

(2010) 08 CAL CK 0084

Calcutta High Court

Case No: C.O. No. 1745 of 2010

Bina Debnath @ Bina Devi

APPELLANT

Vs

Dilip Debnath and Others

RESPONDENT

Date of Decision: Aug. 6, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151
- Constitution of India, 1950 - Article 227
- Partition Act, 1893 - Section 2, 3

Citation: (2011) 2 CALLT 379

Hon'ble Judges: Jyotirmay Bhattacharya, J

Bench: Single Bench

Advocate: Sabyasachi Bhattacharya and S.T. Mira, for the Appellant; Souradipta Banerjee, for the Respondent

Judgement

Jyotirmay Bhattacharya, J.

Two orders being Order No. 182 dated 7th April, 2010 and order No. 185 dated 12th May, 2010 both passed by the Learned Civil Judge (Junior Division), First Court at Sealdah in Title Suit No. 287 of 1987, are under challenge in this application under Article 227 of the Constitution of India at the instance of the defendant No. 1/petitioner herein.

2. Heard Mr. Bhattacharya, learned Advocate, appearing for the petitioner and Mr. Banerjee, learned Advocate, appearing for the opposite party Nos. 1 to 8. Since the other opposite party did not seek any leave to participate in the process of sale of the suit property by auction, service of notice of this revisional application upon the said opposite party, was dispensed with.

3. Considered the material on record including the order impugned.

4. Let me now consider as to how far the learned Trial Judge was justified in passing the impugned order in the fact of the instant case. By the first order i.e. order No. 182 dated 7th April, 2010, the petitioner's application for allowing her to purchase the share of the plaintiffs and the other defendant in the suit property as per the valuation made by the learned Commissioner, was rejected by the learned Trial Judge.

5. Subsequently the petitioner filed another application u/s 151 of the CPC for reconsideration of the petitioner's aforesaid prayer by recall of the earlier order dated 7th April, 2010. The petitioner's said application was rejected by the learned Trial Judge by the subsequent order being No. 185 dated 12th May, 2010. The propriety of both the aforesaid orders is under challenge in this application.

6. Let me now give the short background of this litigation leading to passing of the aforesaid orders in the instant case. The impugned orders were passed in a partition suit between the parties. The preliminary decree was passed in the said suit on 30th September, 2002 declaring the plaintiff's share to the extent of 29/36th share in the suit property. The share of the defendant No. 1 was declared as 1/9th therein. The share of the defendant No. 2 was declared as 1/36th in the suit property. Admittedly the suit property is a very small property comprising of about 6 chatak and 25 square feet land with structure standing thereon. The suit property is incapable of partition by meets and bounds, according to the shares of the parties as declared in the preliminary decree as the suit property is too small and there are many co-sharers in it. All the parties have come to the conclusion that the said property cannot be partitioned by meets and bounds as per the declared shares of the parties. Thus the only option which is left open to them is to sell the property and to distribute the sale proceeds amongst the co-shares according to their share. The defendant No. 1 who is in possession of the suit property wanted to purchase the suit property as per its valuation as assessed by the learned Commissioner. The plaintiffs also intended to purchase the suit property at the market rate. The defendant No. 2 has not shown any interest in purchasing the suit property by entering into the competition between the aforesaid two groups of competitors.

7. In this context the learned Trial Judge held that since both the plaintiffs and the defendant No. 1 have expressed their intention to purchase the suit property, it would be better if the sale is conducted by auction amongst the co-sharers so that the said property can be sold to the highest bidder amongst them. Accordingly the learned Trial Judge passed an order on 7th April, 2010 for sale of the said property by auction amongst the co-sharers. The plaintiffs were also given liberty to participate in the auction and to offer bid in the auction sale.

8. The defendant No. 1 was not satisfied with the said order. Accordingly she filed an application u/s 151 of the CPC for recall of the said order so that she can be permitted to purchase the said property by excluding the other co-sharers from entering into any competition with her in the process of sale of the said property to

her. The learned Trial Judge rejected the defendant's said application by holding inter alia that since the earlier order passed by the learned Trial Judge was not challenged in any higher forum, the earlier order which was passed by the learned Trial Judge cannot be recalled. The learned Trial Judge also held that since both the plaintiffs and defendant No. 1 are the co-sharers in the suit property and since both of them wanted to purchase the same, the plaintiffs cannot be denied of an opportunity to exercise their option to purchase the said property. Accordingly the subsequent application of the defendant was also rejected.

9. Mr. Bhattacharya, learned Advocate, appearing for the petitioner, submitted that since his client's prayer for purchase of the share of the other co-sharers is not covered either u/s 2 or u/s 3 of the Partition Act, the method prescribed for sale of the said property as per Section 2 or Section 3 of the Partition Act, cannot be followed. According to Mr. Bhattacharya, under such circumstances, the Court has the power to partition the suit property by equitable method i.e. by resorting to the process of owelty and while doing so, preference should be given to the co-sharer who is in possession of the suit property but is financially weak to compete with the other co-sharers owning major shares and having unlimited recourses as according to him, if such process is followed then the financially sound co-sharer, having major share, may out bid the financially weak co-share having lesser share. In support of such submission Mr. Bhattacharya relied upon the decision of the Hon'ble Supreme Court in the case of [Badri Narain Prasad Choudhary and Others Vs. Nil Ratan Sarkar](#), wherein it was held that in a circumstance where the suit property is incapable of division in specie because of its smallness in size and the number of co-sharers are too many, there is no other alternative but to resort to the process called owelty, according to which the rights and interests of the parties in the property will be separated, only by allowing one of them to retain the whole of the suit property on payment of just compensation to the others. It was further held therein that "all-though the value of the property could be fixed by auction between the two parties, we feel that this method would be unsatisfactory in this case as the plaintiffs who own the major share and have unlimited resources, would out bid the defendant." Under such circumstances, the Hon'ble Supreme Court thought that the more equitable method would be to take the value of the property as Rs. 50,000/- in 1963 as the said property fetched the highest bid of Rs. 50,000/- in an auction held in an execution proceeding in 1963 and further by allowing a reasonable increase for rise in price since 1963 and by taking into account the high price in the locality and by giving the party in possession the first option to retain the whole property on payment of the value of her 13/16th share within certain period.

10. Relying upon the said decision Mr. Bhattacharya submitted that since his client is in possession of the entire property, though she has less share therein, preference should be given to her to purchase the said property on payment of the compensation to other co-sharers and such just compensation, should be

determined by following the method as indicated by the Hon"ble Supreme Court in the said decision.

11. The learned Advocate, appearing for the plaintiff/opposite party, refuted such submission of Mr. Bhattacharya by stating inter alia that the principle which was laid down by the Hon"ble Supreme Court in the aforesaid decision has no application in the facts of the instant case as the facts which were before the Hon"ble Supreme Court in the said case are not identical with the facts of the present case. He further submitted that no doubt in the facts of the instant case the property cannot be partitioned by meets and bounds as per the shares of the parties as the property is too small and the number of co-shares are many. As such he submitted that under such circumstances, justice will be sub-served, if the property is sold to the highest bidder in an auction amongst the co-sharers so that the unsuccessful co-sharers who will not be able to purchase the suit property, can get proper valuation of their share from the sale proceeds.

12. Accordingly he supported both the impugned orders.

13. Let me now consider the submission of the Counsel of the respective parties in the fact of the instant case. Since admittedly the suit property is so small that it cannot be conveniently partitioned amongst the co-sharers by metes and bounds without destroying its intrinsic worth, the Court has to resort to the process known as owelty money and by allowing one of them to retain the entire suit property on payment of just compensation to the other. Thus adoption of this process of partition by owelty money cannot be disturbed in the instant case. In fact, the Hon"ble Supreme Court indicated in the said decision that determination of the owelty money by auction is also an accepted mode but the said mode was found not suitable in that particular case for the reasons as indicated in the said judgment. However, the Hon"ble Supreme Court did not held therein that the mode which was adopted in the said case is the only mode for determination of owelty money and acceptance of the other mode by sale by auction cannot be adopted at all in any circumstances.

14. In this context a question has cropped up as to how to work out the just compensation in the instant case which the unsuccessful party is required to be paid by the party who will be allowed to retain the whole of the suit property.

15. On careful consideration of the decision of the Hon"ble Supreme Court cited by Mr. Bhattacharya, this Court finds that in the said case the defendant had only 3/16th share in the suit property. The said defendant was using the suit property as a business-cum-residence. Under such circumstances the Hon"ble Supreme Court held that preference should be given to such defendant having lesser interest and financially weak so that she can retain the suit property as a whole on payment of owelty money to the other co-sharers. The Hon"ble Supreme Court found that holding of auction for determination of the value of the suit property in that

particular case would not be a proper method as the plaintiff therein who owned the major share have unlimited resources and as such the plaintiff would surely out bid the defendant in the auction. The Hon"ble Supreme Court also held that since the defendant is not only residing in the suit premises but also utilizing the same for her livelihood, preference should be given to her to purchase share of other co-sharers by following the modalities as prescribed therein, instead of putting the said property in auction. The Hon"ble Supreme Court thus chalked out a formula for determining the value of the said property by directing the learned Trial Court to ascertain the value of the said property by accepting the value thereof which it fetched in the auction held in an execution proceeding in 1963 i.e. a few years back before such decision for sale was taken and by allowing a reasonable increase for rise in price thereof since 1963 and also by taking into account the high price in the locality.

16. In the instant case, no doubt, the defendant No. 1 a widow, is in possession of the suit property. Though she has less share in the property but she never claimed that she is utilizing the said property for her residence as well as for earning her livelihood. In the instant case there is no material before this Court wherefrom this Court can ascertain as to who is financially sound than the other and further as to whether the defendant No. 1 is unable to compete with the plaintiffs if the said property is put into sale by auction. Again the basis for calculation of the valuation of the suit property which was available before the Hon"ble Supreme Court in the said decision is not available in the instant case. The valuation of the suit property as in 1963 i.e. during the pendency of the suit was available in the case before the Hon"ble Supreme Court, but no such valuation is available in the present case which may be accepted as the just valuation thereof in the previous year or two-three years back before such proposal for sale was initiated.

17. As such it is very difficult to assess the just valuation of the said property by applying the formula which was laid down by the Hon"ble Supreme Court in the said decision. Thus this Court holds that the justice will be sub-served in the instant case if the property is sold to the highest bidder in an auction amongst the plaintiffs and the defendant No. 1 as both of them expressed their intention to purchase the said property with this rider that in case of tie, preference should be given to the co-sharer who is in possession of the suit property.

18. Accordingly this Court disposes of this revisional application by modifying the impugned orders to the above extent and direct the learned Trial Judge to conclude the sale proceeding by applying the guideline as given above.

19. The revisional application is thus disposed of.

20. Urgent xerox certified copy of this order, if applied for, be given to the parties as expeditiously as possible.