

(2011) 08 CAL CK 0026

Calcutta High Court

Case No: C.O. No. 676 of 2008

Sri Sanjoy Ghosh and
Others

APPELLANT

Vs

Sri Arun Baran Ghosh
and Another

RESPONDENT

Date of Decision: Aug. 16, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 152
- Constitution of India, 1950 - Article 227

Hon'ble Judges: Syamal Kanti Chakrabarti, J

Bench: Single Bench

Advocate: Amitava Das and Shamba Chakrabarti, for the Appellant;

Judgement

Syamal Kanti Chakrabarti, J.

This revisional application under Article 227 of the Constitution has been preferred challenging the legality and propriety of the order dated 15th November, 2007 passed by the learned Civil Judge (Senior Division), 10th Court at Alipore in Title Suit No. 118 of 2000. It appears that by such order the learned Court below has considered a petition filed by the Plaintiff No. 2 on 01.04.2006 u/s 152 CPC praying for correction of the judgement passed by the learned Court below decreeing the suit in preliminary form.

2. In the said order the learned Court below has held, inter alia, that the Plaintiff No. 2 has prayed for modification of the judgement and preliminary decree of partition dated 29.07.2005 on the plea of correction of omissions and errors occurred in the said judgement and decree but in his opinion such an attempt will touch the merit of the judgement which is the subject matter of an appeal and cannot be corrected u/s 152 Code of Civil Procedure. According to the views of the learned Court below the proposed correction or omission, as sought for, are substantive in nature and as such the Court cannot exercise its power u/s 152 Code of Civil Procedure, as prayed

for.

3. Being aggrieved by and dissatisfied with such order the Plaintiff No. 2 has preferred this revisional application contending, inter alia, that his petition was not actually opposed by any of the parties and if the same was allowed it could not cause any prejudice to any of the parties rather it could subserve the interest of the parties to the suit in whose common interest their right of share in the property is to be determined in accordance with law. It is the specific case of the Plaintiff No. 2 that the learned Court below in the aforesaid judgement has come to a finding that all the married daughters of the original owner of the suit property belonging to Kamala Bala Ghosh have relinquished their shares to Gour Gopal, Nitya Gopal, Amiya Gopal, Sanjoy and Tushar by a registered deed dated 29.04.2981 and he has come to a conclusion that upon demise of Tushar in the eye of law, his share in the suit property was devolved upon the five brothers which was admitted by the Plaintiff in his cross-examination. But the learned Trial Court committed an error by directing partition of the suit property amongst the brothers and/or their successors-in-interest in equal 1/5th share which was apparently an accidental slip or mistake capable of correction u/s 152 Code of Civil Procedure. Needless to say that at the time of hearing of this revisional application also the opposite parties have not contested the application though the opposite party made his appearance through the learned Advocate on 09.07.2007.

4. Under the aforesaid circumstances the only point for my consideration is to decide whether the aforesaid claim of the Petitioner/ Plaintiff No. 2 can be treated as an error arising from any accidental slip or omission within the meaning of Section 152 Code of Civil Procedure.

5. While considering the merit of this revisional application the Court should aware that in course of administration of justice every judicial order is to be passed in accordance with law in presence or absence of the parties affected thereby but absence of any party cannot be treated as the sole ground of allowing or rejecting a prayer as claimed by the Petitioner. Therefore, absence of a party or resistance by the other parties, in my opinion, cannot be a sole ground for allowing his prayer without considering the merit of the claim in accordance with law.

6. From the materials on record it appears that the opposite party No. 2 filed the application u/s 152 CPC praying for correction of the judgement and decree dated 29th July, 2005. In paragraph 7 of his application it has been averred that the fact of relinquishment of the share of all the married daughters of Late Kamala Bala who was the original owner of the property is an admitted fact. Such relinquishment was made in favour of Plaintiff No. 2, predecessor of Defendant Nos. 7 to 10, predecessor of Defendant Nos. 11 to 13, predecessor of Defendant Nos. 1 to 6 and Tushar, the youngest son who was missing and subsequently declared dead. In paragraph 6 of such petition it is specifically mentioned that all the daughters of Late Kamala Bala did not give any share to Arun Baran Ghosh, the Plaintiff No. 1.

Therefore, the passing of the judgement and decree in favour of all the five sons having 1/5th share each is apparently an error or omission in the body of the judgement. In this connection the relevant portion of the judgement dated 29.07.2005 passed in T.S. No. 118 of 2000 is quoted below:

Therefore, it is clear from the materials on record and also from the pleadings of the parties and evidence on record led the party of the parties that at present the suit property is a joint property of the parties. It transpires from the evidence that the deft. has stated that the suit property will be divided in 5 equal shares out of which plff. No. 1, 2, deft. No. 1 to 6, deft. No. 7 to 10 and deft. No. 11 to 13 will get equal share i.e. 1/5th share severally and jointly.... Hence,

Ordered

that the suit be and the same is decreed in preliminary form with costs. Accordingly plffs. do get a preliminary decree of partition in respect of 1/5th share each of the suit property and the deft. No. 1 to 6 do get 1/5th share jointly and deft. No. 7 to 10 also do get 1/5th share jointly and so also deft. No. 11 to 13 in respect of the suit property.

7. There is No. findings of the learned Court below as to whether all the daughters of Late Kamala Bala did not give any share to Arun Baran Ghosh. Unless such point is decided on merit in the body of the judgement there cannot be any reflection in the ultimate order. Omission of the learned trial Court to decide such question of fact in delivering judgement cannot be treated as accidental slip or omission or clerical or arithmetical mistake to be cured u/s 152 Code of Civil Procedure.

8. But in the instant application u/s 152 CPC the Plaintiff No. 2 has submitted a new chart showing the revised share of the successors-in-interest of Kamala Bala which is not in consonance with the specific terms of the decree. The Plaintiff No. 2 claims that the learned trial Court ought to have declared share of Arun Baran Ghosh (Plaintiff No. 1) to the extent of 33/275, that of Gour Gopal Ghosh (Plaintiff No. 2) to the extent of 121/550, Sanjoy Ghosh and Ors. to the extent of 121/550, Subir Ghosh and Ors. to the extent of 121/550 and Pranil Ghosh to the extent of 121/550. The difference in determining the extent of share of the aforesaid five cosharers arose out of the fact that all the daughters of Late Kamala Bala did not give any share to Arun Baran Ghosh (Plaintiff No. 1) and this fact has not been explained and at all considered by the learned Trial Court in his judgement and preliminary decree. Now if this omission is cured u/s 152 CPC treating it as accidental slip or arithmetic mistake it will be a denial of existing fact. It appears that consciously or unconsciously the learned Trial Court has failed to take a note of this fact and divided the respective shares of the cosharers without taking into consideration the aforesaid fact. This, in my opinion, is the subject matter of appeal and cannot be treated as an arithmetic error because the judgement has been passed by the learned Trial Court admittedly upon consideration of entire evidence on record.

9. Therefore, I hold that such a prayer for correction of the extent of share of each co-sharer cannot be allowed in exercise of the power conferred u/s 152 CPC and the learned Court below has rightly rejected the prayer since substantive question of actual share to be apportioned in favour of each co-sharer is to be determined in the context of admitted fact and laws of inheritance which requires fresh adjudication and application of mind which cannot be entertained by the revisional Court. Accordingly, I hold that the instant revisional application is not sustainable in law and the same is accordingly dismissed giving liberty the Petitioner to approach the appropriate forum for the reliefs sought for.

10. Urgent certified photocopies of this order, if applied for, be supplied to the parties, on compliance of all requisite formalities.