

9 SCOB [2017] HCD 167**HIGH COURT DIVISION**

First Miscellaneous Appeal No.105 of
2014
with
Civil Rule No.626(FM)/13

Kazi Helall Islam and others
Vs.
Kazi Rokhsana Islam and others

Mr. Mahbub Ali with
Mr. M. Ali Murtaza, Advocates,
----- For the defendant-appellants.
Mr. Md. Abdus Salam Mondal,
Advocate,
----- For the plaintiff-respondents.

Heard on : 08.05.2014 and
Judgment on : 11.05.2014.

Present :

Mr. Justice Nozrul Islam Chowdhury
And
Madam Justice Kashefa Hussain

Code of Civil Procedure, 1908

Order 40 Rule 1:

Order 40 Rule 1 of the Code of Civil Procedure may be invoked also in a partition suit due to “special circumstances such as danger to the property”. ... (Para 9)

Code of Civil Procedure, 1908

Order 40 Rule 1:

As we have mentioned before there is a prima-facie apprehension of danger to the property, which is apparent under the circumstances. Moreover, since the suit land is in possession and control of the defendant-appellants it is quite probable that pending final determination of the rights of the parties, the party in possession and control might abuse such possession and control and the sisters may be deprived of their rights. Alienation of mesne-profits which in this case are primarily the rents received by the defendants from the tenants in the disputed property may also result in wastage of the property and therefore entails a source of danger of alienation of the property before final determination of the rights of the parties to the Partition Suit. Upon such considerations we feel that the Court below judiciously and by exercising its discretion very correctly granted the prayer of the plaintiffs under Order 40 Rule 1 for appointment of receiver to the suit property. ... (Para 12)

Code of Civil Procedure, 1908

Order 40 Rule 1:

The appellants had also submitted that the receiver is a third person and therefore he cannot be inducted into the affairs of a family dispute. Our finding upon this argument is that given that the receiver is a ‘third person’ in the literal sense, yet he is an officer of the Court and is appointed by the Court itself empowered under its discretionary power under Order 40 Rule 1 of the Code of Civil Procedure and therefore the appointment of receiver cannot be challenged only upon the ground of his being a ‘third person’ if other circumstances exist and call for his appointment under special circumstances and as

long as the Court grants the prayer for appointment of receiver correctly exercising its discretion, such appointment may not be called into question. ... (Para 16)

Judgment

Kashefa Hussain, J :

1. This Civil Miscellaneous appeal is directed at the instance of the defendant-appellant against the judgment and order dated 27.06.2013 passed by the Joint District Judge, Additional Court, (in charge) Dhaka, in Partition Suit No.45 of 2013 allowing the prayer for appointment of receiver for the suit properties.

2. The facts relevant for disposal of the appeal in a nutshell are that, the plaintiffs being sisters of the defendant brothers instituted Title Suit No.45 of 2013 for partition. During pendency of the suit at one stage upon the prayer of the plaintiffs the Court issued an order appointing receiver in the suit land under Order 40 Rule 1 of the Code of Civil Procedure as against which the defendants as appellants filed the instant miscellaneous appeal. The appellants having taken several grounds in the miscellaneous appeal including one that no strong prima-facie case exists for the appointment of receiver and that without consent of the parties in such appointment, specially where the suit property is a family property, such order of appointment of receiver cannot be lawfully sustained. The defendants have also stated that there is no allegations of imminent danger, wastage and destruction of the properties which are preconditions and criteria behind the principle of such an order and that the receiver appointed is a third person been brought into a family dispute and therefore the appointment of receiver cannot be sustained in the eye of law.

3. The defendant-appellants have stated that they had partitioned the suit land through mutual halafnama and that it was amicably partitioned through the halafnama deed dated 25.02.2001 and that all the co-sharers have received their respective saham and that other formalities were also exhausted subsequently. The defendant-appellants have also stated that some of the property including the share of the sisters were acquired by the government through L.A. Case No. 13 of 2007 and that the plaintiffs had even received compensation against the said acquisition and therefore since the suit land had already been partitioned, the plaintiff sisters cannot now claim anything from the suit land and that the suit land lawfully belongs to the defendant-appellants.

4. The plaintiff-respondents however had denied the claims made by the defendant-appellants and stated that it is admitted that a halafnama was executed on 25.01.2001 between the co-sharers, but the plaintiffs alleged that even though the halafnama was executed on 25.01.2001, but the said halafnama was never acted upon and subsequently the plaintiffs could never receive their share of the property or the proceeds arising out of their portion of the suit land. They have asserted that subsequently on 04.01.2009 a heba declaration was made by the defendants in the plaintiff's favour but at the time of the heba declaration, the plaintiff-sisters had no knowledge of the fact that the land they had received had already, prior to the so-called 'heba' been acquired by the government through L.A. Case No.13 of 2007. The plaintiffs further alleged that the defendant-appellant brothers with the ulterior motive of depriving the plaintiff sisters, deliberately suppressed the entire fact of acquisition of the suit land by the government and since the suit land had already been acquired prior to the heba, hence, the plaintiffs are being deprived of their rights and lawful share to the suit property.

5. Mr. Mahbub Ali with Mr. M. Ali Murtoza, the learned Advocates appeared on behalf of the defendant-appellants while Mr. Md. Abdus Salam Mondal, the learned Advocate appeared on behalf of the plaintiff-respondents to oppose the appeal.

6. Mr. Mahbub Ali, the learned Advocate for the defendant-appellants submits that the property being already partitioned and the plaintiffs also having received their share of the saham, therefore they cannot claim anything more from the suit land which rightly belongs to the defendant-appellants only. He has also submitted that the order of appointment of receiver given by the trial Court cannot be sustained in law since there was no consent of parties. The learned Advocate also asserts that there is no apprehension of any imminent danger, wastage or destruction to the property. In support of his submission he has relied on the decision given by our Apex Court in the case of Faiz Ahmed Chowdhury & another –Vs- Beaktear Ahmed Chowdhury and others reported in 36 DLR (AD) 1984 page 97. The learned Advocate has also challenged the appointment of the receiver on the ground that the receiver is a third person and he cannot be brought into an internal dispute between family members in a partition suit.

7. On the other hand, Mr. Md. Abdus Salam Mondal, the learned Advocate appearing on behalf of the plaintiff-respondents submits that the sisters having been deprived of their share in the suit land have rightly and lawfully instituted the suit for partition inasmuch as that the defendant brothers have through collusion and suppression of facts and other devices tried to deprive the plaintiffs of the due shares to the suit property inherited from their father. He has also argued that the order appointment of receiver has been correctly issued within the ambit of law by the Court below under Order 40 Rule 1 of the Code of Civil Procedure and in support of his submissions he has relied upon a decision of this Court in the case of Nurul Hossain –Vs- Hasan Banu reported in 35 DLR (1983) page 29 from which case he has drawn an analogy with the case before us, submitting that appointment of receiver was also affirmed by this Court in that case and the facts and circumstances of the case is similar to the instant case.

8. We have heard the learned Advocates of both sides and perused the impugned order and the relevant documents available on record and gone through the decisions cited before us. Upon perusal of the records of the Civil Suit No.45 of 2013 for partition inter alia other documents placed before us, we find that the instant matter comprises basically of allegations and counter allegations against each other, that is, between the brothers and sisters which has given rise to the suit. After going through the records it appears that the suit properties comprising four schedules of land are rented out properties from which rents are received every month but the plaintiff sisters are not receiving anything out of the proceeds thereof. Now whether the plaintiffs can claim their share in the suit property and whether they have actually been deprived or not are eventually disputed matters of fact and have to be decided at the appropriate forum where the said suit is pending. Our considered opinion is that pending the suit, in the mean time to avoid any misappropriation of the proceeds of the rent or to avoid any other danger to the property or whatsoever, appointment of receiver is necessary to protect the subject matter of the suit and in the case it is only just and convenient to do so. We have considered the decision cited by the appellants in the case of Faiz Ahmed Chowdhury & another –Vs- Baktear Ahmed Chowdhury & others 36 DLR (AD) (1984) where the principle they have enunciated is as under :

“Civil Procedure Code (V of 1908)

Or. 40, r.1

Partition Suit-Appointment of a receiver in respect of the property in partition suit – Not to be ordered except by the consent of the parties or due to some special circumstance such as danger to the property.”

9. We have considered this decision and we have also taken note of the fact that in the case before us. Although ‘consent’ as such of the defendants was not taken but there is another situation contemplated of in the said decision, but which the learned Advocate for the defendant-appellants, while relying on this case overlooked and hence failed to appreciate that Order 40 Rule 1 of the Code of Civil Procedure may be invoked also in a partition suit due to “special circumstances such as danger to the property”.

10. Though it is a general principle and which has also been decided by decisions given by our Apex Court, that as a general rule, appointment of receiver is not desirable in a partition suit and a party in a partition suit cannot claim appointment of receiver for the sole reason of there being a dispute in existence. In this context the principle enunciated by our Apex Court in the case of Shaheda Akhter Rina –Vs- Ayub Ali reported in 64 DLR (AD) (2020) is hereby quoted from para 21 of the judgment which reads as under :-

“As a general Rule it is not proper to appoint a receiver in a suit for partition. Mere existence of a dispute cannot be a ground whatsoever for appointment of a receiver. ”

11. Therefore though it is true that as a ‘general rule’ appointment of receiver is not desirable in a partition suit, but simultaneously it is also true that there are exceptions as opposed to the ‘general rule’ and these exceptions may be discerned from the particular situation and circumstance existing in a particular case and in our considered view, such an exception does exist in the case before us.

12. As we have mentioned before there is a prima-facie apprehension of danger to the property, which is apparent under the circumstances. Moreover, since the suit land is in possession and control of the defendant-appellants it is quite probable that pending final determination of the rights of the parties, the party in possession and control might abuse such possession and control and the sisters may be deprived of their rights. Alienation of mesne-profits which in this case are primarily the rents received by the defendants from the tenants in the disputed property may also result in wastage of the property and therefore entails a source of danger of alienation of the property before final determination of the rights of the parties to the Partition Suit. Upon such considerations we feel that the Court below judiciously and by exercising its discretion very correctly granted the prayer of the plaintiffs under Order 40 Rule 1 for appointment of receiver to the suit property. In coming to such finding we have also drawn support from the decision given by this Court in the case of Nurul Hossain -Vs- Hasan Banu reported in 35 DLR (1983) and which has been relied upon by the respondent.

13. The relevant portion of the judgment in 35 DLR (1983) page 28 reads thus :-

“ Civil Procedure Code (V of 1908)

Or. 40

Appointment of Receiver is called for when a co-sharer is put to such hardships that with out court’s intervention remedy is not available.

Allegations of mismanagement, element of danger or apprehension of alienation and wasting of the property are important factors to be weighed by the Court but the apprehension must be well founded and must be such that without protection of the court the property in question will be wasted or dissipated.

In the instant case, receiver was prayed for not only on the ground of wastage of damage but also on the ground that the plaintiffs who were female co-sharers had been kept out of enjoyment of the property and the defendants were appropriating all the rents of the tenanted premises from the tenants. Order 40 confers very wide powers on the Court to appoint a receiver and where it appears to the Court “to be just and convenient” the Court may appoint a receiver.

In a suit for partition of joint-family property it was proved that a co-owner admittedly entitled to a half share in a considerable portion of the properties in suit was being kept out of possession by the co-owner with the result that all supplies were cut off from his branch of the family, and although no case of waste might have been established against the co-owner in possession the case was eminently a proper one for the appointment of receiver.

The appointment of receiver is a discretionary matter. So long it is found that discretion has been properly, exercised by the Court below and has not been exercised in an improper, arbitrary or whimsical manner an order of appointment of receiver made by a Subordinate Court does not call for an interference by this Court. ”

14. After perusal of the judgment we have discovered that in this case also an appointment of receiver was prayed for in a partition suit and the facts and circumstances of the case reported in 35 DLR (1983) here are very similar to the one we are dealing with at present.

15. Therefore placing our reliance in the decision cited above and taking other facts and circumstances into consideration, we are of the finding that there is a reasonable apprehension that the property might be facing danger of alienation, wastage, damage including other factors that may crop up and the plaintiffs might actually be put to severe hardship if the prayer for appointment of receiver is not granted.

16. The appellants had also submitted that the receiver is a third person and therefore he cannot be inducted into the affairs of a family dispute. Our finding upon this argument is that given that the receiver is a ‘third person’ in the literal sense, yet he is an officer of the Court and is appointed by the Court itself empowered under its discretionary power under Order 40 Rule 1 of the Code of Civil Procedure and therefore the appointment of receiver cannot be challenged only upon the ground of his being a ‘third person’ if other circumstances exist and call for his appointment under special circumstances and as long as the Court grants the prayer for appointment of receiver correctly exercising its discretion, such appointment may not be called into question.

17. Under the foregoing facts and circumstances we are of the considered view that the appointment of receiver given by the Joint District Judge in his impugned order dated 27.06.2013 has been correctly given and does not call for our interference. Therefore we find no substance in the appeal and accordingly the appeal is dismissed.

18. In the result, the appeal is dismissed and the connected Rule being Civil Rule No.626(FM)/13 stands discharged without any order as to costs.

19. Before we part with the records it is necessary to mention that the parties being co-sharers are at liberty to withdraw 40% out of the respective proportionate shares in the amount received and deposited by the receiver in the Court.

20. Communicate the order at once along with a copy of this judgment to the Court below immediately for information and necessary action.

Nozrul Islam Chowdhury, J :

21. I agree.