

(2011) 05 CAL CK 0096**Calcutta High Court****Case No:** C.O. No. 2358 of 2008

Ashim Kumar Banerjee

APPELLANT

Vs

Radharani Mallick and Another

RESPONDENT

Date of Decision: May 19, 2011**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 47 Rule 1, Order 9 Rule 13, 151
- Partition Act, 1893 - Section 4

Hon'ble Judges: Prasenjit Mandal, J**Bench:** Single Bench**Advocate:** S.P. Roychowdhury and Anit Kr. Rakshit, for the Appellant; Sabyasachi Bhattacharyya, Manik Das and N. Mitra, for the Respondent**Final Decision:** Dismissed**Judgement**

Prasenjit Mandal, J.

This application is directed against the Order No. 316 dated April 25, 2003 and June 16, 2008 passed by the learned Civil Judge (Senior Division), 7th Court, Alipore in Misc. Case No. 22 of 1998 and Misc. Case No. 10 of 2003 respectively.

2. The short fact necessary for the purpose of disposal of this application is that the predecessor-in-interest of the Petitioner, namely Lilabati Banerjee, instituted a suit being Title Suit No. 168 of 1967 for partition claiming one-fifth share in the suit property as described in the schedule of the plaint. The said suit was renumbered subsequently as Title Suit No. 173 of 1968 and it was decreed in the preliminary form on March 13, 1968. Thereafter, the heirs of the original Plaintiff, that is, the Petitioner and others filed an application u/s 4 of the Partition Act for pre-emption and that application was converted into the Misc. Case No. 8 of 1988. That Misc. case was allowed ex parte on March 14, 1992. Thereafter, the said suit was decreed in the final form on December 4, 1995. Then an execution case bearing Execution Case No. 7 of 1995 was initiated for execution of the final decree. The possession of the

property under pre-emption was delivered to the pre-emptor by evicting Smt. Radharani Mallick, that is, the predecessor-in-interest of the opposite parties on September 7, 1996. Thereafter Smt. Mallick filed an application under Order 9, Rule 13 of the CPC for setting aside the ex parte order dated March 14, 1992 passed in Misc. Case No. 8 of 1998 and that application was converted into the Misc. Case No. 40 of 1996.

3. Smt. Mallick filed another application under Order 9, Rule 13 of the CPC for setting aside the ex parte final decree and that application has been converted into the Misc. Case No. 39 of 1996 subsequently, renumbered Misc. Case No. 23 of 1997 and again renumbered as Misc. Case No. 21 of 1998.

4. The contention of the Petitioner is that they did not get any notice of the Misc. Case No. 40 of 1996 (subsequently renumbered as Misc. Case No. 24 of 1997) and then again renumbered as Misc. Case No. 22 of 1998. That misc. case was allowed ex parte against Lilabati Devi, predecessor-in-interest of the Petitioner on November 21, 1998. In C.O. No. 3123 of 1998, the order of setting aside the order of pre-emption was affirmed on December 15, 1998. But, Lilabati Devi was not served on a notice in the C.O. No. 3123 of 1998 and she did not appear in the said C.O. case at all. Lilabati Devi filed an application u/s 151 of the CPC on November 20, 1999 in the Misc. Case No. 22 of 1998 for recalling the order dated November 21, 1998. Thus, I find that the application for recall of the said order had been filed after one year from the date of the order dated November 21, 1998. That application was rejected by the learned Trial Judge by the Order No. 316 dated April 25, 2003. Subsequently, Lilabati Devi filed an application for review of the order dated April 25, 2003 and that review application being Misc. Case No. 10 of 2003 was also dismissed by the impugned order dated June 16, 2008. Being aggrieved by such orders of rejection of the application u/s 151 of the CPC and the application for review, the Petitioner has filed this application.

5. Now, the point for consideration is whether the impugned orders should be sustained.

6. Upon hearing the learned Counsel for the parties and on going through the materials on record, I find that the facts as stated above, are not in dispute at all. By the earlier order dated April 25, 2003, the learned Trial Judge rejected the application u/s 151 of the CPC filed by Lilabati Devi for setting aside the ex parte order passed in Misc. Case No. 22 of 1998. As per order No. 105 dated July 11, 1997 in Misc. Case No. 22 of 1998, on consent of both the sides, the service of summons upon the opposite party Nos. 4 to 10 was dispensed with. Subsequently, in the Civil Revision Case No. 3123 of 1998, the Hon'ble Court has observed that the order was passed of the Civil Revision Case in the presence of Lilabati Devi. Thereafter, the learned Trial Judge has observed that the ground of non-service of summons upon Lilabati Devi could not be believed.

7. From the above facts, it appears that by the order dated July 11, 1997 service of notice of the Misc. Case No. 40 of 1996 renumbered as Misc. Case No. 22 of 1998 upon Lilabati Devi was dispensed with. Lilabati Devi also participated in the C.O. No. 3123 of 1998. So, her contention that she was unaware of the Misc. Case No. 22 of 1998, cannot be accepted. I, therefore, hold that the learned Trial Judge has rightly rejected that belated application u/s 151 of the Code of Civil Procedure. There is no mistake or error on the part of the learned Trial Judge in passing the impugned order.

8. Mr. Roychowdhury has contended that fraud had been practised upon the Court in order to set aside the order of pre-emption and so the impugned order dated April 25, 2003 should not be supported. I have gone through the entire lower record but it does not appear that fraud had been practised upon the Court to have the order of pre-emption set aside. So, this contention on behalf of the Petitioner cannot be accepted.

9. So far as the review matter is concerned i.e. Misc. Case No. 10 of 2003, the impugned order was passed on April 25, 2003 and the application for review was filed on June 3, 2003. That application for review was dismissed on contests on June 16, 2008. The learned Trial Judge has discussed elaborately as to the scope of review as per Order 47 Rule 1 of the Code of Civil Procedure. If I discuss the same, it will be nothing but a repetition of the same. I hold that the learned Trial Judge has arrived at a correct conclusion.

10. As regards delay, Mr. Roychowdhury has referred to the decision of Brij Indar Singh v. Kanshi Ram and Ors. reported in Indian Appeals 1917 218. He has submitted that if sufficient cause for admitting of a time barred application is shown, the Court can exercise judicial discretion.

11. Mr. Roychowdhury has next referred to the decision of Jatindra Nath Nandi and Ors. v. Krishnaghan Nandi and Ors. reported in 1956 CWN 858 and he submits that the High Court is competent to see that proper orders are made when a matter comes in revision. The mere fact that in the present case, the Plaintiffs did not move against a particular order would not stand in the way of the High Court making an application in accordance with law.

12. Mr. Roychowdhury has next referred to the decision of Collector of Central Excise, Jaipur Vs. M/s. Raghuvan (India) Ltd., particularly the Head Note B and thus, he submits that the limitation period for doing or not doing an act has to be enacted and prescribed and cannot be imparted by the Courts by implication. Albeit, in absence of a limitation period for exercise of a power affecting the right of a citizen, the courts can hold that the same would be exercised within a reasonable time.

13. Thus, Mr. Roychowdhury has submitted that in appropriate cases, the court could well entertain a belated application and in the instant case, the Court should entertain the belated application for recall of the order dated November 21, 1998.

14. On the contrary, Mr. Sabyasachi Bhattacharyya appearing on behalf of the opposite party has referred to the decision of [Inderchand Jain \(D\) through L.Rs. Vs. Motilal \(D\) through L.Rs.,](#) and submits that re-appreciation of evidence by the review court is beyond the scope of its review jurisdiction. The Review Court cannot sit in appeal over its own order and rehearing of the matter is impermissible in law.

15. Thus, he submits that present application should be rejected. This decision, I hold, is appropriate in the instant situation and so, the application for review is not maintainable.

16. Mr. S. Bhattacharyya has referred to the decision of Ananda Mohan Khara v. Jaladhar Mondal and Anr. reported 1998 WBLR (Cal) 369, Mr. Bhattacharyya has submitted that when no period of limitation is provided, 90 days period is reasonable. In the instant case, the application u/s 151 of the CPC had been filed after one year from the date of setting aside the order.

17. Mr. Bhattacharyya has also referred to the decision of Tarapada Dey and Ors. v. Amitava Dey reported in 2009 (3) CHN 798 and thus, he submits that the review application under Order 47, Rule 1 of the CPC lies if there has been a discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. In the instant case, the Petitioner having failed to satisfy either of the conditions of review, the Trial Court was justified in rejecting the belated application u/s 151 of the CPC and so, there is no scope of interference with the impugned order.

18. Having considered the above facts and circumstances, I am of the view that the learned Trial Judge is quite justified in passing the impugned order dated April 25, 2003 holding that service of summons was duly dispensed with upon Lilabati Banerjee, opposite party No. 4 and other opposite parties on consent by the parties. And so, there is no scope of interference with the order dated April 25, 2003. The learned Trial Judge has, therefore, rightly rejected the belated application u/s 151 of the CPC filed by Lilabati Banerjee by the order dated April 25, 2003.

19. Consequently, the application for review under Order 47, Rule 1 of the CPC is not maintainable as any of the conditions for review has not been fulfilled in the instant case. So, there is no scope of interference with the order dated June 16, 2008.

20. Accordingly, I am of the view that the Petitioner has failed to show errors of law in the impugned orders.

21. So, the application fails to succeed. It is, therefore, dismissed.

22. Considering the circumstances, there will be no order as to costs.

23. The records of the C.O. No. 3123 of 1998 disposed of on December 15, 1998 and the Title Suit No. 168 of 1967 now pending before the learned Civil Judge (Senior Division), 7th Court, Alipore be returned at once to the concerned Department and the Court.

24. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.