25.04.2022
SL No.41
Court No.8
(gc)

FAT 12 of 2022
With
CAN 1 of 2022

Sandip Kumar Saha
Versus
Rita Saha & Ors.

Mr. Partha Pratim Roy,
Mr. Kushal Chatterjee,
Mr. Saptarshi Kumar Mal,
...for the Appellant.
Mr. Krishna Das Poddar,
Mr. Ayan Mitra,
...for the Respondents.

The appellant is the person who is in complete control over the suit property. Such fact has been adequately borne out from the deposition of Sandip Kumar Saha on 1st October, 2021 during the course of acceptance of the report filed by the Advocate Commissioner in the partition suit.

Mr. Partha Pratim Roy, learned Advocate representing the appellant has strenuously argued that the appellant was not responsible for inducting tenants in the suit property nor the business which is admittedly running at the ground floor generates substantial income which could have been taken as the basis of owelty money as determined by the Commissioner.

We may not have to go deeper into the Commissioner's report as the facts admitted during the evidence of Sandip Kumar Saha are good enough to sustain the report filed by the Advocate Commissioner including the determination of the owelty money. Sandip Kumar Saha during his examination and cross-examination on 1st October, 2021 has admitted that there are five tenants, in the ground floor one company under the name and style M/s. Ma lan Mohan Yaran Trading and Rina Saha and Sandip Saha have been inducted as tenants, all are enjoying and possessing the ground floor of the suit premises as tenants. It is interesting to note that the partnership firm was reconstituted on 29th September, 1978. The reconstituted partnership firm would show that other co-sharers of the properties were not the partners and the said business was being carried on by Sandip Kumar Saha and his associates with the exclusion of the other co-sharers. The nature of business would suggest that it is capable of generating considerable income and in fact the business was flourishing. Sandip Kumar Saha has failed to demonstrate that from the income of the said partnership firm, KMC tax liabilities and other liabilities of the properties were met. However, he has admitted during his evidence that he inducted tenants and collected rents and out of such rental income, he used to maintain the said property. There are apparent contradictions in the evidence with regard to source of the fund by out of which he claimed to have paid taxes and maintained the property. It was his evidence that all the co-sharers permitted him to induct the tenants in the suit premises but he could not produce any document to show that they have given him such permission. The fact remains that he was in complete control of the suit property. It is also interesting to note that he inducted his son as a tenant in the first floor of the premises in question. The overall impression that one could gather from the evidence is that Sandip Kumar Saha was in control of suit property and he was enjoying the said property to the exclusion of all other co-sharers and beyond his shares. He was found to be in possession of the entirety of the lucrative ground floor. The Commissioner in his further report prepared in terms of the order dated 30th November, 2018 has indicated the valuation of the respective allotted portion. It would appear from the said report that the appellant is in possession of the entirety of the ground floor and through his son, Sounak Saha, in the first floor. It further appears that the other tenants on the first floor or any other portion of the suit premises were all inducted by him. In view of the fact that he was carrying on commercial activity from the ground floor, the valuation of the property would be certainly higher than the valuation of the third floor of the suit premises. The property has a strategic location and from the ground floor it is more convenient to carry on commercial activity.

Taking into consideration the aforesaid factors and enjoyment of lucrative portion in the suit property, the Commissioner relying upon the valuation of Directorate of Registration and Stamp Revenue assessed the valuation of the portion occupied by different parties in the suit property and thereafter adjusted the shares by payment of compensation to the co-sharers getting properties of lesser value by way of owelty money. The learned Trial Judge has meticulously considered the rival contentions as also the final report. The final report of the Commission read with the evidence of the defendant No.1, in our view, justified the conclusion arrived at by the learned Advocate Commissioner.

Mr. Partha Pratim Roy, learned Counsel appearing on behalf of the appellant has relied upon an unreported judgment of a Coordinate Bench in ***FAT 392 of 2017 with CAN 345 of 2018 with CAN 10426 of 2017 (Dinabandhu Paul & Ors. Vs. Chandra Rani Paul & Ors.) dated 25th November, 2019*** to argue that the engineer commissioner appointed by the Trial Court was incompetent to function as a partition commissioner. In this regard he has relied upon a written objection at page 100 of the stay petition. It is admitted position that the appointment of Monojit De was never challenged before the Trial Court. We have carefully gone through the written objection. We do not find any whisper of any ineligibility of Monojit De to carry on the work of commission was ever raised. The objections are with regard to his impartiality and not competence. In fact, the Rules referred to by Mr. Roy, Rule 238 and 244 of the Civil Rules and Orders of the Calcutta High Court would not show that a person not being Advocate would be incompetent to carry on such survey work. Both the Rules read conjointly would show that what was emphasized is the knowledge of survey which undoubtedly Monojit De possess. Further more Order XXVI, Rule 13 empowers the Court to issue commission to such person, as it thinks fit to make the partition in terms of preliminary decree. The report is not sacrosanct and only a piece of evidence which has to pass through the judicial scrutiny.

We do not find any reason to interfere with the order passed by the learned Trial Judge in accepting the report of the Commissioner.

The appeal fails.

The final decree of partition shall be drawn up by the Trial Court as expeditiously as possible in terms of the Commissioner's report.

Accordingly, the appeal being FAT 12 of 2022 and the application being CAN 1 of 2022 stand dismissed.

However, there shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Ajoy Kumar Mukherjee, J.) **(Soumen Sen, J.)**