

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FA 39 of 2021

Minati Das & Anr.
versus
Jagatdhatri Das & Ors.

For the Appellants : *Mr. Shibaji Kumar Das,*
Ms. Rupsa Sreemani,
Ms. Ankita Giri.

For the Respondents : *Mr. Asis Bhattacharyya,*
Mr. Biswanil Mitra.

Hearing is concluded on : *11th January, 2023.*

Judgment On : **24th January, 2023.**

Tapabrata Chakraborty, J.

1. The final decree dated 12th February, 2021 passed by the learned Civil Judge (Senior Division) 3rd Court, Howrah in a partition suit being Title Suit no. 232 of 2011 is the subject matter of challenge in the present appeal preferred by the defendants in the suit.

2. The suit for declaration, partition and injunction was filed by the plaintiff/respondent for partition of his half share in the following suit property :

‘Schedule of the Property :

All that piece and parcel of Mokarari Mourashi bastu land measuring more or less 03 cottahs 03 chittaks 17 square feet along with a two storied building standing thereon with all easement right appertaining thereto comprising within Municipal building no. 10/1, Nabin Senapati Lane, Police Station- Shibpur, District- Howrah, butted and bounded by:-

On the North : Nabin Senapati Lane.

On the South : Property of 10/1/1, Nabin Senapati Lane.

On the East : Nabin Senapati Lane.

On the West : Property of 10/2, Nabin Senapati Lane.’

3. The suit was decreed in preliminary form ordering *inter alia* as follows :

‘That the instant suit be and the same is decreed on contest against the defendant in preliminary form without any order as to cost.

The shares of the plaintiff and defendant are hereby declared to the extent of 50% in respect of the suit property.

The parties are directed to get the suit property as mentioned in the schedule of the plaints partitioned by metes and bounds amicably amongst themselves maintaining their respective and existing share and possession over the suit property and also maintaining equality and equity of valuation of each share in the property (observing the Belting Method for the purpose of assessing the valuation of each share in the property) of each co-sharer within

three months from the date of delivery of the judgment, failing which the parties are at liberty to get the suit property mentioned in the schedule of the plaint partitioned by metes and bounds through court upon appointment of a survey knowing Advocate Commissioner as per order of the court.

Preliminary decree be drawn up accordingly.'

4. Pursuant thereto, the learned Partition Commissioner was appointed, who completed the commission work including field measurement, valuation and allotment and submitted the commission report on 3rd December, 2019 observing *inter alia* that the '*Pltffs. will get of Rs. 1,68,006/- from the defdts. as owelty money otherwise pltffs. will get 54 sq. ft. land from the defdts. allotment*'. After submission of the report, the parties abstained from filing any objection and the learned Judge accepted the report and the final decree was passed on 12th February, 2021 directing *inter alia* as follows :

'It is ordered and decreed that the Suit be and the same is decreed finally and the preliminary decree passed on 23/07/2018 be made final.

The right title and interest of the parties to the suit as indicated in preliminary decree dated 23.07.2018 is hereby declared in final form.

Let the commission report be mode part of final decree.'

5. Prior to the final decree, the plaintiff expired and his legal heirs, being the respondents in the present appeal, were brought on record and the final decree was passed on contest.

6. Mr. Das, learned advocate appearing for the defendants/appellants (hereinafter referred to as the appellants) submits that the learned Commissioner's report was prepared in an illegal and arbitrary manner and in utter violation of the preliminary decree dated 23rd July, 2018. In the said report there is no explanation as to how the learned Commissioner arrived at a finding that the plaintiffs/respondents (hereinafter referred to as the respondents) would get Rs. 1,68,006/- as owelty money. The valuation of the land and structure as taken into consideration by the learned Commissioner while preparing the report dated 3rd December, 2019 was imaginary, fictitious and exorbitant. The same could not have been accepted by the learned Court below. In the learned Commissioner's report there is no indication as regards the source of valuation. There is also no explanation as to why an area of 225 square feet, was included in the respondents' allotment and as to why the appellants' allotment was restricted to only 943 square feet. The report also does not offer any reason as to why an amount of Rs. 6,97,500/- was taken into consideration while calculating the valuation of the plaintiff's share of land. Thus, the learned Commissioner's report being a cryptic and unreasoned one, is not sustainable.

7. Drawing our attention to the cross-examination of PW1, Mr. Das submits that there was an admission on the part of plaintiffs that for repairing the back portion of the structure presently occupied by the plaintiffs in the suit property, the predecessor of the appellants incurred all necessary expenditure and such fact ought to have been taken into

consideration by the learned Court below while passing the preliminary decree.

8. According to Mr. Das, there are discrepancies galore in the learned Commissioner's report. The property as described in the schedule does not tally with the property delineated in the map as prepared by the learned Commissioner. In support of his arguments, Mr. Das has placed reliance upon the judgments delivered in the cases of *Jagannath -vs- Arulappa & Anr.*, reported in 2005(12)SCC 303 and *Abani Mohan Sinha and another -vs- Bharati Ghosh (Smt.) and others*, reported in 1997(4)ICC 285.

9. *Per contra*, Mr. Bhattacharyya, learned advocate appearing for the respondents submits that having not preferred any appeal against the preliminary decree, the appellants are estopped from disputing the veracity and sustainability of the directions towards determination of shares of the respective parties.

10. He denies the allegation that property described in the schedule is different from the property delineated in the map as prepared by the learned Commissioner. The property on the eastern side, is butted and bounded by the Nabin Senapati lane which is 16 feet wide. The appellants' entry to the property is from the said eastern side whereas the entrance to the respondents' portion is through the northern side of the property, which is butted and bounded by another limb of the Nabin Senapati lane, much lesser in width. Taking into consideration such fact and applying the belting method, the learned Commissioner had appropriately determined the

valuation of shares of the respective parties and there is no infirmity in such determination.

11. Mr. Bhattacharyya further argues that the appellants' representative was present at the time of identification and measurement of the property. Neither did he raise any objection at the time of commission work nor did the appellants file any objection to the learned Commissioner's report and as such, the appellants are estopped from reopening the *lis* as finalized through the final decree.

12. Indisputably, the appellants were present at the time of commission work and did not raise any objection against the measurement of the suit property. They did not even file any written objection to the learned Commissioner's report. It is not a case that while valuing the suit property, any structure standing on the said property had been excluded. It would be relevant to refer to Section 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. In partition suits where it is not possible to divide the properties by metes and bounds equally, it will be necessary to allot properties of unequal value amongst the different sharers in the suit. When properties of distinct proportion and value are allotted to a sharer by way of adjustment of the value, the sharer to whom the property of more value is allotted has to be directed to pay the sharer to whom the property with lesser value is allotted by way of equalisation of their shares. Such provision for equalisation of shares is recognised by law and termed as

provision for owelty or equality of partition. As per the order of the learned Court below and applying the belting method the allotment of land was determined to be of 1241 square feet and 943 square feet and the valuation was determined to be Rs.2084/- per square feet and Rs.3100/- per square feet for the plaintiffs and the defendants respectively. In the pucca structure over the schedule property, the plaintiffs were found to be occupying 'R1, R2, V. K. and Bath' whereas the defendants were found to be occupying 'R3, R4, V1,V2, K2 and Bath in Ground floor' and 'R5, R6, V3 stair case in First floor'. Thereafter towards equalisation of shares, it was directed that the plaintiffs/respondents would get Rs. 1,68,006/- as owelty money.

13. The argument of Mr. Das that the respondents did not incur any expenditure towards repair and development of the portion occupied by them and that the suit property described in the plaint schedule does not tally with the description of the said property in the map prepared by the learned Commissioner, are not acceptable to this Court inasmuch as no such issue was argued before the learned Court below and having not preferred any appeal against the preliminary decree, which determined the shares of the parties, the appellants are precluded from disputing its correctness in the present appeal preferred against the final decree.

14. The directions of the learned Court below, contained in the preliminary decree, were duly complied with by the learned Commissioner. It is not a case that while determining the value of share, the learned Commissioner had applied any different yardstick in respect of the appellants' allotment. As such, the allegation that learned Commissioner

had acted arbitrarily, in determining the share, is not acceptable to this Court. No objection was also filed by the appellants against the learned Commissioner's report and no claim towards revaluation was agitated. No changed circumstances have been pleaded or argued in the present appeal. The scope of an appeal against the final decree is limited, as the final decree merely implements the preliminary decree which has attained finality. From the calculation and valuation note it appears that the learned Commissioner strenuously calculated the exact quantum of land and the structures occupied by the parties. The learned Commissioner was survey passed and had the expertise to conduct commission work and such determination made by an expert should not be normally substituted.

15. There is no dispute as regards the proposition of law laid down in the case of *Jagannath* (supra). However, the same has no application as the appellants themselves, did not challenge the preliminary decree or file any objection against the learned Commissioner's report. The judgment delivered in the case of *Abani Mohan* (supra), the Court interfered since the learned Commissioner while valuing the suit property excluded the structure and the shop room on the ground that the structures were in a dilapidated condition. The said judgment is, thus, distinguishable on facts.

16. Since the rights of the parties are adjudicated upon by the Court before a preliminary decree is passed, the said decree must, in so far as rights adjudicated upon are concerned, be deemed to be a final decision. A preliminary decree passed in a partition suit, is not a tentative decree but

must, in so far as the matters dealt with by it are concerned, be regarded as conclusive.

17. Applying such proposition of law to the facts of the present case, we are not inclined to interfere with the judgment and decree impugned in the present appeal.

18. Accordingly, the appeal is dismissed. The judgment and decree dated 12th February, 2021 passed by the learned Civil Judge (Senior Division) 3rd Court, Howrah in the Title Suit No. 232 of 2011 is affirmed.

19. There shall, however, be no order as to costs.

20. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)