

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE HARISH TANDON
And
THE HON'BLE JUSTICE PRASENJIT BISWAS

FAT 184 OF 2022

Sri. Durga Prasad Roy Chowdhury

- Vs -

Sri. Ashoke Kumar Roy Chowdhury

For the appellant : **Mr. Soumik Ganguly, Adv.**
Mr. Sayan Ray, Adv.
Ms. Chandana Chakraborty, Adv.

For the respondent : **Mr. Anjan Dutta, Adv.**

Hearing concluded on : **05.09.23**

Judgment on : **17.10.2023**

Prasenjit Biswas, J:-

1. The order dated 16.06.2022 passed by the learned Civil Judge (Senior Division), 2nd Court, Barasat, North 24 Parganas, in Title Suit No. 779 of 2017 whereby learned Court accepted the report of the Pleader Commissioner overruling the objections raised by the appellant is under challenge in this appeal.

2. Only question which remains for consideration is of a garage situated in the ground floor left by the deceased and is not partitioned by the Partition Commissioner.

3. Learned Counsel appearing on behalf of the appellant/defendant submitted before us interalia that there are serious errors and discrepancies in the report of the commissioner and the learned Trial Court committed error and illegality by accepting the report and directing for drawing up final decree in terms of the said report. It is further submitted by the learned Counsel that the report lacks proper quantum of land and structure allotted to the appellant and the respondent. It is further assailed by the learned Advocate that the report of the Pleader Commissioner is vitiated due to non-mentioning of valuation of the suit property and allotment of shares of the parties which is required for fixing the stamp duty which would be paid by the parties at the time of drawing up of the final decree.

4. Our attention is drawn by the learned Counsel that although the Trial Court recorded the objection raised by the appellant to the report submitted by the Pleader Commissioner but learned Court failed to give any reason or satisfaction as to why the report is correct and well-defined in relation to the allotment of shares of the parties. It is further submitted by the learned Advocate at the time of hearing that the existence of the garage situated in the ground floor has not been indicated in the report submitted by the commissioner and more so, it has not been partitioned by the Pleader Commissioner and it remains joint.

5. At the time of hearing learned Counsel appearing for the respondent admitted that the garage situated in the ground floor has not yet been partitioned. He further submitted that the report submitted by the commissioner is correct and there is no error in the same. It is further submitted by the learned Counsel that the areas allotted to the respondent/plaintiff is less than that of allotted to the defendant but he does not need the wealthy money. So, as per his submission report

submitted by the Pleader Commissioner cannot be rejected on the ground that wealthy money has not been calculated.

6. We have extensively gone through the report submitted by the Pleader Commissioner and the impugned order passed by the learned Trial Court. We also have considered the rival submissions advanced by both the parties.

7. It appears from the report submitted by the Pleader Commissioner that the respondent is occupying the ground floor and the appellant is occupying the first floor. It is further lighted from the report that the valuation has not been ascertained by the commissioner which is required for assessment of the Court Fees to be paid at the time of drawing up of the final decree. Although, both the parties admitted the existence of a garage in the ground floor, there is no whispering about the garage in the report submitted by the commissioner and it remains joint and has not yet been partitioned. It further appears from the impugned order that although the learned Trial Court recorded the objection of the appellant in acceptance of the report filed by the Pleader Commissioner but there is no such reason or satisfaction of the Court as to why the report of the Pleader Commissioner is correct and well-define as well as allotment of shares to the parties is just and correct.

8. In the present case it appears that there is a serious discrepancy regarding measurement taken by the commissioner as stated by him in his report. The Trial Court refused to attach importance to the discrepancies highlighted by the appellant and came to the conclusion that the report of the commissioner is correct, as well as share allotted to the parties is also correct and well-define. We may observe on consideration of the case of the parties, the nature of controversy raised by the case and other material facts and circumstances and felt that in

the interest of justice fresh investigation in respect of the suit properties is necessary. It ought to have ensured that the report of the commissioner should be absolutely free from blemish.

9. Order 26 Rule 10(2) of CPC provides that the report of the commissioner shall form part of the record. It is open to those of the parties to examine the commissioner in respect of the matters referred to and mentioned to him. The word “examination” referred to in Rule 10(2) CPC is to be understood in the context of the word “examination” in the Evidence Act, which includes examination-in-chief, cross-examination and re-examination. If the parties have no grievance against the report of the commissioner question of examining the commissioner would not arise but once objection is raised by the party to the report of the commissioner, in order to substantiate the said objection a prayer may be made before the Court for not accepting the report submitted by the commissioner, along with a prayer for giving him permission to examine the commissioner, attaching any of the matters referred to by him or mentioned in the report. Whenever, objection is raised to the report of the commissioner contended that the report is incorrect, and to substantiate such a stand, parties normally examine the commissioner and cross-examine all those aspects in the light of the objection taken.

10. If the parties are successful in discrediting the report entirely or a portion of the report, the respect of which the party has grievance then the Court in its discretion may reject the report of the commissioner but simultaneously it is also true that if in the cross-examination nothing is substantiated over the objection raised by the parties it is open to the Court to accept and act on the report submitted by the commissioner. It appears that the learned Trial Court committed serious error in accepting the report without considering the evidence

adduced by the Pleader Commissioner wherein he stated about the existence of garage with shutter in the ground floor of the suit property.

11. From the report submitted by the Pleader Commissioner it appears that he has not mentioned about the existence of garage in the ground floor and it has not been partitioned by the Advocate Commissioner as admitted by both the parties at the time of hearing of this case. The Trial Court decreed the suit in final form by accepting the report of the Pleader Commissioner without considering the facts that it is vitiated due to non-mentioning of the valuation of the suit property and valuation of the share of the parties, which is required for fixing stamp duties required to be paid by the parties at the time of drawing up the final decree.

12. For the above reasons as mentioned in the above paragraphs, we are of the opinion that the impugned order dated 16.06.2022 passed by the learned Trial Court is vitiated by an error of law and is not sustainable under the provisions as enshrined in the Act.

13. The impugned order dated 16.06.2022 passed by the learned Trial Court is hereby set aside.

14. The instant appeal be and the same is hereby allowed. The Pleader Commissioner is, therefore, requested to go further into the matter and determine the share of the garage of the parties therein. The commissioner will suggest the valuation of the garage situated in the ground floor and what will be the share of the parties therein. For this purpose, Pleader Commissioner will be at liberty to summon the parties to the suit. The remuneration of the commissioner will be fixed by the Trial Court and Trial Court also fixes the time for filing of the report by the commissioner.

15. However, there is no order as to costs.

16. The appeal, being No. FA 184 of 2022, is hereby allowed. Consequently, connecting application, if any, is hereby disposed of accordingly.

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

18. Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)