

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 2664 of 2022

Narayan Chandra Datta @ Narayan Datta

VERSUS

Aruna Dutta & Ors.

For the defendant/petitioner:

Mr. Surya Prosad Chattopadhyay, Adv.

Mr. Arujun Samanta, Adv.

Mr. Ankit Chatterjee, Adv.

for the opposite parties:

Mr. Washef ali Mondal, Adv.

Last Heard on : December 16,2022

Judgment on : January 06, 2023

Biswaroop Chowdhury.:

The petitioner before this Court is the defendant in a suit for declaration and partition before Learned Civil Judge (Senior Division) at Barasat being Title Suit No – 237 of 2008 and is directed against the order dated 7-05-2022 passed by the Learned

Judge rejecting the application filed by the petitioner under order 26 Rule 9 of the Code of Civil Procedure.

The case of the petitioner may be summed up thus:

1. The opposite parties instituted Title Suit praying decree for declaration, partition and injunction before the Learned 2nd Court Civil Judge Senior Division at Barasat.
2. The petitioner appeared before the Learned Court and contested the suit, and a preliminary decree was passed.
3. Pursuant to the passing of preliminary decree survey Commissioner was appointed who upon completion of commission work submitted his report. The report submitted by survey commissioner was rejected by the Learned Trial Court.
4. The petitioner pursuant to the rejection of the report filed application under Order 26 Rule 9 of the Code of Civil Procedure with a prayer for conducting survey on the following points.

- A. Whether any construction is going on over any portion of the suit property or not and if so, the construction regarding its length and breadth.
- B. Whether there is a common passage over the suit property or not and if there is passage measuring the same towards East or West.
- C. Whether any construction or pillar/boundary was made upon the common passage or not? And if made then to state whether it was constructed according to building plan and municipal law? Whether any partition plan existed between the parties or not?
- D. Whether plaintiff or his promoter made the construction upon the plaintiff's allotted land or upon the common passage? If encroached measure the area of encroachment.
- E. Local features.
- F. Rough sketch map.

The opposite parties/plaintiff's contested the application by filing written objection. By order dated 07/05/2022, learned trial Court was pleased to reject the application under Order 26 Rule 9 of Code

of Civil Procedure filed by the Petitioner/Defendant. The petitioner being aggrieved has come up with the instant application. It is the contention of the petitioner that the Learned Trial Court erred in law and fact in erroneously observing that the points as regards which the defendant has sought for a report were not the matters of dispute in the suit. It is further contended that the Learned Trial Court ought to have considered the fact that during the pendency of the suit the said Satyandranath Dutta have appointed a promoter and/or developer in order to develop his portion of the property that is the property demarcated as plot no 'A', and marked with Red border in the plan of the said partition deed dated 14-12-1982. It is also contended that the Learned Trial Court ought to have considered the fact that the plaintiff's/opposite parties are also carrying on construction in such a manner in order to convert the common passage of the suit property in to main entrance of the premises demarcated as plot no. A.

Heard Learned Advocate for the petitioner and Learned Advocate for the opposite parties Learned Advocate for the petitioner submits that the subject matter of the Writ Petition being

WPA 1184 of 2021 and the application for appointment of survey Commissioner under order 26 Rule 9 of the Code of Civil Procedure were different, which the Learned Trial Court failed to appreciate. Learned Advocate draws attention to the Order passed in the Writ Application being WPA – 1184 of 2021 where the Learned Judge of this Court while disposing the writ application was pleased to direct the Municipal Authority to consider the representation with regard to unauthorized construction only and not enter into or decide any private dispute of the parties regarding right title and interest in respect of the said land. Learned advocate for the opposite parties submits that the grievance of the petitioner is already adjudicated in Writ Petition being WPA 1184 of 2021 thus the application for appointment of Commissioner is not maintainable. Learned Advocate further submits that when a preliminary decree is already passed in partition suit there is no scope to appoint Commissioner under Order 26 Rule 9, but Commissioner can only be appointed under order 26 Rule 13 of the Code of Civil Procedure for partition of immovable property.

Now upon perusing the operative portion of the order passed by the Learned Trial Court it appears that the Learned Trial Court disposed the application under Order 26 Rule 9 the Code of Civil Procedure with the following observation.

‘The points as regards which the defendant has sought for appointment of Learned Commissioner appear to be those in respect of which the Hon’ble Court has directed respondent No-3 of WPA 1184 of 2021 to take steps.

It is further required to be stated here that the original suit for partition has already been disposed off by this Court and Learned Commissioner was appointed for affecting the partition by metes and bounds. It further appears that the points as regards which the defendant has sought for report of commissioner were not the matters in dispute in the suit filed by the plaintiff.

Keeping in mind these facts and circumstances this Court is not inclined to allow the prayer of the defendant.’

Upon perusal of the order passed in WPA – 1184 of 2021 it appears that the said application was disposed by a Learned Single Judge of this Court by observing as follows:

The writ petition is accordingly disposed of by directing the respondent no.3 to consider and dispose of the representation made by the petitioner strictly in accordance with law after giving an opportunity of hearing to all the necessary parties including the petitioner at the earliest but positively within a period of six months from the date of communication of a copy of this Order. The said respondent shall pass a reasoned order and communicate the same to all the necessary parties, including the petitioner immediately thereafter.

In the event the aforesaid respondent is of the considered opinion that the construction has been made either in violation of the plan sanctioned or devoid the sanction plan, then necessary steps shall be taken to deal with such unauthorized construction, in accordance with law. The aforesaid respondent shall restrict the consideration of the representation with regard to unauthorized construction only and not enter into or decide any private dispute of

the parties regarding right title and interest in respect of the aforesaid land.'

Thus upon reading the observation made by the Learned Judge of this Court in WPA 1184 of 2021 it appears that the Learned Judge made it clear that the concerned respondent municipal authority shall consider the representation of the petitioner with regard to unauthorized construction only and if the said respondent is of the considered opinion that the construction has been made either in violation of the plan sanctioned or devoid the sanction plan then necessary steps shall be taken to deal with such unauthorized construction in accordance with law. The respondent/municipal authority was restrained from entering into or deciding any private dispute of the parties regarding title and interest in respect of the aforesaid land.

In the application for appointment of Commissioner before the Learned Court below the following points were raised to be enquired by the Commissioner?

1. Whether any construction is going on over any portion of the suit property or not and if the construction is going on then

state whether it is new or old and measure the construction regarding its length and breath.

2. Whether there is a common passage over the suit property or not and if there is passage measuring the same towards East to West?
3. Whether any construction of pillar/boundary wall was made upon the common passage or not? And if made then state whether it was, constructed according to building plan and municipal law? Whether any partition plan existed between the parties or not?
4. Whether plaintiffs or his promoter constructed the construction upon the plaintiffs allotted land or upon the common passage? If encroached measure area of encroachment.
5. Local features.
6. Rough sketch map.

Thus upon perusing the points sought to be enquired by appointment of commissioner it appears that only one point deals

with enquiry as to whether plaintiff made construction on common passage according to building plan and municipal law.

It is well settled principle of law that Municipal Authority has obligation to see as to whether construction of building is made according to sanctioned plan, it has no jurisdiction to see as to whether co-sharer has given any consent to the said construction or not. On the other hand a Civil Court hearing a partition suit has an obligation to see that status-quo with regard to the suit property is maintained during pendency of the partition suit.

In the case of Sant Ram V Daya Ram reported in AIR-1961 Punjab-P528 the Hon'ble Court listed the following propositions on the subject of the rights and obligations of co-owners in joint properties.

1. A co-owner has an interest in the whole property and also in every parcel of it.
2. Possession of the joint property by one co-owner is in the eye of law possession of all even if all but one are actually out of possession.

3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.
4. The above rule admits of an exception when there is ouster of co-owner by another. But in order to negative the presumption of joint possession on behalf of all on the ground of ouster the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other, as when a co-owner openly asserts his own title and denies that of the other.
5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.
6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.
7. Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners it is not open to anyone to disturb the arrangement without the consent of others, except by filing a suit for partition.

8. The remedy of a co-owner in possession or not in possession of a share of the joint property is by a suit for partition as for actual joint possession but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.
9. Where a portion of the joint property is by common consent of the co-owners resolved for a particular common purpose it cannot be diverted to an inconsistent user by a co-owner; if he does so he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered.

It has also been held in different judicial decisions that one of several joint owners is not entitled to erect a pucca building upon joint property without the consent of the other co-sharers even though the erection of such a permanent structure may not cause direct loss to the other joint owners. It is well settled that the suit for partition does not come to an end with the passing of the preliminary decree but that it continues upto the stage the final decree is prepared. It is also well established that in such

suits more than one preliminary decree can be passed. It is further well established that the Court should as far as may be avoid multiplicity of suits by compelling the party to go in for fresh suits with respect to the property in question. Thus it is clear that changes in circumstances after the preliminary decree is passed can be taken into account.

As an important point is raised about encroachment on common passage such point should not remain without enquiry by commission as it well settled that every co-owner is entitled to make full use of the common passage. Learned Judge while disposing the application for appointment of survey commissioner rejected the prayer of the petitioner firstly on the ground that the points as regards which the defendant has sought for appointment of Learned Commissioner appear to be those in respect of which this court in writ jurisdiction has directed the Municipal Authority to take steps. The second ground cited for rejection is that original suit for partition has already been disposed off and learned commissioner was appointed for affecting partition by metes and bounds, and the

points which the defendant sought for report of commissioner were not the matters in dispute in the suit filed by the plaintiff.

Upon perusing the Order passed by the Learned Trial Court, and the order passed in Writ Petition WPA 1184 of 2021 and the points raised in the application for appointment of commissioner this Court is of the view that as the Learned Judge of this Court while disposing the writ petition. WPA – 1184 of 2021 observed that the Municipal Authority shall restrict the consideration of the representation with regard to unauthorized construction only and not enter into or decide any private dispute of the parties regarding right title and interest in respect of the suit land there is no bar in appointing a Commissioner to enquire the points raised by the petitioner except the point of construction without building plan. Now with regard to the 2nd ground for rejection as cited by the Learned Judge that the original suit for partition is already disposed and Learned Commissioner is appointed for affecting the partition by metes and bounds, and the points as regards which the defendant has sought for report of commissioner were not the matters in dispute in the suit filed by

the plaintiff this Court is of the view that as the suit for partition does not come to an end with the passing of the preliminary decree but that it continues upto the stage of the final decree is prepared, and in order to prevent multiplicity of proceedings change in circumstances can be taken into account the ground cited by Learned Trial Court cannot be sustained.

Although an order rejecting prayer for appointment of commissioner is usually not revisable but considering the nature of the suit and the disputes raised this court is of the view that in the interest of justice there should be an appointment of Commissioner.

In view of the discussion made hereinabove the order dated 07/05/2022 passed by Learned Civil Judge (Senior Division) at Barasat in T.S. 237/2008. is set aside. The application for appointment of Commissioner stands allowed. Sri Samar Banerjee Learned Advocate and member Bar Association City Civil Court Calcutta and member of Bar Association Presidency Small Causes Court Calcutta is appointed as survey Commissioner to enquire the following points.

1. Whether any construction is going on over any portion of the suit property or not and if the construction is going on then state whether it is new or old and measure the construction regarding its length and breadth.
2. Whether there is a common passage over the suit property or not and if there is passage measuring the same towards East or West?
3. Whether plaintiffs or his promoter made the construction upon the plaintiff's allotted land or upon the common passage? If encroached measure the area of Encroachment.
4. Local features.
5. Rough sketch map.

Learned Commissioner shall upon notice to all parties and their Learned Advocates cause enquiry as stated above and upon completion of enquiry shall submit report before Learned Court below within four weeks, from the date of communication of this order. Learned Commissioner shall be entitled to a remuneration of 600 gms to be paid by the petitioner. Learned Advocate for the petitioner is requested to serve copy of the plaint, copy of the

application under Order 26 Rule 9 of the Code of Civil Procedure and copy of the preliminary Decree to the Learned Commissioner. This Revisional Application stands disposed. However, in the facts and circumstances of the case there shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury, J.)