

OD-8

APO No. 25 of 2019
GA No. 321 of 2019
in
CS No. 540 of 1988

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

PRAMATHA NATH SEN
Versus
SANDHYA BASU MALLIK & ORS.

BEFORE:

The Hon'ble JUSTICE SANJIB BANERJEE
And
The Hon'ble JUSTICE SUVRA GHOSH

Date : February 14, 2019.

Appearance:
Mr. D.C. Thakur, Adv.
Mr. A.K. Mukhopadhyay, Adv.

Mr. Sudip Deb, Adv.
Mr. Sunil Kumar Chakraborty, Adv.
Mr. Sumitava Chakraborty, Adv.

Mr. Sanat Kumar Dutta, Adv.

The Court : In view of the good grounds shown, the marginal delay in preferring the appeal is condoned.

The appeal is directed against an order dated November 26, 2018 by which a commissioner had been appointed to partition the joint assets between the parties.

The appellant here is the first defendant in the partition suit. Two of the sisters of the appellant are the plaintiffs and a third sister, who did not contest the suit at the preliminary stage, is the second defendant.

The plaintiffs claimed that the immovable properties indicated in Annexure-“A” to the plaint along with the cash and deposits in banks and like places described at Annexures-“B” and “C” to the plaint and the other immovable properties set out at Annexure-“D” to the plaint were all joint properties and the parties, as the children of the original owner, were each entitled to one-fourth therein.

The matter was taken up at the preliminary stage and by a judgment and preliminary decree dated December 15, 2016, each of the parties to the suit was declared to be entitled to one-fourth share in the properties indicated in Annexures-“A” and “D” to the plaint. As noticed above, Annexure-“A” to the plaint covered all the immovable properties and Annexure-“D” to the plaint covered all the movable properties like gold coins, jewellery and silverware. The bank accounts and investments covered by Annexures-“B” and “C” to the plaint were not found to be the joint properties of the parties. The declaration in the preliminary decree is worded thus:

“It is declared that the plaintiffs and defendants have 1/4th share each in the suit properties in Annexure-‘A’ and Annexure-‘D’ to the plaint as discussed hereinabove.”

Ordinarily, it is a decree that one goes by, notwithstanding what may be contained in the judgment that precedes it, unless there is an anomaly or there is an indication in the decree to refer to the judgment.

The preliminary decree also provided for the parties to amicably divide the joint assets between themselves, failing which liberty was given to any party to approach the Court for appointing a Commissioner of Partition. Upon the joint properties not being amicably divided within any reasonable time, the plaintiffs approached the Court for the appointment of a commissioner. The present appeal arises out of such order.

In course of the Court appointing a commissioner, a submission was made on behalf of the first defendant that though the preliminary decree referred to the entirety of Annexure-“D” to be the joint properties of the parties, but the judgment that preceded the decree had clearly held that it was only the jewellery indicated in Annexure-“D” which was joint and not the gold coins referred to therein.

It appears that the first defendant relied on a deed of gift said to have been executed by the father of the parties on April 15, 1983, a few months before the father died. A copy of such deed of gift has been appended to the stay petition and the items gifted by such deed to the first defendant-son are indicated as follows:

“1) Money lying jointly in Fixed Deposits & Savings Bank Accounts with different Bank on “either or survivor” basis;

- 2) Deposits in C.D.S.Account lying at the Allahabad Bank, South Calcutta Branch.
- 3) Accumulated Balance in N.S.C.VI Issue; lying at Kalighat P.O. for the benefit of my grandsons and ; --
- 4) Gold Coins as declared in the Gold Control return, to hold the same by him absolutely and for ever. These gifts shall take effect on my death.”

In the judgment of December 15, 2016, the Court clearly upheld the validity of the deed of gift and found that the movable properties, investments and the like indicated in the deed of gift were beyond the joint assets of the parties to the suit. It is for such reason that Annexures-“B” and “C” to the plaint were not included in the preliminary decree since such annexures covered the deposits and investments in banks and the like. As far as Annexure-“D” is concerned, it has two entries indicating gold coins. The rest of the entries are not all items of jewellery, but are certainly not gold coins. The two relevant entries indicating the gold coins in Annexure-“D” to the plaint are set out:

“2. 282 piece of Arabic, Porsaian(*sic.*), Murshidabad gold coins, Victoria Mohars, Full Gunees (British), in possession with defendant No. 1.

“3. 14 Pieces of Gold Coins lying with Central Excise Gold Cell, Calcutta - papers are (Documents of seizure list) with defendant No.1.”

The plaintiffs assert here that even if the preliminary of December 15, 2016 did not recognise the entirety of Annexure-“D” to be the joint properties of the parties, in the light of the discussion in the judgment that preceded the decree, only the items covered by the deed of gift of April 15, 1983 ought to be excluded insofar as they related to Annexure-“D” to the plaint. The fourth item in the deed of gift, according to the plaintiffs, not only indicates gold coins but also refers to such gold coins as declared in the gold control return. It is the contention of the plaintiffs that the deed of gift cannot be taken to imply that all the gold coins owned by the donor were indicated to pass to the donee under the relevant document.

On a plain reading of the deed of gift, the plaintiffs submit, it is only such gold coins which are declared in the gold control return that may have been intended to pass to the donee and not the other gold coins that were owned by the donor.

What the plaintiffs assert is a possible view based on the relevant deed of gift. However, the preliminary decree and the judgment that preceded it confined the joint interest of the parties to only the jewellery covered by Annexure-D to the plaint and excluded all the gold coins referred to therein. The plaintiffs did not prefer any appeal from the relevant judgment and preliminary decree and, as such, they cannot now seek to restrict the effect of the judgment and the preliminary decree in the manner contended.

Notwithstanding the deed of gift referring only to gold coins covered by the gold control return, this Court found that all the gold coins indicated in Annexure-D to the plaint had to be excluded as having passed under the deed of gift to the first defendant. Such position has attained finality and the plaintiffs cannot be permitted to reopen the same by a side-wind in the first defendant's present appeal.

Accordingly, the order impugned dated November 26, 2018 is modified by directing the Commissioner of Partition to take appropriate steps in respect of all the immovable properties indicated in Annexure-A to the plaint and also in respect of all the movable properties indicated in Annexure-D to the plaint except the gold coins covered by Items 2 and 3 in Annexure-D to the plaint.

The remainder of the order dated November 26, 2018 is left undisturbed.

APO No.25 of 2019 and GA No.321 of 2019 are disposed of as above.

There will be no order as to costs.

(SANJIB BANERJEE, J.)

(SUVRA GHOSH, J.)