

18.02.2022
Ct. 21
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C.O. 653 of 2020
(Via Video Conference)

Smt. Swapna Paul & Anr.
-Vs-
Sri Sankar Pal & Ors.

Mr. Pinaki Ranjan Mitra,
... for the petitioner
Mr. Mrinal Kanti Ghosh,
...for the opposite parties

This revisional application is at the instance of defendants/petitioners being aggrieved by an order of rejection of their application under Section 151 of C.P.C. whereby they have prayed seeking leave to file written objection against the report of the commissioner who has affected the partition of the disputed property as per preliminary decree in Title Suit No. 59 of 2011 passed by learned Civil Judge (Senior Division), 2nd Court, Howrah on 26.09.2019.

The facts necessary for determination of the present revisional application in gist is that, the plaintiffs/opposite parties have filed Title Suit No. 59 of 2011 for partition of their joint two storied

building situated on 24 Jogin Mukherjee Lane, P.S. Bantra, District- Howrah, measuring 3 cottahs 5 chittacks 25 sq. ft. The suit was decreed in preliminary form on admission by defendant nos. 1 and 2 and ex parte against 3 to 6 and whereby share of plaintiffs, and defendant nos. 3 to 6 have been determined to the extent of $1/6^{\text{th}}$ shares each in the disputed dwelling house including land on which the same is situated and another $1/6^{\text{th}}$ share in favour of defendant nos. 1 and 2.

When the parties have failed to effect partition by metes and bounds and as such on the prayer of the plaintiff the preliminary decree was put into execution for purpose of drawing final decree. A commissioner was appointed for allotment of the shares of the parties as per preliminary decree. The commissioner after apportionment of the share of the parties in the dwelling house has submitted his report.

Now, by filing the present application the defendant nos. 1 and 2 have alleged that they have not been given any opportunity to file written objection against the report of the commissioner. They have also alleged that the commissioner has failed to allocate the shares as per the possession of

the parties in the disputed building. The valuation assessed by the commissioner is far below the present market value of the property in question. Therefore, they have filed a petition under Section 151 of C.P.C. seeking leave of the Court granting them to file written objection against the report of the commissioner which the Court has rejected by passing the impugned order.

The report of the commissioner shows that the commissioner had done the work in the presence of both sides.

In order to find out whether the learned Court below is justified in rejecting the application of the defendants where they have prayed for recalling the order dated 07.03.2019 by virtue of which the Court below has accepted the report.

In order to determine such question it is necessary to discuss the provision of Order 26 Rule 10 of C.P.C which read as follows:-

Procedure of Commissioner;- (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall

return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit :- The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Commissioner may be examined in person :- Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

Perused the Order dated 07.03.2019
which reads as follows

“Today is fixed for acceptance of commissioner report.

Both parties file hazira.

Plaintiff is present.

Defendant no. 1 and 2 file hazira but not present.

Defendant no. 3 to 6 present and submit that they have no objection if commissioner report is accepted.

Defendant no. 1 and 2 do not file any objection. Hence, the Commissioner report is accepted. Sheristadar is directed to assess stamp duty as per valuation in the commissioner's report.

To 06.05.2019 for Sheristadar report.

Order dated 07.03.2019 shows that on behalf of the defendant nos. 1 and 2 hazira was filed before the learned Court, but no one was found present before the Court from the side of the defendant nos. 1 and 2 when the matter was called. It also appears the defendant nos. 3 to 6 who have not contested the case as against whom the original suit was proceeded ex parte, surprisingly happened to be present before the Court on 07.03.2019 and put their no objection for acceptance of the commissioner report. Therefore, prima facie it is seen the report of the commissioner was accepted by the learned Court below in the absence of the

defendants or their counsel though hazira was filed on their behalf.

In the record I find the defendants have already filed their written objection against the report of the commissioner. It appears from the record that out of six defendants only these two defendants/ petitioners have been contesting the suit. Keeping in view such facts and report being accepted by the learned Court below in the absence of the present petitioners and their counsel, this Court is of view before accepting the report and making it as a part of the record an opportunity should have been given to the present petitioners to challenge the veracity of the report of the commissioner by permitting them to examine or cross examine the commissioner.

Therefore, case is send back on remand with a direction to the learned Court below to give an opportunity to the defendant nos. 1 and 2 to file written objection and to cross examine the commissioner and thereafter consider whether to accept or reject the report of the commissioner and pass final decree. The Court should adjust the stamp duty already paid by the plaintiff/ opposite

party no.1 in the Court below at the time of passing the final decree.

Accordingly, **C.O. 653 of 2020 is allowed.**

Interim order, if any, stands discharged.

There will be no order as to costs.

All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

Urgent Photostat certified copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(**Kesang Doma Bhutia, J.**)