

(1985) 05 CAL CK 0024

Calcutta High Court

Case No: C. O. No. 408 of 1985

Mahadeb Hazra and Others

APPELLANT

Vs

Stsubala Sen and Others

RESPONDENT

Date of Decision: May 7, 1985**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 151, 152

Citation: 90 CWN 515**Hon'ble Judges:** S.R. Roy, J; Anil K. Sen, J**Bench:** Division Bench**Advocate:** Asoko Kumar Chakravarti, for the Appellant;

Judgement

A.K. Sen and S.R. Roy, JJ.

The plaintiffs in a suit for partition are the petitioners before as in this revisional application which is directed against an order dated June 7, 1984, passed by the learned Additional Subordinate Judge, Burdwan in Title Suit No. 21 of 1980. By the impugned order the learned Judge has rejected the prayer of the plaintiffs for a formal amendment of the ordering portion of the judgment and decree on an application filed u/s 151 and section 152 of the Code of Civil Procedure. It has been so refused only on the ground that an earlier application for amendment of the decree on similar grounds had been dismissed by the learned Judge by an order dated February 17, 1984 and hence the same point cannot be reagitated. The present application is nor being opposed, not was the application for amendment opposed by the defendant in the court below. It appears to us that the plaintiffs instituted the aforesaid suit for partition of the properties specified in the plaint schedule claiming a moiety share therein. According to the plaint case, the other half share belonged to the defendants.

2. In contesting the suit, the defendants did not dispute the shares, but the defendants took the defence that the property having been partitioned earlier, it is

not a joint property which can be partitioned again. The defence taken by the defendant failed and was overruled and the learned Subordinate Judge on September 25, 1981 decreed the suit on the following terms:

That the Title Suit No. 2 1/1980 be decreed on contest in part in the preliminary form while the other suit be dismissed on contest. The parties of both the suits do effect among themselves an amicable partition of the "Ka" lands of Title Suit No. 2 1/80 within 90 days from date, failing which any of the parties will have the liberty of having the same done through court by a pleader commissioner to be appointed on prayer.

3. The decree that was drawn up incorporated the same direction. It is obvious to us that there was an unfortunate accidental omission in the ordering portion of the judgment when the court failed to declare the plaintiffs' share in decreeing the suit in the preliminary form and in directing partition between the parties. This was realised at long last obviously when steps were proposed to be taken for making the decree final. At this stage the plaintiffs filed in application u/s 152 of the CPC for correcting the decree by incorporating a declaration as to the plaintiffs share in the Ka lands. This application was dismissed by the learned Subordinate Judge by the order dated February 17, 1984 on the view that since the decree - is in terms of the judgment, or, in other words, the decree being in conformity with the ordering portion of the judgment, there is no scope for correcting the decree in exercise of the powers u/s 152. The application was accordingly dismissed and the plaintiffs then came with the application out of which the present revisional application arises which is now an application u/s 151 read with section 152 of the Code for correction of both the ordering portion of the judgment and the decree itself. This application was dismissed for reasons already indicated hereinbefore by us. That is the order now being impugned before us in the present revisional application. Having heard the learned Advocate for the petitioners and considering the records, we have no doubt in our minds that there had been an accidental omission in the ordering portion of the judgment dated September 25, 1981 whereby the suit was decreed in the preliminary form. The learned Subordinate Judge himself found it to be so in his earlier order dated February 17, 1984. Having found as such, the learned Subordinate Judge did not take the necessary steps for correcting his own error, but on the other hand, went on dismissing the application filed for such correction, on behalf of the plaintiffs, not appreciating that if this defect be not removed, the position would lead to a stalemate because there will be a preliminary decree in a partition suit which can never be made final. It is unfortunate that a Judge of the standing of Subordinate Judge could not appreciate that such a situation should not be allowed to stand and it is the duty of the court to correct such errors committed by Court, apart from the fact that there are high authorities in support of the plaintiffs contention that accidental errors in the judgment can very well be corrected in exercise of the inherent powers of the court. This being the position, we set aside both the orders viz. the impugned orders, the earlier order dated February

17, 1984 being set aside in exercise of our suo motu powers and allow the application for amendment of. the ordering portion of the judgment as also the decree be incorporating therein a declaration of the plaintiffs 8 annas share in the "Ka" lands. Let necessary correction be made by the learned Subordinate Judge in the records. The revisional application is disposed of accordingly.