

Item-73. 02-02-2023

SAT 230 of 2013

sg Ct. 8

Meera Srimani
Versus
Premananda Srimani & Ors.

In spite of service of notice upon Sri Sukdeb Srimani, the appellant no.3 is not represented. The other appellants are also not represented.

In view of our order dated 23rd December, 2022, we propose to decide whether the second appeal involves any substantial question of law.

We have perused the grounds of the appeal. The appellate judgement and decree dated 22nd December, 2011 affirming the judgment and decree dated 22nd September, 2000 passed by the learned Civil Judge (Junior Division), 3rd Court, Hooghly in a suit for declaration, permanent injunction, mandatory injunction and recovery of possession is the subject matter of challenge in this second appeal.

The plaintiff filed a suit claiming ownership of A scheduled property. It was claimed that they are in possession of the said property as owner by virtue of the registered partition deed dated 21-12-1960. The plaintiff is paying the municipal taxes. The defendant no.2 is also the owner and in possession of B scheduled property by virtue of said same deed of partition and he is being assessed separately in respect of B schedule property. The original plaintiff alleged that there is no common wall in the partition deed except the ingress and egress passage of the eastern side. There is 1 feet space open to sky in the northern side wall of A scheduled

property which is A-1 scheduled of the plaintiff and forms part and parcel of A schedule property. It was alleged that in September, 1986, the defendant no.2 tried to construct a building on the northern side wall of A scheduled property after encroachment of A-1 scheduled property. In spite of protest, the defendant tried to raise construction thereby interfering with the possession of the plaintiff. However, since the illegal construction was continuing, the plaintiff filed a suit for declaration, permanent injunction and an order of status quo was passed. At the time of hearing of the injunction petition in the earlier proceeding, the defendant no.2 filed a sanctioned plan which was not in conformity with the measurement and allotment made to the parties in the partition deed as a consequence, the order of status quo was vacated.

An appeal has been preferred by the plaintiff. The District Judge restored the order and restrained the defendant no.2 from making any construction on A scheduled property. This order was, however, violated. The plaintiff filed a petition of local inspection of the A and B scheduled properties which, however, was disallowed. The plaintiff contended that the prayer of the defendant no.2 was illegal and in violation of Bengal Municipal Act, 1932. The plaintiff since partition has been enjoying the light and air through B-1 scheduled property in respect of the building described in A scheduled property for over 20 years.

In view of the encroachment made by the defendant, the plaintiff filed the present suit. The defendant no.1 contested the suit by filing the written statement and alleged that the said defendant is no way concerned with the dispute of boundary wall between the plaintiff and the defendant no.2 and the municipality

has not sanctioned any plan allowing any illegal construction in contravention of the Rules of the Bengal Municipal Act, the defendant no.2 in his written statement has stated that he was allotted his share to the adjacent north of the plaintiff's share under the partition deed. The northern wall of the plaintiff was not allotted to him absolutely and it was also the same with regard to the southern side wall of the defendant no.2. The allotted rooms of the defendant no.2 and the allotted room of the plaintiff were adjacent rooms along with a varanda to the east of the rooms and that varanda was also divided by a common wall. The northern side wall of the plaintiff was not mentioned in the partition deed as common wall due to mistake and this mistake did not change the actual physical allotment of the portion. The defendant is in possession of a room adjacent to the northern side wall of the plaintiff and there is no existence of an open to sky vacant space about 1 feet breadth to the north of the northern side wall of the plaintiff. A commission was held to this effect in TS No. 343 of 1986 and the commissioner has indicated the said fact in his report. The defendant has constructed first floor on his allotted tile shed rooms after constructing a cemented roof in place of tiles on the basis of his sanctioned plan and after considering the sanction plan court rejected the injunction petition of the plaintiff. It was specifically stated that the plaintiff did not acquire any easement right for light and air from the northern side wall and the allegation that the cause of such construction is that room of the plaintiff became dark and inhabitable for the is baseless.

The trial court framed 12 issues in allowing relief in favour of the plaintiff. The trial court relied upon the exhibit A, which is

the sanctioned plan of the defendant no.2 and the inspection report being Exhibit 3. These two documents would clearly show that exhibit A was not sanctioned due to shortage of back and side space as per Building Committee Meeting resolution held on 28.01.1985. The red ink mark and yellow ink marks showing partition line, side plan, existing and proposed construction in Exhibit A – due to long passage of time were not clearly visible and might have been erased but the existing and proposed construction were clearly mentioned therein. This plan would clearly show the partition line, the existence of the common wall in between the partitioned rooms of the parties. It would be evident from the exhibit 1 and exhibit A, that the area of land of the defendant no.2 which was mentioned in the exhibit 1 and the area of land which was mentioned in exhibit A. There was no discrepancy of measurement regarding the breadth of the land but exhibit A shows some more land in length than exhibit 1. It is also appears from exhibit A that there are some vacant land to the north of the existing construction of defendant no.2 and thereafter tank of India Jute Mill. P.W. 1 deposed that they have been possessing some land of India Jute Mill since long. Hence, the inclusion of some land of India Jute Mill in the exhibit A is not unusual. However, this discrepancy does not prove that Exhibit A was illegal or any encroachment of the land of the plaintiff. Exhibit C is the report of the commissioner and this report clearly shows the existence of a common wall of the parties in between their rooms and partition line and corroborates exhibit A.

On such consideration, the trial court dismissed the suit.

The first appellate court in concurring with the findings that

the evidence of the Advocate Commissioner was not exhibited as it was done after a long time of the construction and at the time of the commission, the Commissioner did not consult the sanctioned plan. The trial court has also relied upon the exhibit C which would show that there was no door or window of the plaintiff on his northern wall and there is no cogent evidence by the plaintiff of enjoying any vacant side space to the north as opposed to the evidence emanating from exhibit C. The appellate court on proper appreciation of the evidence has concurred with the findings arrived at by the trial court.

From the partition deed it would appear that the Schedule “kaa” which was allowed in favour of plaintiff, Janakananda Srimani has a land measuring land measuring 35’-6” in length from north to South in the eastern side, 34’-9” in length from north to south, in the western side 34’-00” from east to west in breadth in the northern side and 31’-8” in breadth, from east to west in the southern side total measuring 1 katha, 9 chittak and 32 sq.ft with building thereon having three rooms in the ground floor and three rooms in the upper floor. The boundary of the said “Kaa” scheduled property of the plaintiff has been mentioned in both of “Cha” Schedule in the eastern side, “Gaa” schedule property in the north, property of Klachand Bandopadhyay in the west and “Kaa” schedule property in the south.

However, schedule “Gaa” of the said partition deed which was allotted in favour of Jeebananda Srimani (defendant) has a land measuring 53’ in length from north to south in the eastern side 44’-6” in length from north to south in the western side 37’-6” in breadth from east to west in northern side, 34’ in breadth

from east to west in southern side measuring 2 katha 6 chittak with 6 chittak with brick built wall on which two rooms with shed and a kitchen with shed having brick build wall and a 'Dalan' in front with two privies, the boundary of which is only both of "Cha" schedule in eastern side land of India Jute Mill in northern side, property of Kalachan Bandopadhyay in the west and "Kha" scheduled property in the south.

Both the courts have found that they could not find any existence of the common wall of the parties in the suit property. The partition deed is completely silent about the existence of a common wall in between the plaintiff and the defendant no.2 in schedule kha, which was allotted to the plaintiff. The appellate court found that in the "kaa" schedule property that was allotted to Jeebananda Srimani there is a mention of brick building wall.

According to the plaintiff the wall on which the construction has been made by the defendant is a common wall on which no construction can be made. On the other hand of the defendant stated that the said wall on which the construction has been made belongs to him which was allotted in his favour by the aforesaid partition deed, Exhibit-1. The main allegation in the suits against the defendant is that there was encroachment of land by him. But it is surprising that in the suit no local investigation was made by any survey knowing commissioner. It appears from the materials on record that by order No.11 dated 12.07.88 passed by the Id. Munsif, 2nd Court, Serampore, in T.S. 6/91 (earlier 302/1987), the application for local investigation filed by the petitioner under Order 39 Rule 7 read with Order 26 Rule 9 of the C.P. Code was rejected. Against the said order petitioner moved a revisional

application which was disposed of by the Hon'ble Court with an observation that there was no legality or material irregularity in the order impugned. It was observed also that there was no need of a fresh commission under Order 39, Rule 7 read with Order 26, Rule 9 of the Code. Thus, the application for local investigation filed by the plaintiff was turned down by the lower court as well as by this court. The plaintiff could not prove any encroachment or right of easement.

The concurrent findings of facts on the basis of the evidence on record cannot be said to be perverse. On the basis of material on record, it cannot be said that the plaintiff was able to establish his case.

On such consideration, we do not find any reason to interfere with the concurrent findings of both the courts. The second appeal stands dismissed at the admission stage.

(Uday Kumar, J.)

(Soumen Sen, J.)