

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Siddhartha Roy Chowdhury

FA 74 of 2010

With

CAN 1 of 2009

Sri Chandan Kumar Jana

Vs.

Smt. Kanaklata Panda & Ors.

For the Appellant : Mr. Amit Baran Dash, Adv.
Ms. Ankana Sarkar, Adv.

For the Respondents : Mr. Soumen Kr. Dutta, Adv.
Mr. Sabyasachi Bhattacharjee, Adv.

Hearing Concluded On : 06.07.2022

Judgment On : 13.07.2022

Siddhartha Roy Chowdhury, J:- Challenge in this appeal is to the judgment and final decree passed by the learned Civil Judge, Senior Division, 1st Court, Contai in Title suit no. 112 of 1999 on 10th April, 2000 and 20th July, 2009 respectively. For proper appreciation of the lis, facts in brief are indicated herein below.

The suit property was originally owned by Haraprosad Giri, Panchanan Giri and Banabehari Giri having $1/3^{\text{rd}}$ share each. After the demise of Banabehari Giri his $1/3^{\text{rd}}$ share devolved upon the son Subimal Giri and two daughters i.e. defendant no. 8 and predecessor of defendant nos. 3 to 7. The defendant no. 1 purchased the share of Subimal Giri, the son of Banabehari Giri. The $1/3^{\text{rd}}$ share of Haraprosad Giri was acquired by his son Adhar Giri and after his death Lalmohan Giri and Bablu Giri two sons of Adhar Giri, Rohini Giri, the widow and Sandhyarani Giri, the daughter acquired said $1/3^{\text{rd}}$ share of Adhar Giri. The plaintiff purchased the share of Sandhyarani Giri and Rohini Giri on 13th February, 1998. The defendant no. 1 purchased the share of Bablu Giri and Lalmohan Giri.

After the demise of Panchanan Giri his son Ananta Giri stepped into his shoes and sold 18 decimal of land to the defendant no. 2. Widow, son and five daughters of Ananta inherited the rest of the property acquired by Ananta. Four daughters of Ananta transferred their share by way of gift to Mayarani, wife of Rajaram, Madhabi the other daughter exchanged her share with Rajaram on the basis of registered deed of exchange. Rajaram and Mayarani sold their property to plaintiff and thus plaintiff acquired 'Ka' schedule property by purchase which is comprising within plot no. 799 having an area of $59 \frac{1}{2}$ decimal of land out of 155 decimal of land. During L.R. settlement possession of the plaintiff was taken note of in the revenue record. Since the defendants did not agree to amicable partition, the plaintiff filed the suit.

The defendant nos. 1 and 2 contested the suit by filing written statement denying all allegations made against them. It is their specific case that defendant no. 1 purchased entire $1/3^{\text{rd}}$ share of Banabehari from his legal heirs and also purchased half share of Hiranmay i.e. the son of Adhar and defendant no. 2 purchased 18 decimal of land from the son of Panchanan thus jointly they acquired $95 \frac{1}{2}$ decimal of land. The defendants further contended that the plaintiff has been possessing the western portion of suit plot while they have been possessing the eastern portion. The defendants adverted further that defendant nos. 3 to 8 do not have any right title interest over the suit property. The defendants also expressed their willingness to get the property partitioned.

Learned Trial Court upon considering the evidence on record was pleased to pass the preliminary decree declaring inter alia that the plaintiff has title over $59 \frac{1}{2}$ decimal of land and the defendant nos. 1 and 2 have jointly own $95 \frac{1}{2}$ decimal of land in the 'Kha' schedule property while defendant nos. 3 to 8 jointly do not have right title interest therein. Both the parties were directed to effect partition by metes and bounds amicably within two months from the date of passing of decree i.e. on 10th April, 2000. But as a matter of fact, the parties failed to effect partition by metes and bounds and an Advocate Commissioner was appointed to effect such partition in terms of preliminary decree.

Learned Advocate Commissioner, Sri Arup De relayed the suit property with the help of settlement map 1954 to 1957 using 100 links steel chain, tape, peg etc. surveyed the suit plot no. 799 and opined that valuation of the land throughout the plot is same. Learned Commissioner

allotted 59 $\frac{1}{2}$ decimal of land to the plaintiffs and 95 $\frac{1}{2}$ decimal of land to the defendants out of which 4 decimal of land was culled out for the passage running on the south western side of the suit plot no. 799 leading to public road. The report of the learned Commissioner was submitted before the learned Trial Court to which the plaintiff raised objection.

Learned Advocate Commissioner was examined on oath and learned Trial Court after considering the evidence of learned Advocate Commissioner was pleased to accept the report of the learned Advocate Commissioner, effecting partition by metes and bounds in terms of the preliminary decree and was further pleased to pass final decree on 29th July, 2009 treating the report of learned Advocate Commissioner, case map, fold book as part of final decree with further direction that partition will be effective only on drawing up of final decree on requisite stamp papers to be submitted by parties.

The plaintiff being aggrieved by and dissatisfied with such mandate of learned Trial Court filed this appeal.

Though the memorandum of appeal is taken out to assail the judgment dated 10th April, 2000 and the final decree dated 28th July, 2009, learned Advocate for plaintiff/appellant confined his argument assailing the final decree, passed by the learned Trial Court relying upon the report of learned Advocate Commissioner.

It is contended that learned Commissioner allotted *Ata land* to the defendant while *arable land* has been allotted to the plaintiff. *Ata land* is costlier than that of *arable land*.

It is further contended that the Learned Partition Commissioner has failed to ascertain the value of the portion allotted to the respective parties, which is contrary to the provision of Order 26 Rule 14 of the Civil Procedure Code as well as Order 26 Rule 10 of the Civil Procedure Code.

Learned Advocate for the appellant, took us to the oral testimony of learned Partition Commissioner and adverted that learned Advocate Commissioner did not take any evidence regarding possession of respective parties which is absolutely necessary for just and fair partition. Learned Advocate Commissioner allotted 4 decimal of land to the defendants/respondents which was within the exclusive possession of the plaintiff/appellant.

Drawing our attention to the pleadings of the defendants, it is submitted that the *Ali bandh* was in joint possession of the parties to the lis but learned Advocate Commissioner committed error in allotting the said strip of land to the defendants/respondents exclusively and thereby frustrated the very purpose of partition.

Learned Advocate for the plaintiff/appellant strenuously argued that the trees standing on the suit property was allotted to the defendants but without assessing the valuation and thereby the learned Advocate Commissioner acted in detrimental the interest of plaintiff/appellant. To buttress his point learned Advocate for the appellant relied upon the judgment passed by the Co-ordinate Bench of this Hon'ble Court in **Saraswati Devi and Ors. vs. Satya Narayan Gupta** reported in **AIR 1977 Calcutta at Page 99** and argued that in a suit for partition first the subject matter should be ascertained and, thereafter, the subject matter

should be properly assessed and valued and for fair valuation of allotment for the parties, the assets and liabilities of the joint properties should be found out.

Refuting such contention of learned Advocate for the appellant, learned Advocate for the defendants/respondents argued that no part of plot no. 799 having an area of 1.55 decimal of land is *Ata* or high land. It is admittedly "*Jal/Jaljami*". Since the parties acquired ownership in respect of the suit property by purchase, learned Partition Commissioner made allotment keeping in view the respective possession of the parties. Learned Advocate for the respondent in course of argument took us to the schedule of the plaint filed by the plaintiff/appellant and we find that the suit property is having an area of 155 decimal comprised within plot no. 799 and by nature "*Jal*". Our attention is drawn Exhibit 2 R.S.R.O.R and from that document we find that the nature of the land comprised within plot no. 799 is "*Jal*". Admittedly the plaintiff/appellant is occupying the western part of the suit plot while eastern part is occupied by the defendants/respondents which the parties have acquired by purchase. Therefore, in our view, learned Partition Commissioner did not commit any mistake by not assessing the valuation of the property when the nature of the entire plot of land 799 is uniform i.e. "*jal*".

Admittedly learned Trial Court declared title the plaintiff in respect of $59\frac{1}{2}$ decimal of land and $95\frac{1}{2}$ decimal of land to the defendants in the preliminary decree.

Upon careful perusal of the report of the learned Partition Commissioner and the evidence adduced by him, we find that the

Advocate Commissioner allotted $59\frac{1}{2}$ decimal of land to the plaintiff/appellant and the defendants/respondents are actually given $91\frac{1}{2}$ decimal of land for all practical purposes and remaining 4 decimal of land has been merged with the existing passage running on the south west side of the suit plot leading to the road. The plaintiff in his plaint has admitted the existence of that strip of land which is being used as passage leading to the public road and the same is being used by both the parties. This fact belies the claim of the plaintiff/appellant that the learned Commissioner allotted the strip of land scooping out 4 decimal of land from his allotment and thereby deprived the plaintiff/appellant. On the contrary we find from the Exhibit B1 the deed of gift executed in favour of defendant/respondent no. 1 the existence of the passage running on the southern end of plot no. 799 which has further been depicted as the passage for the purpose of ingress and egress. Learned Advocate Commissioner scooped out 4 decimal of land from the allotment of defendants/respondents as we find from the report of the Commissioner and merged the same with the existing passage leading to public road, and Exhibit B, B1 and C are eloquent about this passage on south-western part of suit plot.

It is fact that learned Advocate Commissioner in course of his evidence stated that he has allotted *Ata land* to the defendant and agricultural land to the plaintiff but the document Exhibit 2 indicates that nature of land is "*Jal*". It goes without saying that evidence percolating from the document should always prevail over the evidence projected through oral testimony. While we consider the oral testimony of learned

Commissioner regarding the nature of land in contradistinction with Exhibit 2 the R.S.R.O.R., we find it to be “*Jaljami*”. Therefore, we are not inclined to attach any importance to the oral testimony of the learned Advocate Commissioner about the nature of land. It is true 5 trees are found standing on the ridge of the land allotted to the defendant/respondent but at the same time it is equally correct that 4 decimal of land from the allotment of defendants/respondents is culled out and mingled with the existing passage running on the south western side leading to public road to be used the plaintiff/appellant as well.

We have perused the judgment of the Co-ordinate Bench pronounced in **Saraswati Devi & Ors. vs. Satya Narayan Gupta (supra)** reported in **1977 Calcutta at Page 99**. It is trite to say that the judgment should not be considered to be a statute; in order to use a judgment as precedent, the case in hand should be *pari materia* with the facts of the case decided. The judgment pronounced in the case of **Saraswati Devi (supra)** was passed on a different factual matrix involving movable and immovable properties and as such the said judgment is not applicable in the appeal under consideration.

In our view, learned Advocate Commissioner followed the procedure properly as laid down under Order 26 Rule 14 of the Civil Procedure Code. Rule 10 of Order 26 of the Civil Procedure Code, we are afraid, has nothing to do with partition commission.

The report of the learned Advocate Commissioner in our considered opinion does not suffer from any infirmity and we do not find any reason to disagree with the wisdom of learned Trial Court in passing the final

decree based on the report of Advocate Commissioner. The appeal is devoid of merit and is dismissed but without cost.

I agree

(Siddhartha Roy Chowdhury, J.)

(Soumen Sen, J.)