immediately thereafter, Mr. Chakrabarty, learned advocate appeared and submitted that he could not appear when the matter was taken up for hearing and prayed for giving him an opportunity of hearing. On the basis of such submission, this Court directed Mr.

Chakrabarty, learned advocate, to inform the learned advocates, who made their submissions in this matter. Pursuant to the intimation being given, the learned advocates for the respective parties have appeared and are heard afresh and this civil order is decided by this order.

- 2.** The plaintiff in a suit for partition and for other consequential reliefs have filed this application under Article 227 of the Constitution of India challenging an order dated 12th April, 2023 passed by the learned Judge, 10th Bench, City Civil Court at Calcutta in Title Suit No.786 of 2020.
- 3.** By the order impugned, the learned Trial Judge passed an order of stay of all further proceedings in connection with Title Suit No.786 of 2020 until further orders.
- 4.** Petitioner filed a suit for partition and for other consequential reliefs, which was registered as Title Suit No.786 of 2020 against Madhabi Ghosh and Pradip Ghosh i.e. the opposite parties herein. The opposite party no.1 herein claiming to be the executor of the last will and testament of one Prodosh Kumar Ghosh dated 22nd March, 1999, filed an application for grant of probate, which was registered as Probate Case No.51 of 2015. The said probate case was subsequently renumbered as O.C. No.5 of 2017, which is now pending before the Court of the learned Judge, 6th Bench, City Civil Court at Calcutta.
- 5.** The opposite party no.1 filed an application under Section 10 read with Section 151 of the Code of Civil Procedure in Title Suit No.786 of 2020 praying for stay of all further proceedings of the partition suit being, Title Suit No.786 of 2020 till the disposal of O.C. Case No.5 of 2017.

6. Mr. Banerjee, learned advocate appearing for the petitioner submits that the nature of the probate proceeding and the partition suit are completely different and the proceedings are pending before different Courts. He further submits that the issues involved in the probate proceeding cannot be said to be directly and substantially in issue in the suit for partition. He submits that the pendency of probate proceeding does not have any manner of impact on the partition suit. He further submits that since the subject-matter of the suit for partition and the probate proceeding is same and identical and the parties are also same, this Court can also direct analogous hearing of the partition suit and the probate proceeding in order to avoid any conflict in decisions.
7. In support of his submission that the probate suit and the partition suit can be heard analogously, Mr. Banerjee places reliance upon the decisions of the Hon'ble Supreme Court in the case of **Balbir Singh Wasu Vs. Lakhbir Singh & Ors.** reported at **(2005) 12 SCC 503**, **Nirmala Devi Vs. Arun Kumar Gupta & Ors.** reported at **(2005) 12 SCC 505** and **Shamita Singha & Anr. Vs. Rashmi Ahluwalia & Anr.** reported at **(2020) 7 SCC 152**.
8. Learned advocate appearing for the opposite party no.1 submits that the partition suit has been filed by the petitioner herein claiming 1/4th share in the suit property. He submits that one Nalini Ghosh was the original owner of the suit property, who died intestate leaving behind three sons i.e. Amiya Kumar Ghosh, Provat Kumar Ghosh and Prodosh Kumar Ghosh. He submits that Prodosh Kumar Ghosh had executed a will in favour of the

husband of the opposite party no.1 herein and, therefore, the plaintiff/petitioner herein cannot claim 1/4th share in the suit property.

9. He further submits that the opposite party no.1 being the executor has filed an application for probate, which was filed long prior to the institution of the suit for partition. He submits that even assuming that the principles laid down under Section 10 of the Code of Civil Procedure cannot be strictly applied to the case on hand, the Court in exercise of its inherent powers under Section 151 of the Code of Civil Procedure can direct stay of the further proceedings of the partition suit during the pendency of the probate proceeding. He further submits that title to the suit property and distribution of shares is precisely the subject-matter of the partition suit and, therefore, the fate of the partition suit will be dependent on the fate of the probate proceeding.
10. In support his contention that the partition suit is to be stayed pending disposal of the probate proceeding, he placed reliance upon a decision of the Co-ordinate Bench in the case of **Ashalata Sikdar & Ors. Vs. Radha Binod Sikdar & Anr.** reported at **2017 SCC Online Cal 18465**. He also referred to a decision of the Hon'ble Division Bench of this Court in the case of **Joy Chowdhury Vs. Smt. Kumkum Ray & Ors.** reported at **2015 SCC Online Cal 6219** for the same proposition. He next referred to a decision of a Co-ordinate Bench in the case of **Smt. Mandira Das Vs. Smt. Kamdini Mondal & Ors.** reported at **2014 SCC Online Cal 5204**, a decision of the Hon'ble Orissa High Court in the case of **Ashok Kumar Ray Vs. Smt. Reba Biswas & Ors.** reported at **AIR 2017 Orissa 48** in support of his aforesaid contention. With regard to the power of the Court to pass

an order of stay under Section 151 of the Code of Civil Procedure, the learned advocate appearing for the opposite party no.1 referred to a decision in the case of ***Krishnan & Anr. Vs. Krishnamurthi & Ors.*** reported at ***AIR 1982 Madras 101.***

- 11.** Learned advocate appearing for the opposite party no.2 submits that the probate proceeding has reached the argument stage and the decision on the probate proceeding will have a bearing in the declaration of shares in the partition suit and, therefore, the learned Trial Judge was right in passing the order of stay.
- 12.** Heard the learned advocates for the parties and perused the materials placed.
- 13.** Petitioner filed the suit for partition claiming to have acquired a portion of the share of his father namely Amiya Ghosh, since deceased, in the suit property through inheritance. Petitioner also claims to have acquired a portion of the share of Prodosh Ghosh, in the suit property as his successor being his brother's son as, according to the petitioner, the said Prodosh Ghosh died as a bachelor.
- 14.** The opposite party no. 1 herein who is defendant no. 1 in the probate case claims to have instituted the probate case being the executor of the last will and testament of Prodosh Ghosh. The opposite party no. 1 has disputed the extent of the share claimed by the petitioner in the suit property by filing written statement in the partition suit.
- 15.** The probate court does not decide the title to the property. It only decides the genuineness of the will. In a suit for partition, the Court declares the title of the parties and the extent of their shares in the properties which are

the subject matter of such suit in the preliminary decree. Therefore, the matters in issue in a Probate suit cannot be said to be substantially in issue in the partition suit. However, the fate of the probate case will undoubtedly have an impact on the shares of the respective parties in the suit for partition.

- 16.** It cannot be disputed that in the event, the will executed in favour of Sambhunath Gupta is probated, the share of Prodosh Kumar Ghosh in the suit property would devolve upon the husband of the opposite party no.1 and not upon the plaintiff or other heirs of the deceased brothers of the said Prodosh Kumar Ghosh. In such circumstances, the share of the plaintiff in the suit property will be reduced.
- 17.** On the other hand, if the probate proceeding is dismissed, the share of Prodosh Kumar Ghosh in the suit property will not devolve upon the husband of the opposite party no.1 and the extent of the plaintiffs share in the suit property will be enlarged. Even if, the probate to the will of Prodosh Kumar Ghosh is granted, the same cannot non-suit the plaintiff in the partition suit, as he will be having some share in the property by virtue of inheritance from his father namely Amiya Kumar Ghosh.
- 18.** Therefore, grant of probate, in the case in hand, cannot non-suit the plaintiff.
- 19.** The question, therefore, arises is whether the learned trial judge was right is passing an order of stay.
- 20.** It is well settled that the Court cannot make use of the special provisions of Section 151 of the Code where the party had his remedy provided elsewhere in the Code.

21. Mr. Banerjee may be right in contending that Section 10 of the Code cannot be applied to the case of instant nature. It is equally well-settled that inherent jurisdiction of the Court to make orders *ex debito justitiae* is affirmed by Section 151 of the Code.
22. In **Krishnan (supra)** it has been held that where the Code is silent and where the exercise of power is not opposed to or prohibited by the provisions of the Code, the Court can invoke its inherent jurisdiction if it is satisfied that it is necessary for the ends of justice.
23. This Court has to now consider whether it was necessary for the ends of justice for the learned Trial Judge to invoke its inherent power.
24. In the case on hand, the petitioner claims to have acquired a share in the property as an heir of his father and also as an heir of Prodosh Ghosh, since deceased. Though the fate of the probate case may have an impact on the extent of the share of the plaintiff insofar as devolution of title upon the death of Prodosh Kumar Ghosh is concerned but the same cannot in any way affect the extent of share of the plaintiff insofar as inheritance from his father is concerned.
25. That apart, the executor of the last will and testament of Prodosh Kumar Ghosh is a party in the suit for partition and the probate case has already reached the stage of argument. However, in the partition suit, the pleadings are complete but the issues are yet to be framed. Therefore, it will take some time for the partition suit to reach the stage of passing the preliminary decree.
26. In **Ashalata Sikdar (supra)**, all the parties claimed to be the heirs of one Mohan Bakshi Sikdar and the petitioners therein claimed that the said

Mohan Bakshi Sikdar bequeathed his entire property to the defendants in the partition suit by virtue of a will. On such facts, the co-ordinate bench held that in the event probate is granted, the entire distribution of shares and title in the suit property will be affected.

27. In ***Mandira Das (supra)***, the co-ordinate bench on the facts of that case observed that if the probate application is allowed, the petitioner therein would be totally non-suited.
28. In ***Jay Chowdhury (supra)***, a preliminary decree was passed ignoring the pendency of a probate proceeding and a title suit challenging the validity of a deed of gift. In an appeal from the said preliminary decree, the Hon'ble Division Bench after setting aside the preliminary decree, was pleased to transfer the partition suit and the declaratory suit to the Court where the probate proceeding was pending so that all the three suits can be tried simultaneously and are disposed of by a common Court. The Hon'ble Division Bench noted that the fate of the probate case and the declaratory suit will have an impact on the extent of share of the parties in the partition suit.
29. In ***Ashok Kumar Ray (supra)***, it was held that the decision in the partition suit would operate as *res judicata* in the probate proceeding.
30. In ***Nirmal Devi (supra)***, the Hon'ble Supreme Court after holding that the decision on the question of proof of will have a direct impact on the Civil Suit, transferred the Civil Suit to the Court where the probate proceeding was pending with a direction to club the probate proceeding and the Civil Suit and be tried together.

31. In **Balbir Singh Wasu (supra)**, the Hon'ble Supreme Court after noting that a large number of issues would overlap observed that both the probate proceedings and the civil suit challenging the execution of the will should be clubbed and heard together.
32. In **Shamita Singha (supra)**, the Hon'ble Supreme Court after noting that the defendants in the suit for partition has raised the point of execution of the will observed that the testamentary proceeding would have a direct bearing or impact on the pending suit for partition, directed the suit for partition and the testamentary proceeding to be heard together.
33. After analysing the decision cited at the Bar, this Court finds that the Hon'ble Division Bench of this court as well as the Hon'ble Supreme Court have directed the partition suit and the testamentary proceeding to be clubbed and heard together in order to avoid conflict of decisions as the testamentary proceeding would have a bearing on the suit for partition.
34. The Co-ordinate Benches in **Ashalata Sikdar (supra)** and **Mandira Das (supra)** dealt with situations where the plaintiff would be non-suited if the probate applications are allowed. The said decisions being distinguishable on facts do not have any manner of application to the case on hand.
35. In the case on hand, the probate proceeding has reached the argument stage and the issues are yet to be framed in the partition suit. If the partition suit and the probate proceedings are directed to be clubbed and heard together, it will unnecessarily delay the disposal of the probate proceeding which is at the final stage.
36. Considering the stage of the probate case and the partition suit and the limited impact of the probate case on the partition suit as observed

hereinbefore, this Court is of the considered view that no fruitful purpose would be served in staying all further proceeding of the partition suit. It is, therefore, observed that all further proceedings of the partition suit can continue till the stage prior to the passing of the preliminary decree as the same would sub-serve the interest of justice. This Court, therefore, holds that the learned trial judge was not justified in passing an order of stay of all further proceedings in the partition suit. The impugned order is, therefore, liable to be set aside and the same is accordingly set aside. Since the extent of shares of the parties in the partition suit would depend upon the fate of the probate case, therefore, in order to avoid conflict of decisions, a direction is to be passed upon the Court dealing with the partition suit not to pass preliminary decree till the disposal of the probate suit.

- 37.** This Court, therefore, directs that the preliminary decree in the suit for partition being, Title Suit No.786 of 2020 shall not be passed till the disposal of the probate proceeding being, O.C. Case No.5 of 2017 pending before the learned Judge, 6th Bench, City Civil Court at Calcutta.
- 38.** With the above observations and directions, C.O. 3457 of 2023 stands disposed of.
- 39.** There shall be, however, no order as to costs.
- 40.** Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(HIRANMAY BHATTACHARYYA, J.)

KS AR(Ct.)