

28.04.2022
SL No.5
Court No.8
(gc)

**FA 165 of 2018
With
CAN 3 of 2019
(Old No: CAN 12581 of 2019)**

**Smt. Kaberi Saha & Ors.
Vs.
Md. Nezamuddin & Anr.**

Mr. Debajyoti Basu
...for the Appellants.
Mr. Partha Pratim Roy,
Mr. Sarbananda Sanyal,
...for the Respondents.

We have heard the learned Counsel for the parties.

The appeal is arising out of a final decree passed upon acceptance of the report filed by the Advocate Commissioner on 9th June, 2014. The appellants did not participate in the final decree proceeding. The Advocate Commissioner was not cross-examined by the appellants. However, an appeal is preferred against the acceptance of the report filed by the Advocate Commissioner. We have gone through the report of the Advocate Commissioner. The Advocate Commissioner has filed a detailed report before the learned Civil Judge (Senior Division), Malda. The property was duly identified by the local surveyor and the local people. After completion of the commission work, the Commissioner prepared a detailed report giving description of the properties. The Commissioner

appeared before the Trial Court and proved his report in accordance with law. The report would reveal that the plaintiffs are occupying area in excess of the admitted share in the property. Obviously, the plaintiffs were not interested to participate in the final decree proceeding as it was clear to the plaintiffs that during survey the said fact would be clearly established. During commission, Gobinda Saha, Biswanath Saha, Uttam Saha and Ashok Kr. Saha were found in possession in North-East side and their possessed area, as per commissioner's calculation is 1260 sq. links, i.e. 550.125 sq.ft. in place of 541 sq.ft. Similarly, Smt. Kaberi Saha and Smt. Archana Saha were found in possession in the North-West side and their possessed area, as per calculation was 312 sq.ft in place of 59.45 sq.ft. Smt. Kaberi Saha and Smt. Archana Saha were found to be in possession in excess of their share. This finding has remained unshaken. The Commissioner, in our view, has rightly considered the possession of Gobinda Saha, Biswanath Saha, Uttam Saha and Ashok Kr. Saha, Smt. Kaberi Saha and Smt. Archana Saha as members of a single family and, accordingly, made joint allotment to them and their joint allotment was described in the B-Schedule of the property.

The learned Counsel appearing on behalf of the appellants submitted that they became the tenant in respect of a portion of the suit property under the

predecessor-in-interest of the present respondents, namely, Md. Nezamuddin.

However, in the written objection, there is no mention of such ground. The only point urged appears to be that the Commissioner illegally made joint allotment in respect of the plaintiffs and illegally allotted C-Schedule property by disturbing the possession of Smt. Kaberi Saha and Smt. Archana Saha. The appellants could not jointly their possession in excess of their shares.

Having regard to a clear finding that Smt. Kaberi Saha and Smt. Archana Saha are holding areas in excess of their share and there has been no cross-examination on this point by the appellants, although they had enough opportunity to cross-examine the Commissioner on this point, we do not find any reason to interfere with the order passed by the learned Trial Judge in accepting the report filed by the Advocate Commissioner and to draw up the final decree in terms of the Commissioner's report.

Accordingly, the appeal fails.

The appeal being FA 165 of 2018 and the application for vacating the interim order being CAN 3 of 2019 (Old No: CAN 12581 of 2019), accordingly, stands dismissed.

However, there shall be no order as to costs.

The record shall be sent down immediately in order to expedite the proceeding before the learned Civil Judge (Senior Division), Malda in Partition Suit No.111/2011.

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.)