HIGH COURT OF CALCUTTA
Bench: The Hon'ble Justice Ajoy Kumar Mukherjee
Date of Decision: 10th May 2024

CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

FMA No. 3846 of 2014

Sandhya Dhara & Others. …APPELLANT(S)

VS

Saradindu Dhara & Others. …RESPONDENT(S)

Legislation and Rules:
Section 78 of the Indian Trusts Act, 1882,
Order XLI Rules 23, 23A, 24, 25, and 33 of the Code of Civil Procedure,
Indian Succession Act

Subject: Appeal against the order of remand involving the interpretation and enforcement of a family settlement deed, its revocation, and the resultant direction for partition suit.

Headnotes:

Family Law and Trusts – Dispute over family settlement and subsequent deed of revocation – Plaintiffs/appellants contested the validity of the revocation of a family settlement that purportedly created a life interest for Sudhangshu Sekhar Dhara and vested remainder in the beneficiaries – Trial court dismissed the suit, identifying the settlement as a trust created by will, revocable under Indian Trusts Act, Section 78 – Appellate court upheld dismissal but remanded for partition – Held, the deed construed as creating a trust rather than an immediate partition, allowing for revocation under Section 78 of the Indian Trusts Act [Paras 1-18].

Procedural Law – Remand inappropriate under Order XLI Rule 24 if sufficient evidence exists on record – Appellate court modified trial court's dismissal into a directive for partition without setting aside original judgment – Supreme Court directed final disposition under Order XLI Rules 24 and 33 without remand, citing sufficient evidence to settle the dispute finally [Paras 19-25].

Decision: FMA No. 3846 of 2014 allowed in part – Order of remand set aside – Court directed to dispose of the case in accordance with Order XLI Rule 24 read with Rule 33, to finalize the partition decree based on the sufficient evidence already on record.

Referred Cases:

- Judgment reported in (2016) 10 SCC 767
- Judgment reported in (2017) 14 SCC 207
- Judgment reported in (2021) 11 SCC 277

- Judgment reported in (2015) 11 SCC 762
- AIR 1988 SC 54
- Bachhaj Nahar v. Nilima Mondal & Another [(2008) 17 SCC 491]

Representing Advocates:
For the Appellants: Mr. Kumar Jyoti Tewari, Ms. Shabana Hasim, Ms. Neha Roy
For Respondent No. 6 and 8: Mr. D.K. Adhikari, Mr. Debdip Adhikari
For Respondent No. 5: Ms. Sohini Chakraborty, Mr. Sagnik Chatterjee, Mr. Sayan Mukherjee
For Respondent No. 1, 2, 3, 4, 7, 9, and 10: Mr. Ariruddha Chatterjee, Mr. Asif Sohail Tarafdar

Ajoy Kumar Mukherjee, J.

1. The instant appeal has been preferred by the plaintiffs/appellants against the order of remand vide judgment and decree dated February, 12th 2014 passed by the learned Additional District Judge, 14th Court, Alipore, in T.A No. 126 of 2012. By the order impugned learned Court below modified the judgment and decree dated 26th April, 2012 passed by learned Civil Judge (Senior Division) 7th Court, Alipore, in T.S. no. 86 of 2005 and thereby ordered to send the matter before the Trial court on restricted remand as if it is a partition suit to mould the Relief to the parties.

2. The background of the case is that the father of the parties namely Sudhangshu Sekhar Dhara (since deceased) executed an alleged family settlement dated 6th July 1992 and distributed his property among his sons and daughters and retained one portion under his 'khas' possession. In the said deed it was specifically mentioned that aforesaid Sudhangshu would enjoy the property as trustee and after his demise the trust would be dissolved and the beneficiaries would get their portion absolutely. Subsequently on January, 3rd 1996, said Sudhangshu executed a deed of revocation, thereby cancelled and revoked the aforesaid deed of settlement dated 6th July, 1992.

3. The plaintiffs being some of the sons and daughters of said Sudhangshu filed aforesaid T.S. No. 86 of 2005, interalia seeking for

declaration of their absolute right title interest in the suit property in terms of settlement as mentioned in the schedule to the plaint and also for cancellation of the aforesaid deed of revocation dated January, 3rd 1996.

4. The defendant no. 1, 2 and 4 contested the said suit by filing written statement denying all material allegations brought by the plaintiff in the plaint. The specific case of the defendants is that the deed of settlement executed by Sudhanghsu does not exist, following the deed of revocation and therefore the question of allotment as per deed of settlement does not arise and that now the parties are governed by the Successions Act and accordingly they prayed for dismissal of the suit.

5. Learned Trial Court by a judgment and decree dated 26.04.2012 dismissed the aforesaid suit observing that the deed dated 6th July, 1992 is basically a deed of trust created by will. Being aggrieved by the aforesaid judgment and decree the plaintiffs preferred appeal before the District Judge, Alipore being T.A. No. 126 of 2012. Learned Appellate Court after hearing the parties was pleased to affirm the ultimate conclusion recorded by the Trial court, but held that the reasons thereof are not at all sustainable. Therefore, the court below invoking it's jurisdiction under order XLI. Rule 33 of Code of Civil Procedure was pleased to modify the decree directing the learned trial judge to proceed with the suit in order to divide the suit property among the parties to the suit by metes and bound as if the suit is one for partition to pass a preliminary decree, declaring respective shares of all the parties to the suit according to the rule of succession applicable to the parties. Therefore Court below sent back the suit on restricted remand to the trial court with the direction to pass a preliminary decree for partition in respect of the entire suit property covered under the deed of settlement according to the share of the parties and also to proceed to pass a final decree of partition in accordance with law, if amicably partition could not be effected by metes and bounds by the parties.

6. The plaintiffs/appellants being aggrieved by the said order of remand preferred the instant appeal being FMA No. 3846 of 2014. This Court by its order dated March 5th, 2024 held that the appeal would be heard on the following substantial question of law.

> "whether the court below was justified in remanding the case for passing a decree of partition by metes and bounds in respect of the suit property when he was of the clear view that Sudhangshyu Shekahr Dhara by Exhibit-2 has created a trust by will and he has revoked the same by the deed of cancellation marked as Exhibit-A"

7. Mr. Tewari on behalf of the appellants, submits that so far as Exhibit 2 i.e. deed of settlement dated 03.07.1992 is concerned both the courts below misconstrued such deed. The recital of such deed would indicate that the settlement deed executed on 3.07.1992 is to take effect on that day. On careful reading of recital of the said document, it reveals that Sudhangshu had created in himself a life interest in the property and vested the remainder in favour of the beneficiaries. He further contended that it is settled law that the executant while divesting himself of the title to the property could create a life interest for his enjoyment and the property would be devolved on the settlees with absolute right on the settlor's demise. Thus Exhibit-2 is a deed of settlement and not a deed of trust created by will as has been wrongly held by both the courts below. He further submits that the aforesaid deed of settlement dated 03.07.1992 cannot be cancelled by the executant by way of revocation deed dated 3rd January, 1996. The settlor ought to have approached before the civil court for cancellation of such deed of settlement. The Registrar cannot act as a quasi-judicial authority to cancel the deed of settlement. In fact a registered instrument cannot be cancelled by such unilateral action. In this context he relied upon the judgment reported in (2016) 10 SCC 767.

8. Regarding the order of remand Mr. Tewari on behalf of the appellant argued that the impugned judgment and decree passed by the court below is

contrary to the provision of section 107 read with order XLI rule 23, 23(A), 24 and 25 of the Code of Civil Procedure. He strenuously argued that for remanding the suit to Trial Court, the court below had to set aside the judgment and decree under appeal. While affirming the judgment and decree under Appeal, Court below cannot remand the matter even by exercising power under order XLI rule 33 of the Code of Civil Procedure. In this context he relied upon decision of (2017) 14 SCC 207 and (2021) 11 SCC 277. He further argued that the court below while passing the order impugned had travelled beyond pleading and practically had transformed a suit for declaration into a suit for partition. The relief granted by the court below is contrary to the pleading and reliefs sought for in the pleading, which is beyond his jurisdiction. In this context he relied upon (2008) 17 SCC 491 (Bachhaj Nahar Vs. Nilima Mondal & another)

9. Mr. Adhikari appearing on behalf of the respondent no. 6 and 8, against the above mentioned argument made by the appellant, submits that the court below after examining the documents and evidence adduced by the parties came to the final finding that the alleged deed of settlement is not a deed of settlement according to the recital, but it is a trust created by will which can be revoked under section 78 of the Indian Trust Act. He further submits that the learned court below has not done anything contrary to the law by affirming the judgment and order passed by the learned Trial Court. Moreover the Court below had modified the order of learned Trial Court to mould the relief, the parties are entitled to get by way of partition and thereby remanded back the case to the Trial court by exercising his judicial discretion under order XLI rule 33 of the Code, to proceed as if the suit is a suit for partition and to pass a preliminary decree declaring respective share of the parties in terms of rule of succession.

10. He further submits that according to the provisions under order XLI rule 24, where evidence on record is sufficient the appellate court may determine the case finally, instead of remanding the same to the Trial court. In this context he relied upon Apex Court judgment reported in (2015) 11 SCC 762 and AIR 1988 SC 54.

11. Ms. Chakraborty appearing on behalf of the respondent no.5 submits that the order of the Trial Court is justified, since the court below having elaborately dealt with the merits of the case and having come to a conclusion affirming the final adjudication of the Trial Court, had observed that the parties were all co-sharers in the suit property. The subsequent effect of such findings is that all the parties had their right title and interest over the suit property which was undivided. The instant lis is continuing since 2005 and as such to settle the dispute among the parties, the court below had directed to dispose of the suit as one for partition so that complete relief can be granted to all the parties. She further submits that under order XLI rule 33 of the Code, the court is empowered to grant such relief and to pass such decree or order as the case may require and such power may be exercised by the court in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection. Ms. Chakraborty in this context relied upon the following judgments

(a) (2008) 17 SCC 491

(b) (2017) 14 SCC 207

(c) (2021) 11 SCC 277

12. Ms. Chakraborty further argued that this High Court is dealing with the Appeal under the provision of section 100 of the Code of Civil Procedure and not under order XLIII rule 1(u) of the Code of Civil Procedure. While dealing with an appeal under order XLIII rule 1(u) of the Code, the court only has a limited scope of examining the legality of the order of remand and it is not open for the appellants to submit the merits of the case. Since the court below

was completely justified in passing the order impugned, the appellants at this stage cannot challenge the same on its merits. In fact the court below had taken realistic approach and endeavour to finally settle the dispute between the parties once for all and for which this High court should not interfere with the judgement impugned.

13. Mr. Tarafdar appearing on behalf respondent no. 1,2,3,4,7,9 and 10 contended that the impugned judgment/order did not reverse the decree passed by the Trial court. On the other hand the judgment and decree under appeal was modified to mould the reliefs to the parties that they are entitled to get. The impugned judgment passed by the Court below makes it clear that the court below affirmed the decision of the Trial court. He further submits that appellant ought to have preferred a second appeal if he was aggrieved with the impugned judgment passed by the court below and as such this appeal in its present form is not maintainable and the court below rightly remanded back to the trial court exercising his power under order XLI rule 23, 23A, 25 to give appropriate reliefs to the parties in order to stop multiplicity of proceeding. In fact there is no impediment on the part of the Court below to permit the Trial court to treat the suit as a suit for partition in order to mould reliefs to the parties which are aptly required to be decided, to bring about an ultimate conclusion of the lis.

DECISION

14. I have gone through the recital of the deed of alleged family settlement executed by Sudhangshu Sekhar Dhara on 3rd July, 1992, which is marked as Exhibit-2 before the Trial court. It has been clearly recited in the said deed by said Sudhangshu Sekhar Dhara that he acquired the suit property by way of deed of gift and he has described the settlees/his sons and daughters as beneficiaries of the deed. It is further stated in the deed that so long Sudhangshu will alive, he will act as trustee to look after the said property and he will enjoy all the usufructs derived from such property and a portion of such

income shall be expended for his own requirement and the rest portion shall be incurred for repairing and other purposes and he also stated in the said deed that he has practically created a trust which shall be treated as "Sudhangshu Sekahr Dhara Trust" and at the same time he has also stated that after his death there will be no existence of the Trust and after his death the respective beneficiaries i.e. his sons and daughters will get their respective settled portions, created in the said deed as exclusive owners.

15. On careful reading of the recital in the deed and the schedule, it is clear that on the date when the deed was executed said Sudhangshu had created right title and interest in favour of his sons and daughters/beneficiaries but only on his demise they are to acquire absolute right of enjoyment alienation etc. To put it differently, Sudhangshu had created in himself a life interest in the property in Praesenti and since the executant Sudhangshu did not divest himself of the title to the property and created a life interest for his enjoyment with the intention that the property would devolve on the settlees with absolute rights on settlor's death, both the courts below had committed no wrong in observing that the deed in question was practically a trust created by will. In order to determine as to whether it's a deed of settlement or a trust created by will, the test is whether right title and interest in the property created in praesenti or interest therein intended to be transferred only on the death of the settlor. In this context nomenclature of the deed cannot be conclusive guiding factor [(1996) 9 SCC 388].

16. The recitals in the document is to be read as a whole and in the present context, going through the recitals it appears that the executant in various places made it clear that he had not divested himself of the title of the property. In such view of the matter the provision of section 78 of the Indian Trust Act 1882 clearly attracts and if it is construed as a trust created by will, then under section 78, the trust created by will can be revoked at the pleasure of the testator at any time before his death. Accordingly Sudhangshu had

authority to revoke the said deed dated 3rd July, 1992, which he did before his death and there is no reason to observe that such revocation by Sudhangshu during his life time was illegal.

17. While coming to the later part of the judgment, it appears that the court below rightly affirmed the judgment of the Trial court but in the ordering portion he ordered to send back the record to the Trial court on restricted remand in order to pass a preliminary decree of partition in respect of the entire suit property, covered under the aforesaid deed marked exhibit-2 and to pass a final decree of partition thereafter.

18. Needless to say that court can remand a case before the trial court for fresh adjudication under order XLI rule 23, rule 23A, and rule 25 of the Code of Civil Procedure.

19. Rule 23 of order XLI of the Code provides that where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by an order, remand the case and may further direct what issue or issues shall be tried in the case, so remanded. Rule 23A of order XLI of the Code provides that the court from whose decree, an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same power as it has under the rule. On the contrary rule 24 of order XLI provides that where evidence on record is sufficient, appellate court may determine case finally instead of remanding the same to the Trial Court.

20. At the cost of repetition, it is to be noted that in the present case the suit was not disposed of on any preliminary issue by the Trial Court. The court below i.e. the first appellate court has also not set aside or reversed the judgment passed by the Trial court. As I have stated above that in order to attract rule 23 or 23A of order XLI, what is required is that the appellate court

has to set aside the order of the Trial Court. Since in the present context the Court below has not set aside the judgment and decree of the Trial Court, so rule 23 or 23A cannot have any application in the present context.

21. If we come back to the history of the present case, the beneficiaries of the Trust deed are the sons and daughters of the creator of the document namely Sudhansnu Sekhar Dhara, who was admittedly absolute owner of the property and who got the same by way of deed of gift. As said father/Sudhanshu had revoked the Trust deed created by Will during his life time, then it is obvious that exhibit-2 does not have any existence after such revocation. It is also admitted positon that original owner (father) Sudhans Sekhar Dhara died. According to the law of inheritance with the death of the father and due to extinguishment of exhibit-2, all the legal heirs of Sudhanshu have inherited share in the property covered by exhibit-2 and accordingly court below was also justified in coming to a conclusion that the real dispute between the parties which is pending for a long time can only be settled if a preliminary decree and thereafter a final decree of partition is passed and from the aforesaid facts and circumstances of the case, it also appears that hardly any further document or evidence is required for passing the said decree of partition by the Court below.

22. In such view of the matter, the Court below ought not to have passed order remanding the case to the Trial court for passing decree of partition, when the court below has sufficient jurisdiction to pass such decree and when he is of the clear view that the deed of settlement marked exhibit- 2, created by settlor Sudhanshu is a trust created by Will and in terms of section 78 of Indian Trust Act the same stood revoked by the subsequent deed of revocation marked exhibit-A and that both the parties now entitled to succeed to the suit property left by the said settlor according to the natural law of inheritance and the suit property is undoubtedly joint and undivided property of the parties and no partition has yet been taken place and for which the

appropriate relief in this case is the partition of the suit property by metes and bounds. Court below further observed that the present facts and circumstances of the case demand and require that there should a decree of partition by metes and bounds in respect of the suit property for beneficial enjoyment of the parties in order to put an end to the litigation forever.

23. In view of above observation, it is not clear what prevented the court below to invoke his jurisdiction under order XLI rule 24 of the Code which runs as follows:-

> "24. where evidence on record sufficient, Appellate Court may determine case finally.--- where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds."

24. It is needless to reiterate that remanding a case for fresh decision in the matter like the present one is nothing but harassment of the litigant. The primary object underlying rule 24 of order XLI and section 107(1) (a) is to ensure full and final settlement of controversy between he parties once and for all by drawing the final decree on the litigation without unnecessary and unjustified delay. By using the words "after resettling the issues if necessary" empowers the appellate courts to resettle the issue if necessary and decide the Appeal finally. Rule 24 applies to those cases where the evidence upon the record is sufficient to enable the appellate court to pronounce the judgment without remand. This is because the first appellate court is the final court of fact and when all questions of fact and law or of law and fact are open for consideration and decision, I find no reason as to why the court below remanded the case before the trial court for passing partition decree while affirming the judgement and decree of Trial court. In fact the court below has also not given any reason as to why he has no jurisdiction to pass order of final decree. Since in the present case the evidence on record is sufficient to

enable the Appellate Court to pronounce judgment, the order is governed by rule 24 and not by rule 23. There is no need for the court below in such cases to remand the case under Rule 25 after recasting the issue as the parties are fully aware of their respective stands and had laid all evidence in support thereof.

25. In such view of the mater FMA being 3846 of 2014 is allowed in part and the part of order impugned which only relates to order of remand is hereby set aside. Court below is directed to dispose of the case involved in the appeal, in terms of order XLI rule 24 read with order 41 rule 33 at the earliest in the light of discussion as made above.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.