

13.09.2023  
Court No. 19  
Item no.67  
CP

C.O. 1877 of 2021

Kashinath Mondal & ors.  
Vs.  
Achinta Naiya & ors.

Ms. Sarmistha Ghosh Sarma  
.....for the petitioners.

Mr. Satyajit Mondal  
Mr. Malay Dhar  
Mr. Amit Bikram Mahata

...for the opposite parties.

The revisional application arises out of an order dated February 21, 2019, passed by the learned Civil Judge (Junior Division), Second Additional Court at Diamond Harbour in Title Suit No. 116 of 2016. By the order impugned, the learned court had rejected the commissioner's report dated September 22, 2008. The report was filed pursuant to a direction upon the learned Trial Judge by the first appellate court for appointment of some other commissioner, in order to effect partition of the suit property by metes and bounds.

The background of the case is required to be discussed. The predecessors of the opposite parties as plaintiffs, instituted the suit for declaration of title, partition and injunction. The suit was filed before the learned Civil Judge (Junior Division), 3<sup>rd</sup> Court at Diamond Harbour. Originally the suit was

registered as Title Suit No. 110 of 1989. Subsequently, the suit was renumbered as Title Suit No. 116 of 2016. The suit land involved plot No.1567 (bastu) and 1574 (pukur). The predecessors of the petitioners contested the suit by filing a written statement. The suit was decreed in preliminary form and the right of the parties to the extent of 12.5 decimals each, in plot No.1567 was declared. In the preliminary decree, the learned Trial Judge had recorded that the plaintiffs were in possession of a portion of the south block of the property in question. Thereafter, a commissioner was appointed to partition the suit property in terms of the preliminary decree. The commission was held and the report was accepted. The final decree was passed by making the report of the survey passed commissioner, a part of the decree.

The said final decree was challenged by the petitioners in Title Appeal No. 50 of 2002. The learned Additional District Judge, Fast Track, 2<sup>nd</sup> Court, Diamond Harbour allowed the appeal by setting aside the final decree dated August 22, 2001, as also the commissioner's report and remanded the suit to the trial court for appointment of another survey commissioner to partition the property and to pass a final decree on the basis thereof. Accordingly, the learned Trial Judge appointed another learned

advocate commissioner in compliance with the order passed by the first appellate court. The learned advocate commissioner completed the work of commission and filed a report before the learned court below on September 22, 2008. Along with the said report, a sketch map had been prepared, delineating the portions allotted to the plaintiffs in orange and the defendants' portion in yellow.

The defendants accepted the report and did not raise any objection. The plaintiffs/opposite parties filed an objection on various grounds. According to the plaintiffs, the field work was not done in accordance with the procedure applicable. Fixed points had not been identified for taking the measurements. The learned advocate commissioner tried, as far as practicable, to retain the portion over which the defendants had allegedly made construction, in violation of the order of injunction. That the area allotted to the plaintiffs was not even. Continuity was not maintained. It was impossible for the plaintiffs to use such bifurcated property for the purpose of construction of a dwelling house or for any other suitable use. The learned court below, upon considering the objection of the plaintiffs, rejected the commissioner's report.

The defendants/petitioners have challenged the said order on the following grounds:

- a) The learned court below could not have relied upon the preliminary decree while assessing the correctness of the learned commissioner's report. The preliminary decree only declared the shares but did not direct that the existing possession of the plaintiffs should be maintained, while making the appointment.
- b) The first appellate court, had categorically arrived at a finding that the alleged registered deed of partition dated June 30, 1948 had not been acted upon and parties were not possessing their shares on the basis thereof. Thus, the earlier commissioner's report was set aside on such ground and a new partition commissioner was directed to make a fresh commission in order to divide the property by metes and bounds in terms of the shares declared.
- c) The learned first appellate court had also observed that both the parties were to be given some portions in the front of the plot in question. Such aspects were taken care of in the subsequent commission and the property was divided accordingly. The report was wrongly rejected.

d) The learned trial judge rejected the report without taking into consideration the observations of the learned first appellate court and also without giving any reasons as to why the learned court thought the allotment in favour of the plaintiffs to be abrupt, unmethodical and contrary to the procedure to be followed in this regard.

The learned advocate for the opposite parties submits that the commissioner's report did not take into consideration the fact that the defendants had already constructed some portions, in violation of the order of injunction. Such construction was void and illegal. On the basis of those constructions, the present possession of the defendants should not have been accepted and the report should not have been prepared by maintaining the existing possession of the defendants. The defendants actually did not have any right to those constructions as the same were constructed in violation of the order of injunction.

It is further submitted that the map which was considered by the learned court below was indicative of the fact that the allotment to the plaintiffs, which was demarcated in orange was irregular and unsystematic. The portion was not continuous but bifurcated. Thus, the learned court below did not

commit any error in rejecting the commissioner's report.

Having heard the learned advocates for the respective parties, this court finds that the learned court, upon a 'fleeting glance' at the commissioner's report and the map with regard Plate – III, found that the plaintiffs' allotted land was surrounding the defendants' allotted land. The allotment appeared to be fragmented and not according to procedure. Such allotment would not enable the plaintiffs to put the land to optimum use. That the learned commissioner had gone out of line and deviated from the express direction envisioned in the preliminary decree, while conducting the partition.

A detailed report had been prepared by the learned commissioner, which is quoted below:

"It is found from the case map that the present possession of the plaintiff side at south eastern portion of southern block of the bastu plot no. 1567 measuring north 90 links, South 86 links, East 105 links west 130 links about an areas of 88 x 117.5 or 10340 sq.links and possession of the defendant side just west of plaintiff's portion within this block measuring north 60 links south 54 links East 118 links west 118 links about an areas of 57 X 118 or 6726 sq.links which is just north of public pathway by bricks, Plot No. 1574 which is tank one just north of the above mentioned block North and East side Bank with Bamboo groves about width of 20 links, tank used as ejmal. Remaining portion of the plot no. 1567 just west of this tank as danga vacant land. Measuring north 53 links south 75 links, East 154 links West 160 links about an areas of 157 x 64 or 10,048 sq.links. Plaintiff possessed eastern portion, defendant western portion. One ejmal path way from

east to west from plaintiff's house just northern portion of the defendants house, measuring north 60 links south 60 links east 12 links west 12 links about 60 x 12 or 720 sq.links, then towards north measuring north 20 links south 20 links east 124 links, west 124 links about 20 x 124 or 2480 sq.links as ejmal passage. As per preliminary decree plaintiff is entitled to get half of share within plot no. 1567 and 1574. Remaining half share to defendant side. So plaintiff is entitled to get remaining portion within suit plot no 1567 from eastern portion, western of tank measuring north 24 links south 24 links east 136 links, west 136 links about 3264 and also defendant entitled to get half share within 1567 just western portion of the plaintiff's this portion measuring north 29 links south 46 links, east 136 links, West 136 links and north 70 links, south 75 links, east 18 links, west 74 links about 5105 sq.links and 1522 sq.links Total 6822 sqlinks allotment portion plaintiff shown in orange colour and defendants shown in yellow colour others were as shown in this plate no.-III case map. From tank plaintiff side, entitled to get half share and defendant also half share. Plaintiff's portion allotted from eastern portion measuring North 72 links south 65 links east 120 links, west 125 links and defendant side just west of this portion measuring north 72 links south 65 links east 125 links west 120 links which all were shown in the plate no.-III, case map. Total allotted portion of plaintiff bastu and tank shown in orange colour defendant bastu and tank shown in yellow colour."

In my opinion, elaborate discussions had been made by the commissioner as to the measurements taken and how such area was sought to be divided. The decision of the learned first appellate court was also clear on points as to how the earlier commissioner's report was incorrect and those observations were also necessary to be considered

while deciding whether the present advocate commissioner's report should be accepted or not.

This court is of the view that even if the findings of the learned Civil Judge (Junior Division), 3<sup>rd</sup> Court at Diamond Harbour with regard to the unmethodical allotment of the property of the plaintiffs is correct, but such finding would have to be supported by reasons. Defects in the commissioner's report ought to have been pointed out in some detail, before rejecting the same. In this case, the objections of the plaintiffs were presumed to have been accepted, but the learned court below did not specify which of the objections had led the court to hold that the commissioner's report was unacceptable. The anomalies in the method of allotment contained in the report, ought to have been specifically discussed by the learned trial judge.

Under such circumstances, without going into the merits of the correctness of the commissioner's report, this court is of the view that the order impugned deserves to be set aside only on the ground that the detailed reasons are absent.

The order impugned is set aside. The learned court below is directed to reconsider the report of the commissioner upon hearing both the parties and upon taking into consideration the objections raised by the plaintiffs.

The said exercise shall be completed within a period of two months from the date of communication of this order.

This court has not gone into the merits of the issues involved.

If any subsequent order has been passed in the meantime, for appointment of another commissioner, the same stands set aside in view of the order passed hereinabove.

The revisional application is accordingly disposed of.

There shall be no order as to costs.

Parties are to act on the server copy of this order.

**(Shampa Sarkar, J.)**