CIVIL REVISION

Present :

The Hon'ble Mr. Justice Prasenjit Mandal

Judgment on 08.09.2010

C.O. No. 3857 of 2008

Debashis Ghosh.

Versus

Subhas Chandra Ghosh & ors.

Points:

Addition of party – After the exparte preliminary decree whether party can be added on the ground of devolution of interest of one of the defendant before granting of probate- Code of Civil Procedure, 1908 –O 1 R 10

Facts:

The opposite party no.1 instituted a suit for partition against his two brothers claiming 1/3rd share in the suit property. Trial Judge passed an ex parte decree for partition in the preliminary form declaring 1/3rd share of each of the plaintiff, defendant no.1 and the defendant nos.(2a) and (2b) collectively. After passing of the said preliminary decree, the petitioner filed an application under Order 1 Rule 10(2) of the C.P.C. for addition of party of himself and his five brothers as defendants on the ground of devolution of interest of the petitioner and his brothers on the basis of a Will executed in their favour by the deceased original defendant no.2 in respect of his share in the suit property. That application was rejected by the learned Trial Judge.

Held:

The property in suit, as described in the schedule of the plaint was inherited by the plaintiff, defendant no.1 and the original defendant no.2 (now deceased) in equal share. Thus, each of them inherited to the extent of 1/3rd share in the suit property. Preliminary decree had been passed ex parte accordingly, when the defendants though appeared in the suit did not contest

afterwards. During the pendency of the suit, thereafter, on the death of the original defendant no.2, his heirs have been substituted as defendant nos.(2a) and (2b) in the suit. Thus, Court finds that interest of the defendant no.2 was fully protected by the preliminary decree passed by the learned Trial Judge. The learned Trial judge has rejected the application for addition of parties on the grounds that though the applicant and his five brothers claimed the share of the defendant no.2 by a deed of Will, the deed of Will has not been probated as yet and so the petitioner and his five brothers did not accrue any right, title and interest in the suit property.. Since probate has not yet been granted, I do not find anything wrong in the impugned order. Para 3 and 4

Cases cited:

Hem Nolini Judah Vs. Isolyne Sarojbashini Bose and ors., AIR 1962 SC 1471; Amit Kumar Shaw and anr. Vs. Farida Khatoon and anr., (2005) 11 SCC 403; Vaman Ganpatrao Trilokekar and ors. vs. Malati Ramchandra Raut and ors., AIR 1988 Bombay 321; Terai Tea Co. Pvt. Ltd. vs. Kumkum Mittal and ors., AIR 1994 Cal 191

For the petitioner: Mr. Bratindra Narayan Roy,

Ms. Priyanka Das.

For the opposite party No.1: Mr. Falguni Majhi.

For the Opposite party nos.2 & 3: Mr. Sanjoy Ghosh.

Prasenjit Mandal, J.: This application is directed against the order no.90 dated July 19, 2008 passed by the learned Civil Judge (Senior Division), Asansol in Title Suit No.107 of 1995 rejecting the petitioner's application under Order 1 Rule 10(2) of the Code of Civil Procedure.

2. The short fact of the case is that the opposite party no.1 instituted a suit for partition being Title Suit No.107 of 1995 in the Court of the learned Assistant District Judge, Asansol against his two brothers claiming 1/3rd share in the suit property, as described in the schedule of the plaint. In that

suit, the defendant no.1 filed a written statement but he did not contest the suit ultimately. During the pendency of the suit, the opposite party no.2 also appeared but he also did not contest the suit. Accordingly, the learned Trial Judge passed an ex parte decree for partition in the preliminary form on January 5, 2007 declaring 1/3rd share of each of the plaintiff, defendant no.1 and the defendant nos.(2a) and (2b) collectively. After passing of the said preliminary decree, the petitioner filed an application under Order 1 Rule 10(2) of the C.P.C. for addition of party of himself and his five brothers as defendants on the ground of devolution of interest of the petitioner and his brothers on the basis of a Will executed in their favour by the deceased original defendant no.2 in respect of his share in the suit property. That application was rejected by the learned Trial Judge by the impugned order. Being aggrieved, the petitioner has come up with this application.

3. Having considered the submission of the learned Advocate of both the sides and on perusal of the materials on record, I find that admittedly the property in suit, as described in the schedule of the plaint was inherited by the plaintiff, defendant no.1 and the original defendant no.2 (now deceased) in equal share. Thus, each of them inherited to the extent of 1/3rd share in the suit property. Preliminary decree had been passed ex parte accordingly, when the defendants though appeared in the suit did not contest afterwards. During the pendency of the suit, thereafter, on the death of the original defendant no.2, his heirs have been substituted as defendant nos.(2a) and (2b) in the suit. Thus, I find that interest of the defendant no.2 was fully protected by the preliminary decree passed by the learned Trial Judge.

4. On perusal of the order impugned, I find that the learned Trial judge has rejected the application for addition of parties on the grounds that though the applicant and his five brothers claimed the share of the defendant no.2 by a deed of Will, the deed of Will has not been probated as yet and so the petitioner and his five brothers did not accrue any right, title and interest in

the suit property. Moreover, the defendant no.2 filed a written statement in the suit but such written statement does not lay down any whisper relating to the execution of the deed of Will, as claimed by the petitioner. Since probate has not yet been granted, I do not find anything wrong in the impugned order.

5. Mr. Roy refers to the decision in the case of Hem Nolini Judah Vs. Isolyne Sarojbashini Bose and ors. reported in AIR 1962 SC 1471. But this is not applicable as no probate has been obtained as yet.

6. Mr. Bratindra Narayan Roy, learned Advocate appearing on behalf of the petitioners, refers to the decisions of Amit Kumar Shaw and anr. Vs. Farida Khatoon and anr. reported in (2005) 11 SCC 403 and submits that joinder of transferee pendente lite in the title suit is the discretionary power of the Court and it must be exercised unless the interest of the petitioners are secured properly. In the instant case, I find that preliminary decree has been passed for partition declaring the share of the original defendant no.2. there is no evidence that the plaintiff has taken any step for effecting partition by appointment of a survey passed commissioner. The petitioner also did not get any probate in respect of the Will alleged to have been executed by the defendant no.2 (since deceased). The written statement filed by the defendant no.2 does not indicate that the original defendant no.2 had executed any deed of Will in favour of the petitioner and his five brothers. Thus, the interest of the original defendant no.2 having been fully secured, I hold, that the decision of Amit Kumar Shaw (supra) is not applicable in the instant case.

7. Mr. Roy has also referred to the decision in the case of Vaman Ganpatrao Trilokekar and ors. vs. Malati Ramchandra Raut and ors. reported in AIR 1988 Bombay 321 and thus, he submits that the executors of the heirs of the deceased defendants would seek leave to the court only if they were co-sharers in the property. The Will having not been probated as yet, the

petitioner cannot be declared to have the share in the suit property. So, this decision is not also applicable.

8. As regards the decision in the case of Terai Tea Co. Pvt. Ltd. vs. Kumkum Mittal and ors. reported in AIR 1994 Cal 191 filed by Mr. Roy, as I have held that interest of the petitioners have been secured in the preliminary decree and no application for passing a final decree has been filed as yet, and the petitioner and his five brothers need not be added as parties to the suit for the time being. There is a scope for amicable partition and if it is not done if the petitioner obtains probate before passing the final decree, he is at liberty to approach the court on behalf of the legatees, if the situation demands, in accordance with law.

9. This application is disposed of in the manner as indicated above.

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

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

(Prasenjit Mandal, J.)