

07.08.2023
Sl. No.12
Ct. 19
sayandeep

CO 1119 of 2023

**Pradip Kumar Chattopadhyay
Vs.
Dr. Mrs. Kalyani Chatterjee & Ors.**

Mr. Saptangsu Basu
Mr. Sukalpa Seal

...for the Petitioners.

Mr. Arnab Mukherjee

....for the O.P. Nos. 1 & 2.

Mr. S.P. Mukherjee
Mr. Shuvajit Bose

.....for the O.P. No. 3

The revisional application has been filed by the plaintiff No. 2(b) in misc. case No. 112 of 2021. The misc. case arises out of Title Suit No. 9 of 1991 which was renumbered as Title Suit No. 17378 of 2014.

By the order dated September 20, 2022, the learned Civil Judge (Senior Division) 3rd Court at Alipore rejected Misc. Case No. 112 of 2021.

Misc. Case No. 112 of 2021 was an application for review of the order dated November 25, 2021.

The applications under Sections 2 and 3 of the Partition Act, filed by the petitioner had been rejected on November 25, 2021 on merits. The Court held that the provisions of Sections 2 and 3 of the Partition Act could be invoked only when the Commissioner had returned a finding that the property was impartible. The report of the Commissioner Shri P.K. Roy, had stated that the

property was impartible as none of the co-sharers agreed to change their existing accommodation. Thus, the partition could not be effected by metes and bounds. It was not mentioned in the report that the property by its very nature and characteristic was not capable being partitioned by metes and bounds. According to the Court, the fact that the parties were not willing to give up the areas occupied by them, could not be a factor to decide whether the suit property was impartible or not. Hence, the review application was also rejected.

Aggrieved, the petitioner has filed this revisional application. The review application was also rejected on the ground that unless there was something before the Court which would indicate that the Partition Commissioner was of the specific opinion that the property was impartible, review of the earlier order would not arise.

Mr. Basu, learned senior advocate submits that the earlier order of the Partition Commissioner indicated that the property was impartible and hence the learned Court below was wrong in not entertaining the review application.

Mr. Mukherjee, learned counsel appearing for the opposite party submits that the report of the Partition Commissioner was rejected at the instance of the petitioner. Moreover, the Commissioner had to come to a specific finding, by describing the property and

delineating the same by way of a sketch map, to show that partition by metes and bounds was not possible. Unless such facts and finding and the drawings are before the Court, it would not be possible for the Court to form an opinion in this regard and allow the application under Sections 2 and 3 of the Partition Act. Directing sale of the property and division of the usufructs amongst the co-sharers according to their shares stated in the preliminary decree, would only arise once the commissioner indicates with reasons that the property was impartible.

Learned advocate for the opposite party Nos. 1 and 2 adopts the submissions of Mr. Mukherjee and states that all the reports filed by the Partition Commissioner till date, were set aside at the instance of the petitioner. The said opposite party Nos. 1 and 2 have filed an application for appointment of a learned survey passed partition commissioner afresh, so that the preliminary decree can be acted upon and the property can be divided in accordance with the shares declared in the preliminary decree, without further ado.

This Court is of the view that the circumstances which have been brought forward, require a fresh Commission in the presence of all the parties.

This Court thus, allows the application filed by the opposite party Nos. 1 and 2 on consent of all the parties and directs the learned Court below to appoint a

learned survey passed Partition Commissioner to effect partition of the property by metes and bounds and file a report along with the map before the learned trial court in order to show how the property could be partitioned by maintaining the shares as per the preliminary decree.

It is made clear that the Partition Commissioner shall file the report indicating the best possible way for demarcation and partition of the respective shares. The same shall be delineated by a sketch map. If the property is impartible, but not on the ground that the parties were not inclined to part with their present occupation, the same shall be included in the report. The Partition Commissioner shall clearly indicate whether the property was partible or impartible.

Upon such report having been filed, the learned Court below shall decide whether the property can be partitioned as per the respective shares and pass necessary orders. If not, other means for effecting partition shall be explored. The commission work shall be completed within three months from the date of appointment and the entire issue shall be disposed of by preparing and passing the final decree within six months from the date of communication of this order. The fees of the Commissioner and how the same shall be borne, shall also be decided by the learned trial judge.

Accordingly, CO 1119 of 2023 is disposed of.

All parties, including learned Court below, shall act on the basis of the server copy of this order.

(Shampa Sarkar, J.)