

Case No :CRP 0000008/2015

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Party Name : MANIK CH. DEY Vs NIRMAL CH. DEY & ANR

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THE HONBLE MR. JUSTICE S.TALAPATRA

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Heard Mr. K.N. Bhattacharji, learned senior counsel, assisted by Ms. Y.T. Bhattacharji, learned counsel appearing for the petitioner as well as Mr. B. Banerjee, learned counsel appearing for the respondents No. 1 and 2. The representation from the other respondents in the circumstances is not considered essential.

This case has a unique history.

Earlier also the petitioner had approached this court, questioning the order dated 19.08.2013 delivered in Ex.(T) No.05/2012 by the Civil Judge, Junior Division, Udaipur, South Tripura.

During consideration, it was found that the petitioner herein was not afforded with any opportunity to raise objection against the report submitted by the Survey Commissioner as it was contended by the petitioner that the Survey Commissioner had submitted the report traversing beyond the scope of the writ as issued for doing the survey under Order 26 of the CPC. While disposing of that challenge, being CRP No.75/2013, by the order dated 05.11.2014, this court had passed the following direction :

"Accordingly, this petition is disposed of with the following directions :

The petitioner shall invariably file objection, if any, against the Survey Commissioner's report, as submitted before the Court, within 21st November, 2014 and the executing court shall dispose such objection by 5th December, 2014 positively. It is made clear that the petitioner shall not be granted any further accommodation if no such objection on the Survey Commissioner's report is filed. In the event of failure in submitting such objection, this order will have no effect whatsoever and the execution be carried out and completed in terms of the order dated 19.08.2013 on seeking the due report of completion. Only in the event of filing of the objection by the petitioner within the time specified, the matter shall be disposed by the executing court by 5th December, 2014 and thereafter, the executing court shall draw the execution proceeding to its logical end in accordance with law."

Mr. Bhattacharji, learned senior counsel appearing for the petitioner has submitted that the petitioner had filed the objection against the Survey Commissioner's Report and his objection has been disposed of by the impugned order dated 04.12.2014 delivered in Ex.(T) No.05/2012. While deciding the objection raised against the Survey Commissioner's Report, the executing court has observed as under :

"To decide, it is true that on the writ to the Survey Commissioner he was only directed to ascertain whether the suit land can be partitioned amongst the parties by metes and bounds. But the Survey Commissioner after his survey partitioned the suit land without following order of the court.

Surprising is that neither before preliminary decree nor before final decree the J.Ds raised this issue before the Court. Moreover, from the submission of learned counsel for J.Ds and from the record, it is clear that the J.Ds did not deny their respective share after the partitioned and also did not allege about any discrimination regarding share of the share holders. Though the Survey Commissioner partitioned the land without specific order of the Court, but it is evident that the Court ordered to ascertain the suit land liable to be partitioned with the solemn intention to partition the land after passing of preliminary decree.

Hence, on the basis of the above reason, the contention of the J.Ds cannot be considered in law.

On the other hand, learned counsel for J.Ds raised an issue that the partitioned suit land is not suitable for any purpose and as such the partition can not be effected and the decree could not be executed.

Learned counsel also verbally submitted to order for sale of some portion of the suit land so that the partitioned land could be made usable.

To consider, from the submission of learned counsel, it is understood that the J.Ds desired to avail the privilege of Section 2 of the Partition Act, 1893.

But Section of the Partition Act is applicable in respect of pending suits only, that is, before passing of final decree by the Court. Thus here also at this stage the prayer of J.Ds cannot be considered in law.

Hence under the above facts and circumstances, the written objection filed by the J.Ds is rejected and it is decided that the final decree is very much executable in future.

Issue writ to the Bailiff and the Survey Commissioner in order to execute the final decree as per order dated 22.06.2013.

The D.H. is directed to submit requisites within 7(seven) days."

Mr. Bhattacharji, learned senior counsel has submitted that if the final decree is executed in terms of the Survey Commissioner's report, the petitioner's valuable properties will be damaged and there shall be no salvage. He, therefore, has contended that the partition should be made or the final decree should be executed in such a manner so that his buildings/huts are protected. Mr. Bhattacharji, learned senior counsel has emphatically submitted that by the amount of his share the said huts may probably be protected.

From the other side, Mr. Banerjee, learned counsel has submitted that the buildings/huts as claimed by the petitioner is situated in such a position that there cannot be any equitable partition of the land in terms of the preliminary decree and as such the submission as made the learned senior counsel, if sustained by this court, would create lot of difficulty, having the disastrous consequence on the process of partition of the land in terms of the final decree.

Having regard to all aspects of the matter, this court is of the considered view that the impugned order itself is full of inherent defects. On the one hand, when this order states that beyond the scope of the writ, the Survey Commissioner had taken certain actions, on the other hand, that report has been sought to be acted upon. This cannot be allowed by this court. As such, the Survey Commissioner's report is interfered with and set aside except the observation that it would be very difficult to partition the land equitably according to the share, inasmuch as the learned counsel has stated that the amount of the entire un-partitioned land is so meagre that it would be definitely an arduous task to complete the partition to the satisfaction of all the co-sharers. Further, the learned counsel appearing for the parties have concurred that there had been no initiative from either side to settle these questions of difficulties as to partitioning the joint property land by metes and bounds in terms of Section 2 of the Partition Act, 1893. This is not the phase when the provisions of section 2 of the Partition Act can be considered.

Having regard to the entire circumstances, this court is of considered opinion that there shall be an initiative by the court allowing some space to the parties to adjust their shares, meaning by way of transferring the share from one co-sharer to the other co-sharers. For that purpose, from the day of receipt of this order, 1(one) month's time be provided to all the parties. If within one month's time no adjustment is arrived between the parties or some of the parties, the executing court shall send the Survey Commissioner/s to survey the land and to present a plan of partition by metes and bounds having regard to the preliminary decree. The report has to be placed within another 1(one) month after expiry of the one month for arriving at the adjustment. Thereafter, the executing court, without looking to any other aspect, shall execute the decree. It is made clear that no further objection over these aspects shall be allowed to be raised.

The executing court is directed to complete the entire execution within 10(ten) weeks from the date of receipt of this order. The executing court may also indicate to the Surveyor, whether by protecting the existing huts which are being occupied by the shareholders the partition is possible or not. If it is found that partition by adjustment is not possible then the partition shall be made by metes and bounds.

With this observation and direction, this petition stands disposed of.