

Civil Revision**Present : The Hon'ble Mr. Justice Prasenjit Mandal****Judgement On: October 5, 2010.****C.O. No. 2003 of 2009****Sk. Abul Hossain.****Versus****Sk. Rejabuddin (deceased) & Ors.****Point:**

MODIFICATION OF DECREE: Trial Judge has declared the share of the defendant no.6- Modification of the decree with regard to the share of the defendant no.6 was done in view of the directions of the Hon'ble High Court- Transfer of share had taken Place by exchange or otherwise whether court is competent to modify the decree- Code of Civil Procedure,1908, S152

Facts:

The plaintiff/petitioner herein filed the suit being T. S. No.303 of 1978 for partition before the learned Munsif, Second Court, Contai claiming 13/60th shares in the suit property. That suit was contested by the defendants by filing their respective written statements. The suit was decreed in the preliminary form on May 14, 1994 declaring the share of the plaintiffs to the extent of 13/60th in the suit property. Thereafter, the petitioner filed an application for appointment of a partition commissioner for passing the final decree. The defendant no.6 filed an application dated December 4, 1996 for determination of his share in the suit property. He filed also another petition on

February 10, 1997 for modification and for declaration of his share to the extent of 297/1980th shares in the suit property. Then, the plaintiff moved a revisional application being C.R. No.134 of 1998 before the learned Additional District Judge, Sixth Court, Purba Medinipur, which was disposed of on August 24, 2000 by directing the learned Trial Judge to allot the separate share of the defendant no.6 to the extent of 297/1980 along with the share of the plaintiff. In the meantime, another defendant, namely, Sk. Jangi Hossain, filed an independent suit being T. S. No.91 of 1996 for declaration of his share in respect of the suit property. Ultimately, both the suits were heard analogously and disposed of by a common judgment dated March 14, 2002 by the learned Civil Judge (Senior Division), First Court, Contai. The plaintiff filed an application under Section 152 of the Code of Civil Procedure for correction of the inherent mistake appearing in the judgment. By the impugned order, the learned Trial Judge allowed the application of the defendant no.6; but rejected the application of the plaintiff. Being aggrieved, this application has been preferred by the plaintiff/petitioner.

Held:

By disposal of the application filed by the defendant for modification of the preliminary decree, the learned Trial Judge has virtually passed a fresh decree with regard to the suit properties, described in the schedule of the plaint. The learned Trial Judge has declared the share of the defendant no.6 to the extent of 197/1110. The modification of the decree with regard to the share of the defendant no.6 was done in view of the directions of the Hon'ble High Court in C.O. No.4171 of 2007 and the learned Trial Judge has observed that the claim of the defendant no.6 was genuine. For that reason, he has modified the decree declaring the share of the defendant no.6 to the extent of 297/1110 in respect of plots mentioned in the order impugned. Accordingly, he has passed orders for separate

possession of his (defendant no.6's) share on partition. The preliminary decree was modified to that extent. When transfer of share had taken Place by exchange or otherwise court is competent to modify the decree according to the decision.

Paras-4 & 5

Cases Cited:

Phoolchand & anr. Vs. Gopal Lal reported in AIR 1967 SC 1470

**For the petitioner: Mr. Saibalendu Bhowmick,
Mr. Asish Kumar Dutta.**

**For the opposite parties: Mr. Saptangshu Basu,
Mr. Jayanta Kumar Das.**

The Court:

This application is at the instance of the plaintiff and is directed against the order no.187 dated May 6, 2008 passed by the learned Civil Judge (Senior Division), First Court, Contai in Title Suit No.266 of 2001 thereby allowing an application for modification of the decree filed by the defendant no.6 and at the same time rejecting the other application filed by the plaintiff for modification of the preliminary decree.

2. The plaintiff/petitioner herein filed the suit being T. S. No.303 of 1978 for partition before the learned Munsif, Second Court, Contai claiming 13/60th shares in the suit property. That suit was contested by the defendants by filing their respective written statements. The suit was decreed in the preliminary form on May 14, 1994 declaring the share of the plaintiffs to the extent of 13/60th in the suit property. Thereafter, the petitioner filed an application for appointment of a partition

commissioner for passing the final decree. The defendant no.6 filed an application dated December 4, 1996 for determination of his share in the suit property. He filed also another petition on February 10, 1997 for modification and for declaration of his share to the extent of 297/1980th shares in the suit property. Then, the plaintiff moved a revisional application being C.R. No.134 of 1998 before the learned Additional District Judge, Sixth Court, Purba Medinipur, which was disposed of on August 24, 2000 by directing the learned Trial Judge to allot the separate share of the defendant no.6 to the extent of 297/1980 along with the share of the plaintiff. In the meantime, another defendant, namely, Sk. Jangi Hossain, filed an independent suit being T. S. No.91 of 1996 for declaration of his share in respect of the suit property. Ultimately, both the suits were heard analogously and disposed of by a common judgment dated March 14, 2002 by the learned Civil Judge (Senior Division), First Court, Contai. The plaintiff filed an application under Section 152 of the Code of Civil Procedure for correction of the inherent mistake appearing in the judgment. By the impugned order, the learned Trial Judge allowed the application of the defendant no.6; but rejected the application of the plaintiff. Being aggrieved, this application has been preferred by the plaintiff.

3. Now the question is whether the impugned order should be sustained.

4. Upon hearing the learned Advocate for the parties and on going through the materials on record, I find that the practically by disposal of the application filed by the defendant for modification of the preliminary decree, the learned Trial Judge has virtually passed a fresh decree with regard to the suit properties, described in the schedule of the plaint. The learned Trial Judge has declared the share of the defendant no.6 to the extent of 197/1110. The modification of the decree with regard

to the share of the defendant no.6 was done in view of the directions of the Hon'ble High Court in C.O. No.4171 of 2007 and the learned Trial Judge has observed that the claim of the defendant no.6 was genuine. For that reason, he has modified the decree declaring the share of the defendant no.6 to the extent of 297/1110 in respect of plots mentioned in the order impugned. Accordingly, he has passed orders for separate possession of his (defendant no.6's) share on partition. The preliminary decree was modified to that extent.

5. Now, according to the decision of Phoolchand & anr. Vs. Gopal Lal reported in AIR 1967 SC 1470 variation in shares made in the preliminary decree is also another preliminary decree passed in the suit and so a formal decree is to be passed. In that case, an appeal lies under Order 41 Rule 1 of the C.P.C. and not any revision. Under the changed circumstances, when transfer of share had taken place by exchange or otherwise court is competent to modify the decree according to the decision.

6. In that view of the matter, I hold that in exercising revisional jurisdiction there is no scope of interference with the impugned order. So, the application is dismissed.

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

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.)

