

07 04.12.23

Ct. No. 04

akd

S.A.T. 37 of 2023

CAN 1 of 2023

Smt. Rita Ghosh (Mitra)

Vs.

Pratick Mitra & Ors.

Mr. Amar Nath Sen,

Mr. Biswajit Sarkar.

... for the appellant.

The appellant is beleaguered between the admission made before the partition commissioner and the stand taken on factual matrix which is conspicuously absent in the pleadings filed by the plaintiff/appellant in the partition suit.

The suit for partition and separation of shares was filed in respect of the suit property with sufficient description as required under the provisions of Code of Civil Procedure treating the same to be an undivided property of the parties to the proceeding. The record would reveal that the suit was decreed ex parte in preliminary form declaring the share of the plaintiff and the defendants which is not the subject matter of challenge in any proceeding. The Court thereafter proceeded with the final decree treating that the parties have no dispute with regard to the shares declared in the preliminary decree and appointed a partition commissioner.

The partition commissioner measured the property in presence of the parties and it is reflected from the report that the Counsels appearing for both the parties did not raise any objection on the measurement done by the partition commissioner. The report would further reveal that at the initial stage of the commission work the parties agreed to have the valuation of the aforesaid property and accordingly

direction was passed by the commissioner in this regard. The valuation report was submitted by the parties and it would appear from the said report that both the parties through their Counsels admitted such valuation report received from the Registry Office without any objection.

It is further evident from the said report that the plaintiff/appellant unequivocally submitted before the commissioner to allot ground-floor and second-floor in her favour; and the defendants/respondents showed their intention to have the first-floor. On the basis of the aforesaid submissions and consensus perceived by the commissioner during the currency of the said commission work, accepted the respective decisions and proceeded to allot ground-floor and second-floor to the plaintiff/appellant and the first-floor to the defendants/respondents.

However, the other portions where the drainage, septic tank, staircases and the electric rooms are concerned, the commissioner indicated that apart from the electric room the other facilities and amenities attached to the said suit premises would remain in common and further directed the defendants/respondents to arrange a separate electric connection in the first-floor within a stipulated time.

The said report was submitted before the Court and curiously enough an objection was taken out by the plaintiff taking exception to it.

It would appear from the findings returned by both the Courts below that the first objection relates to sale of a portion of the second-floor to one Kakoli Nandi by the co-sharers/co-owners and, therefore, the partition commissioner should not include the said portion as jointly owned by the parties while allotting the same. The second objection relates to certain

portion of the property which have not been allotted to the plaintiff/appellant and, in fact, the kitchen which is shown in the report has been demolished. It does not appear from the findings made in the impugned order that any other objection was taken by the plaintiff/appellant against the commissioner's report.

Obviously the moment an objection taking exception to the commissioner's report is filed, the Court invited the commissioner to appear and adduce evidence in support of its report and it is undeniable that the said commissioner was extensively cross-examined by the plaintiff/appellant. Both the Courts below have rejected the said objection firstly on the ground that the sale of a portion of the second-floor to one Kakoli Nandi was suppressed by the plaintiff/appellant in the plaint and was sought to be disclosed for the first time before the partition commissioner without any evidence or proof in this regard. Both the Courts have further held that the other objection relating to demolition of the kitchen cannot be taken into account having no relevance and/or proof at the behest of the plaintiff/appellant.

As indicated above, the shares held by the parties in respect of the property is not disputed though in a partition suit there is no concept of plaintiff and defendant, as each party is litigating for their respective share held in the joint property. Neither the plaintiff nor the defendants have disclosed in the plaint or in the evidence that a portion thereof was sold to one Kakoli Nandi, who is one of the coparceners or co-owners in respect of the joint property; rather the plaintiff/appellant proceeded on the premise that the entire property is held in joint by the plaintiff and defendants and in absence of any such document or pleadings having made in this

regard the Court proceeded to decree the suit in preliminary form and ultimately proceeded further to pass the final decree.

Even the report would reveal that the plaintiff's lawyer, who was present at the time of commission work, submitted that the plaintiff should be allotted ground-floor and second-floor, whereas the defendants'/respondents' lawyer conveyed the intention of his clients that the first-floor may be allotted to them. Since there was no dissent before the commissioner in respect of the respective allotment, the Commissioner proceeded to allot the same as desired by the respective parties which cannot be said to be unreasonable, irrational or having any flavour of bias.

It is the ardent duty of the litigant to disclose all the relevant facts and having suppressed the same and later on found to become a counter productive, no blessings from the Court can be expected. A litigant cannot take a rebound to what has been pleaded and the evidence having adduced in the suit and say something de hors the pleadings and evidence and the Court in our opinion have discarded and rejected the aforesaid contention which cannot be said to be illegal, infirm and susceptible to be interfered with in a Second Appeal.

Since the orders were passed taking into account all such aspects, we do not find any substantial question of law is involved in the instant appeal. The appeal is hereby dismissed. Consequently the connected application is also dismissed.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)

