

Manoj Das and ors. Vs. Smt. Snehalata Mathuli and ors.

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Court : Kolkata

Decided On : Jan-18-1996

Reported in : (1996)1CALLT277(HC)

Judge : Basudeva Panigrahi, J.

Acts : [Limitation Act, 1963](#) - Section 5; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 26 - Order 39, Rule 7

Appeal No. : C.O. No. 4423 of 1991

Appellant : Manoj Das and ors.

Respondent : Smt. Snehalata Mathuli and ors.

Advocate for Def. : Bhaskar Bhattacharjee and ;Sk. Sikdar, Advs.

Advocate for Pet/Ap. : S.P. Roy Chowdhury and ;Usha Maity, Advs.

Disposition : Application dismissed

Judgement :

Basudeva Panigrahi, J.

1. This revision is directed against Order No. 111 dated 11.6.91 passed by the Learned Assistant District Judge, 2nd Court, Midnapur in J. Misc. Case No. 6/91 rejecting the application filed by revision petitioners under Section 5 of the Indian

Limitation Act. Defendants 1(ka), 1(kha) and 1(ga), in T.S. No. 11/88 filed this revision. The mother of the petitioners 4 to 7 Late Saibalini Debi purchased a portion of Plot No. 440 from Khandibala Dasi by a Registered sale deed dated 27.7.61. Since the date of purchase, she had been in possession of the suit land and constructed boundary wall on all sides. After the death of Saibalini Debi the petitioners 4 to 22 inherited the said properties and possessed the same. The defendant Bidangabala Das purchased eastern portion of the suit Plot No. 440 measuring 43 decimals under a registered sale deed dated 11.1.58 and she gifted her purchased property to her husband Kailash Das by a registered gifted deed dated 29.7.66. Kailash sold some portion from that land and, subsequently, died on 3.5.78 leaving three sons, five daughters and his widow Bidenga Bala Das as his heirs. Bidenga Bala Das and five daughters transferred the property in favour of three sons of Kailash by a registered deed dated 18.11.81. Before the death of Kailash he had transferred 39 decimals out of 43 decimals of the said land. The petitioner No. 2 claimed to have purchased 17 decimals of suit plot No. 440 from Mahammad Idrish and Nismannessya Bibi by a registered deed dated 23rd May, 1960. It is claimed by the petitioners 1 (ka) to 1(ga) and the defendants-petitioner No. 2 that they have been in possession in specific and separate parcel of the land by constructing house, well etc. within the land in Plot No. 440.

2. The plaintiff-opposite party filed Title Suit No. 11/88 for partition before the learned Assistant District Judge, 2nd Court, Midnapur. Preliminary decree was passed on 3.12.88. The plaintiff following the said preliminary decree applied for final decree and in the said proceeding Advocate Commissioner Satyendra Nath Jana was appointed for local investigation and partition. It is stated that in the preliminary decree the court directed to partition the property following the rule of equity keeping due regard to the present possession of the parties over the suit plots and their mutual convenience and inconvenience. The commissioner after local investigation and partition at the spot of the suit plots submitted his report. The court had fixed a date inviting objection from the parties. When no objection had been filed by any party against commissioner's report, the court accepted the report and passed final decree in pursuance of the same. After the final decree the plaintiff filed an exception case for taking delivery of possession in accordance with the share delineated by the commissioner. At this stage these petitioners filed

an application for review of the final decree along with an application for condonation of delay. The learned court below rejected their prayer for review of the final decree and also dismissed their applications for condonation of delay.

3. Mr. S.P. Roy Chowdhury argued in support of petition and strongly urged that the learned Trial Court has in the instant case illegally rejected the prayer of the revision petitioners under Section 5 of the Limitation Act and consequently rejected the review petition filed by the defendants. Petitioners' specific case is that they could not file any objection against the report of the learned commissioner for being misguided. It was further contended that it was not possible to know from the report that a portion of the structure of the defendants-petitioners had been included within the allotted land of the plaintiff's. It was asserted that the petitioners being informed by the clerk only on 4th March, 1991 whereafter they filed this review application. Therefore, there was sufficient reasons for having not filed objection against the commissioner's report earlier. In that event, the learned court below should have accepted their prayer vis-a-vis allowed the review application. It is contended by the petitioners that they came to know that due to non-filing objection against the report of the learned commissioner it had been accepted and the final decree had been drawn up. It is argued that the objection could not be filed even after exercise of due diligence and it was to within the knowledge of petitioners.

4. Mr. Roy Chowdhury has tenaciously argued that without disposing of the application under Section 5 of the Limitation Act the learned trial court should not have considered the merits of the review application thereby grave jurisdictional error had been caused.

5. The plaintiff-opposite party had however, disputed that the petitioners had no knowledge about the report of the commissioner. It has been further stated that the review application has been designedly filed only with a view to harass the plaintiff.

6. The only ground taken by the petitioners challenging the commissioner's report was that they could not know the implication of report inasmuch as the commissioner in his plan did not state about any structure which is standing on the

suit plot. Again due to the absence of such mention of the structure the petitioners could not understand the effect of the commissioner's report. Therefore, having been misled by the commissioner's report the petitioners could not file objection in time. From the impugned order it appears that the revision petitioners were represented through an Advocate in the court below. The commissioner submitted his report as far back as on 8.1.90 along with all connected papers. On several occasions the petitioners were asked to file objection if any against commissioner's report. Even then it did not arise any response. As per order No. 99 dated 19.6.90 the Advocate of the petitioners was informed about the report of the learned commissioner. On 6.7.90 the learned Advocate of the petitioner in the trial court expressed that he would file written objection and prayed for time and accordingly 20.7.90 was fixed for hearing on the commissioner's report. The defendants although had been provided several opportunities did not file any objection. Accordingly the commissioner's report was accepted. Thus, the learned Trial Court had specifically observed that the claim of the petitioners that they were not aware of the fact about the filing of the written objection against commissioner's report had no basis. The learned Trial Court also refused to accept the contention of the petitioner that they were misguided by the learned commissioner's report which did not indicate the position of the structure standing upon the suit plots. Further it was observed that they failed to prove that after due diligence they could not know about the passing of the final decree. Since specific date was fixed by the parties who did not avail such opportunities by filing objection against the commissioner's report, later on they can not be permitted to state that a party was prevented from filing objection against the commissioner's report. Such conduct of the parties can be said nothing but casual and callous. It emerges from the application that the petitioners could not make out any grounds as to why they failed to file written objection from 20.7.90 till 4.3.91. Since no satisfactory explanation has been assigned by the petitioners before the trial court it was perfectly justified in rejecting their prayer for condonation of delay. In a pending litigation the party has to keep strict vigil about the progress of the case. More so, when a lawyer has been engaged who has to act as sentinel and zealously safeguard the interest of his client. Peculiarly, in the instant case, instead of the lawyer taking note of the date for filing objection the court reminded the

counsel for taking such steps. In the above context, the petitioners can not be permitted to take a stand that they were misled in not filing the objection against the commissioner's report. Even after passing of the final decree the petitioners could have filed an appeal. But curiously they did not file any appeal. Therefore, it is implicit that the petitioners had no grievance against the final decree rather allowed the commissioner's report to be accepted by the court.

7. Mr. Roy Chowdhury, the learned counsel has invited my attention that without disposing of the application under Section 5 of the Limitation Act, the learned court, should not have discussed the merit of the review application thereby it had occasioned irreparable injury to the petitioners. On a careful reading of the impugned order, at the first blush it appears that the learned Trial Court had only discussed about 'the merit of the application. But on a thorough reading of the impugned order it appears that the learned trial court has also discussed the merit of the application filed under Section 5 of the Limitation Act and rejected the same. Therefore, it could not be argued that the learned trial court has committed serious jurisdictional error in deciding both the matters simultaneously. Though, the learned counsel for the petitioners has placed reliance on several decisions such as AIR 1987 SC 1357; 67 C.W.N. 482; 92 C.W.N. 558 but on careful scrutiny it is found none of them is applicable to the present facts and circumstances. Accordingly they need not be discussed at length to avoid proliferation of the judgment.

Therefore, in the above backdrop of case I found there is no merit in the revisional application and accordingly it is dismissed but in the circumstances without costs.