

Item No.8
06.09.2023
Court. No. 19
GB

C.O. 498 of 2023

Sukumar Patra & Anr.
Vs.
Sumana Bhul & Anr.

*Mr. Rahul Karmakar,
Mr. Debabrata Ray*

...for the Petitioners.

*Mr. Rabindranath Mahato,
Mr. Aritra Shankar Ray*

...for the Opposite Parties.

This revisional application arises out of an order dated February 3, 2023, passed by the learned Civil Judge (Senior Division), 3rd Court at Paschim Medinipur. By the order impugned, the learned court below disposed of an application filed by the defendants under Section 151 of the Code of Civil Procedure in a partition suit. By the said application, the defendants prayed for permission to complete the unfinished construction work without claiming any equity in their favour.

The learned court below, citing the order of the Division Bench of this Court, passed in FMAT 19 of 2022 with CAN 1 of 2022 dated February 4, 2022, deemed it fit to complete the construction within the demarcated area as per the commissioner's report, subject to the condition that the said construction would ultimately abide by the final decree and the defendants would not claim any equity over the said property. Opportunity was also given to the plaintiffs to file their written objection to the learned commissioner's report.

Mr. Karmakar, learned advocate appearing on behalf of the petitioners submits that the order impugned suffers from the following irregularities:-

- a) The learned court below could not have allowed construction within the demarcated area as per the learned commissioner's report, without the report, having been accepted.
- b) Without considering the objection of the plaintiffs to the commissioner's report and without affording an opportunity to cross-examine the partition commissioner, the application under Section 151 of the Code of Civil Procedure could not have been allowed. The demarcation by the commissioner could not be treated as sacrosanct.
- c) The commissioner was not authorised to demarcate the portions and allot respective shares to the parties.
- d) The plaint case was based on the fact that by four deeds, one decimal each was purchased by the parties to the proceeding. From the commissioner's report, it would transpire that the total area involved in the suit was less than four decimals. Thus, the construction would create a hindrance for the petitioners.
- e) Without actual demarcation in terms of a final decree, construction over an undivided portion would make the situation irreversible and the plaintiffs would suffer irreparable loss and injury if the construction was completed before the final decree was passed.

Mr. Mahato, learned advocate appearing on behalf of the defendants/opposite parties draws the notice of the court to an

order passed by an Hon'ble Division Bench of this Court in FMAT 19 of 2022, dated February 4, 2022. According to Mr. Mahato, the defendants were allowed to raise construction exclusively within the portion allotted by the sale deed. The Division Bench found that the defendants were, prima facie, in possession of their respective portion. The relevant portion of the order is quoted below:-

“However, having regard to the fact that the sale deeds are not in dispute before us and demarcation is possible on the basis of the said sale deeds in terms of the schedule of the deeds, we direct the learned Trial Court to appoint a survey knowing lawyer at the cost of both the parties to demarcate the properties in terms of the deeds and only thereafter the defendants may be permitted to raise construction, without creating any equity in their favour in the partition proceeding. We are inclined to grant this relief to the defendants having regard to the fact that they are, prima facie, found to be in possession of a portion of the land which is yet to be partitioned but there are supporting deeds of sale to show that 3 decimals of land were sold in their favour. The learned Advocate Commissioner shall demarcate the properties on the basis of the said deed of sale and only thereafter both the parties may be entitled to raise construction on the demarcated portion.”

Mr. Mahato further submits that the report of the commissioner indicates that the defendants were allotted 0.0167 acres in the southern side, shown in the green colour and the plaintiffs were allotted 0.02 acres in the northern side, shown in red colour. Mr. Mahato undertakes that the construction will be restricted to this 0.0167 acres, in the southern side.

Although, Mr. Karmakar has raised an issue as to whether the commissioner could have demarcated on his own and made allotments, Mr. Mahato submits that the tenor of the

order of the Hon'ble Division Bench was such that the partition commissioner would settle the issue by making demarcations and by filing a report before the learned court below.

This Court is not inclined to go into the controversy with regard to the correctness of the report of the learned partition commissioner as the said report is yet to be accepted by the learned court below. The petitioners are at liberty to file their written objection in the meantime and the question of acceptance of the commissioner's report shall be decided on contest. The petitioners are also at liberty to take recourse to Order 26 Rule 10 of the Code of Civil Procedure if they so desire. Upon a contested hearing, the learned court shall decide as to whether the commissioner's report shall be accepted or not.

However, with regard to the correctness of the order allowing completion of the construction, this Court is of the view that the learned court below did not commit any error as the Hon'ble High Court had also permitted such construction. However, the order impugned is modified to the following extent:-

- A) The construction by the defendants shall be restricted to the 0.0167 acres in the southern side shown in green colour in the sketch/map of the commission.
- B) The construction will be subject to the final decree and allotment of the shares.
- C) The Court has already held that no equity will be claimed by the defendants in respect of the

construction in question. This Court further imposes another condition that in the event the construction of the defendants either wholly or partly, falls within the share of the petitioners, demolition shall be effected by the defendant, at their own cost.

D) The construction shall be in accordance with a proper sanction plan and permission from the competent authority.

This order shall not amount to acceptance of the commissioner's report.

The revisional application is thus disposed of.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Shampa Sarkar, J.)