

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**S.A.T. 404 of 2013
With
CAN 1 of 2013 (Old CAN 8662/2013)
CAN 2 of 2016 (Old CAN 322/2016)
CAN 4 of 2017 (Old CAN 8261 of 2017)**

Sk Safir Nur Alam @ Alam & Ors.

Vs.

Moslima Bibi & Ors.

For the Appellants : Mr. Partha Pratim Roy
Ms. Sudipta Bera

For the respondents : Mr. Mukteswar Maity
Ms. Nupur Chowdhury
Ms. Monika Sarkar

Heard on : 10.09.2024

Judgment on : 24.09.2024

Ajoy Kumar Mukherjee , J.:

1. Being aggrieved and dissatisfied with the judgment and decree dated 31.05.2013 passed by Additional District Judge, 1st Court Alipore, in TA 247 of 2002 present second appeal has been preferred. By the impugned judgment learned court below has set aside the final decree passed by Civil Judge (Senior Division) 2nd Court, Alipore, in T.S. 149 of 1978.

2. The instant suit is a suit for partition and settlement of accounts. Plaintiffs case in a nutshell is that plaintiffs are the legal heirs of deceased Habibullah Laskar. Said Habibullah died leaving behind 6 sons and daughters. Said deceased Habibullah had residential house and land at Mouza Hatiara as mentioned in the schedule to the plaint. The plaintiffs and the defendants are the great grandsons of the original owner. Subsequently some parties purchased the property of other co-sharers. Defendant no.35 of the said suit namely Sahanabi Laskar transferred some of his shares in the property in question in favour of Ashraf Ali being the plaintiff no.3 by a deed dated 05.01.1959. Subsequently the plaintiff no. 3 ,4 and 5 and the defendant no 43 being the wife of Ashraf Ali Laskar purchased 2 cottahs 6 chitacks of land in CS dag no. 165 from the heirs of Lal Mohammad, being the defendant no. 34 to 38. Plaintiffs are possessing their own share beside their purchased share with the defendant jointly and the plaintiffs requested the defendants on several occasion for partition of the suit property by metes and bounds but the defendant refused to make partition and for which plaintiff filed the suit.

3. Defendant no.1 contested the suit by filing written statement contending that the suit is not maintainable and the suit is also bad for non-joinder and mis-joinder of parties and some of the properties in the suit have already been vested to the Government of West Bengal and the suit is also bad for non service of notice under section 80 of the Code of Civil Procedure. Accordingly defendant no,1 has prayed for dismissal of the suit. Defendant no. 11 to 11 (gha) appeared by filing vokalatnama. Defendant no. 35 (ka) to 35 (cha) and defendant no. 11 to 21, defendant no.

27 to 33, defendant no 22 to 26 , 34 to 38 , defendant no. 42 , 43, 39 and 44 appeared in the suit through their respective lawyers.

4. Learned Trial Court decreed the suit in favour of plaintiff, in preliminary form against contesting defendants and also directed the parties to make amicable partition by metes and bounds within three months, failing which liberty was given to the plaintiff to partition the suit property by appointing partition commissioner. As the parties failed to make partition amicably in terms of preliminary decree, the court appointed partition commissioner who submitted his report. Neither party filed any objection against the report of the partition commissioner and as such the Trial Court passed final decree considering the report filed by the partition commissioner

5. Being aggrieved by the final decree passed by the Trial Court on 17th June, 1998 first appeal was preferred before the court below, being aforesaid T.A. No. 247 of 2002. While the said title appeal came up for hearing before the court below, he observed that the final decree is inconsistent with the preliminary decree. Moreover, legal heirs of the original defendant no.35 have not been made party in the instant suit. Accordingly court below held that declaration of share has not been made properly and as a consequence, division and allotment of property is also incorrect and he further held that all plots have /had not been considered by the partition commissioner in proper manner in terms of preliminary decree. He also pointed out that the final decree was passed without serving notice and as such he concluded that although final decree passed by the trial court is not void but erroneous as it was passed after the death

of defendant no. 35 and on this score, the final decree is liable to be set aside.

6. A Division Bench of this court while admitting the present appeal by an order dated 19.04.2016, framed the following substantial question of law for adjudication:-

Whether the learned First Appellate Court was justified in reopening the legality of the preliminary decree in an appeal directed against the final decree passed in the partition suit?

7. Mr. Partha Pratim Roy learned counsel appearing on behalf of the Plaintiff/appellant submits that in view of the provision as laid down in section 97 of the Code of Civil Procedure, any person who does not prefer any appeal from the preliminary decree, shall be precluded from disputing the correctness in an appeal which has been preferred against the final decree. In the present context the defendants did not prefer any appeal against the preliminary decree and as such the court below committed substantial error of law in reopening the preliminary decree in an appeal while challenging the final decree.

8. He further submitted that it will appear from the plaint and the documents filed thereto that the defendant no.35 appeared in the said suit along with other defendants but did not contest the suit. In this context referring order XXII rule 10 A of the code he submitted that, no communication was made by the pleader, intimating about the death of defendant no.35 before passing of the preliminary decree. He further submits that defendant no.34 to 39 including defendant no. 35 derived title from their predecessor Lal Mohammad and the heirs of said Lal Mohammad are there to represent the estate of the deceased Lal

Mohammad. Therefore, in absence of any allegation that the other heirs of Lal Mohammad colluded with the plaintiff, it cannot be said that the estate of the deceased defendant no.35 was not properly represented

9. Mr. Roy strenuously argued that from the pleadings and other documents relied upon by the respondents, it does not appear that the heirs of defendant no. 35 was prejudiced for non inclusion of the heirs of the deceased being the defendant no. 35.

10. Referring the judgment reported in ***P. Jesaya Vs. Sub-Collector and another*** reported in **(2004) 13 SCC 431**, Mr. Roy submitted that when the counsel of defendant no. 35 had not intimated about the death, he cannot thereafter take the ground that a decree has been passed against a dead person or for setting aside the said decree, it amounts to an attempt to take not just the other side but also the court for a right.

11. He argued that this court in ***Kanailal Jana Vs. Pulin Bihari Patra (C.O. 1205 of 2021 and C.O. 1206 of 2021)*** held that the suit cannot be held to be abated against the deceased defendant as the share of the said defendant had already been transferred in favour of some of the opposite parties during pendency of the suit. Appellants further case is that deliberate suppression of factum of demise of deceased defendant by the respondent herein before the trial court, before passing of the decree ought to ensure to the benefit of decree holder and the decree ought to be sustained.

12. Mr. Roy further argued that from the plaint it will appear that the total area mentioned in the schedule is 1 acre 62 decimal and from the report of the commissioner it also appears that the commissioner has

considered the total area and subject matter of his report covers 1.62 acres. Therefore, the findings of the court below that all the plots mentioned in the preliminary decree were not taken into consideration by the commissioner, is perverse and not sustainable in the eye of law. In fact from the commissioner's report, it clearly reveals that the entire area pertaining to suit property was allotted in accordance with law. The defendant did not file any objection against the commissioner's report and preferred the present appeal against final decree. He further submits that considerations in an application for setting aside an *ex parte* decree are entirely different from the considerations in an appeal against *ex parte* decree. In an application for setting aside an *ex parte* decree the defendant is only required to show the circumstances in which the defendant was prevented from attending the court on the date of hearing but this ground is completely irrelevant in an appeal against an *ex parte* decree where the defendant has to demonstrate that on the facts and materials available before the court, the decree ought not to have been passed. In such view of the matter Mr. Roy prayed for dismissal of the appeal.

13. Mr. Maity learned counsel appearing on behalf of the respondents herein contended that it is true that neither party challenged the preliminary decree rather accepted the share declared therein and such preliminary decree was passed in presence of both the parties. However the final decree was passed *ex parte* immediately receiving the commissioners report which bears the name of defendant no.35, though he died long back. The argument advanced by the appellant that defendant no.35 transferred his share to the other defendants has got no substance since there is no

such pleading in the plaint. He further submits that the commissioner has no right to allot the share beyond the preliminary decree. In a partition suit all the share must be declared otherwise the suit must be held to be barred for non joinder of necessary parties.

14. Mr. Maity further argued that in the instant case, final decree has been passed on the basis of the commissioner's report but the commissioner's report itself is illegal. He further argued that defendant no.35 had not transferred his entire share and as such it cannot be said that he was represented by other heirs of Lal Mohammad. In such view of the matter the first appellate court has rightly passed the order with the observation that without bringing the legal heirs on record of the left out defendants, the decree is a nullity specially in a partition suit. As such the impugned /judgment and decree does not call for interference.

15. Needles to say that the object of section 97 of the code is to make it clear that if any aggrieved party fails to prefer appeal against a preliminary decree, its correctness cannot be challenged by preferring appeal against the final decree. This is because final decree proceeding is only to enforce what has already been decided in the preliminary decree. Final decree does not relate to the decision of any substantive rights of the parties as to the title to the property. In a partition suit, if preliminary decree was passed and no appeal was preferred against it and where the other side failed to make objection against the commissioner's report, the appellant cannot question correctness of report in appeal against final decree since such appeal is barred under section 97 of the Code. While saying so, I am not unmindful to the provision of law that only the factual correctness of the

decree cannot be challenged in view of bar under section 97, but its legality and validity can still be challenged even in a case where an appeal against preliminary decree has not been made.

16. In the present case it is the specific allegations of the appellant that the final decree was passed *ex parte* and without giving opportunity to the defendant/appellant and for which they have also right to prefer appeal for setting aside the *ex parte* decree. In this context Mr. Roy rightly pointed out that the considerations in an application for setting aside *ex parte* decree are entirely different from the considerations in an appeal against an *ex parte* decree. If an appeal is preferred against an *ex parte* decree, it is not sufficient to plead that since the final decree was passed immediately on receiving the commissioners report, the defendant did not get the opportunity to challenge the commissioners report. If the appeal is preferred against an *ex parte* decree then the entire matter has to be judged on merit.

17. In the present context the court below had set aside the decree passed by the trial court firstly on the ground that the decree was passed against deceased defendant no.35 i.e. against a dead person for which the decree is a nullity and secondly the partition commissioner did not incorporate all the plots for the purpose of drawing up final decree.

18. Now so far as inconsistency in between preliminary decree and final decree as observed by the court below, I do not find any substance in such observation in view of the fact that total area mentioned in the schedule to the plaint of the partition suit is 1 acre 62 decimal and the report of the

commissioner states that the commissioner considered the total area of 1.62 acres while submitted his report before the trial court.

19. As regards the other point that the decree was passed against deceased defendant no. 35, it is not in dispute that defendant no. 35 appeared in the said suit by filing vokalatnama and thereafter he did not contest and his lawyer has also not informed the court or the plaintiff about the death of defendant no.35 in violation of order XXII rule 10A of the Code. The respondent defendants have also not pointed out as to how they got prejudiced for non substituting legal heirs of defendant no. 35 in the suit before passing preliminary decree, when it is specific case of the plaintiff/appellant that defendant no. 34 to 39 derived their title from their predecessor Lal Mohammad and the other heirs and successors of Lal mohammad are there to represent the estate of deceased Lal Mohammad. Defendants also nowhere alleged that the other heirs of said Lal Mohammad colluded with the plaintiffs. In the absence of any specific assertion that the decree was passed in collusion with other legal heirs of Lal Mohammad and that such non substitution of legal heirs of defendant no. 35 has caused materially any substantial injustice to the said defendant, I do not find any substance in the said pleading. In this context reliance can be placed upon ***Shivshankara and another Vs. H.P. Vedavyasa*** reported in **2023 SCC online SC 358** and ***N.K. Mohammad Sulaiman Sahib Vs. N.C. Mohammad Ismail Sahib and others*** reported in **AIR 1966 SC 792**.

20. In the present context since after *bonafide* enquiry the heirs of defendant no.35 could not be brought on record for non furnishing of the

information by the concerned lawyer and considering the submission of the appellant that defendant no. 34 to 39 derived their title from Lal Mohammad, therefore in the absence of legal heirs of deceased defendant no. 35, other legal heirs of Lal Mohammad deemed to have represented the estate which did not cause prejudice to either of the parties, I find that the present second appeal has got no substance even if considering the legality and validity of the impugned preliminary decree and final decree passed by the Trial court.

21. The Judgment relied by the respondent reported in ***AIR 1999 Madras 71 and civil Appeal no. 5755-5756 of 2011 (Moreswar Vs. Venkatesh Sitaram Vedi)*** are factually distinguishable from the present case, in view of the fact that in those cases plaintiff had deliberately suppressed and placed incorrect geneology before the court below and in other case inspite of taking objection plaintiff has chosen not to implead defendants wife and three sons as party defendants, which is not the case in the present context. Here no allegation has been levelled against the plaintiff that plaintiff has deliberately not impleaded legal heirs of defendant no. 35 and on the contrary the defendant did not have any scope to implead legal heirs of deceased defendant no. 35, as his learned counsel failed to discharge his duty under order XXII rule 10A of the Code.

22. In view of aforesaid discussion SA 404 of 2013 is allowed and thereby the impugned judgment and decree passed by the court below in title appeal no. 247 of 2002 dated 31.05.2013 is hereby set aside. Connected applications are also disposed of accordingly.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)