

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No. 505 of 2018

1. Sachida Nand Mishra, S/o Late Ramashish Mishra, Resident of Mohalla-Jhauganj, P.S.- Chowk, Patna City, Distt.- Patna-800008
2. Deota Nand Mishra, S/o Late Ramashish Mishra Resident of Mohalla-Jhauganj, P.S.- Chowk, Patna City, Distt.- Patna-800008
3. Parmatma Nand Mishra, S/o Late Ramashish Mishra, Resident of Mohalla-Jhauganj, P.S.- Chowk, Patna City, Distt.- Patna-800008
4. Dayanand Mishra, S/o Late Ramashish Mishra, Resident of Mohalla-Jhauganj, P.S.- Chowk, Patna City, Distt.- Patna-800008
5. Vivekanand Mishra, S/o Late Ramashish Mishra, Resident of Mohalla-Jhauganj, P.S.- Chowk, Patna City, Distt.- Patna-800008

... .. Appellant/s

Versus

Smt. Bimla Devi Saraf W/o Sri Paras Nath Saraf, Resident of Mohalla-Jhauganj, P.S.- Chowk, Patna City, Distt.- Patna-800008

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Shailendra Kumar Jha, Advocate Mr. Dilip Kumar Jha, Advocate Mr. Anupam Prabhat Shrivastava, Advocate
For the Respondent/s	:	Mr. Sudhir Kumar Bijpuria, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
ORAL ORDER

7 29-10-2024 Heard learned counsel for the appellants and learned counsel for the respondent.

2. This Second Appeal has been filed against the judgment of affirmance.

3. Title Appeal No. 15 of 2016 has been filed by the defendants/appellants against the judgment and final decree dated 09.05.2014 passed in Title Suit No. 685 of 1989 by the learned Sub-Judge-IV, Patna City which has been upheld vide judgment and order dated 04.09.2018 passed by the learned IV Additional District Judge, Patna City in Title Appeal No. 15 of



2016.

4. The matter arises out of Partition Suit No. 685 of 1985 which was filed by the plaintiff/respondent for carving out of 2/3rd share equal to 17 Dhur 11 Dhurki (1193 Square feet) out of total area of 1 katha 6 dhur, 5 dhurki and 15 Furki of the suit land on the basis of purchase through registered sale deed dated 16.06.1988 and 28.07.1988. Defendant no. 2/appellant claimed to have share of 1/3rd in the aforesaid partition suit on the basis of having purchased from defendant no. 1. The aforesaid partition suit was decreed in part by the trial court vide judgment and decree dated 20.03.1996.

5. The plaintiff/respondent had challenged the judgment and decree of the trial court before this Court in Second Appeal No. 226 of 1996 which was allowed vide judgment and decree dated 08.05.2000 and the judgment and decree of the learned trial court had been modified and direction for partition of 2/3rd and 1/3rd share was given.

6. Aggrieved by the aforesaid judgment, the defendant no. 2/appellant filed S.L.P. (Civil) 17913 of 2000 before the Hon'ble Apex Court which was dismissed on 15.02.2000, but it was made incumbent that during the execution proceeding, if it is technically proved that the building cannot be partitioned,



then it will be open to the parties to raise such objection.

7. In preparation of final decree proceeding, Advocate Commissioner was appointed for carrying out of separate takhta of plaintiff's 2/3rd share in the suit property, who submitted his report on 10.09.2010 whereby 1193 square feet in Eastern side from frontage south (main road to north) has been allotted to the plaintiff as her 2/3rd share and rest 1/3rd portion was left for the defendant no. 2.

8. Against the aforesaid report of the Advocate Commissioner, the defendant no. 2/appellant filed his objection-cum-protest petition before the trial court raising his objection on the report of the Commissioner. The plaintiff/respondent filed his reply to the said objection petition.

9. After hearing the parties, learned trial court rejected the objection-cum-protest petition of the defendant/appellant and accepted the Advocate Commissioner's report and further, office was directed to prepare final decree in the suit.

10. Being aggrieved by the judgment and final decree, the defendant no. 2/appellant filed Title Appeal No. 15 of 2016 challenging the order/judgment of the lower court dated 09.05.2014 before the learned District Judge.

11. During the pendency of the aforesaid Title Appeal,



final decree was prepared on 18.07.2016 incorporating the said report of Advocate Commissioner report dated 10.09.2010 as part of the decree.

12. After hearing the parties and materials on record, the learned lower appellate court has dismissed the appeal and held that from the Pleader Commissioner report, it transpires that the suit property consists of vacant land Tin shed part and partly pucca constructed building. The whole constructed part is in dilapidated condition. The report also notes about the valuation of land and building with further clarification that some of the building is less dilapidated than others. From the report, it transpires that the plaintiff has been allotted 1193 square feet area consisting of land and building and their value is Rs. 23,860/- and Rs. 60,000/- respectively. Rest land and building has been left for defendant no. 2/appellant valued at Rs. 10,940/- and Rs. 40,000/- respectively. On analysis, the learned lower appellate court has found that the plaintiff has been given property worth Rs. 83,860/- and defendant/appellant has been given properties worth Rs. 50,940/-. The objection with regard to the excess area of 2/3rd share allotted to the plaintiff by wrong measurement and non-mentioning of measurement of some point in the partition map and destroying intrinsic value of



the property is concerned, it appears from the report of the Commissioner consisting of partition map, raibandi chart, allotment chart, field book, that the share of respondent and appellant has been carved out in such a way that both got property in front of the main road and doing so, the Commissioner has rejected the claim of the plaintiff/respondent to allot him the whole part in front of the main road. It is further held that no question of destruction of intrinsic value as even the Hon'ble High Court in the said order dated 08.05.2000 has held that division of property will not destroy its intrinsic value. In terms of valuation of property, the appellant's share appears to be worth a little more than actual 1/3rd share as out of Rs. 1,34,800/- being valuation of the whole property, appellant's share of property worth Rs. 50,940/-. It is also specifically mentioned that the appellants challenged the Pleader Commissioner's report, but he has not led any evidence to prove allegation mentioned in the objection to the Commissioner's report. Moreover, he has not called for examination of the Commissioner on his report and there is nothing on record to establish that the appellant's claim of the measurement of the plot in question as stated in his objection-cum-protest petition has not been placed in his objection. The measurement of plot



no. 455 in question has taken by the Commissioner is the same as mentioned in Exhibit-4 which is deviation of upto 6 inches which may be due to improvements in terms of construction can safely be held as immaterial difference. It is further held that amalgamation of any further plots with plot no. 455 as claimed by the appellant was not found by learned lower appellate court.

13. After coming to the aforesaid findings on the basis of materials available on record, the learned lower appellate court dismissed the appeal and affirmed the judgment and final decree of the trial court.

14. Considering the submissions made on behalf of the parties and on perusal of materials on record including the judgment and decree of the lower courts below, it appears that the learned court of appeal below which is the final court of facts, after considering the Pleader Commissioner's report, came to a clear finding as mentioned above. It is also apparent that the appellants have not filed any Raibandi and Simpt despite requisition by the Advocate Commissioner allowing several dates to him for the same. While the plaintiff/respondent has filed his Raibandi and Simpt before the Advocate Commissioner claiming his 2/3rd share of property to the area of 1193 square feet to be allotted from the whole breadth of road side, which



was rightly denied by the Advocate Commissioner. The shares of respondent and appellants have been carved out in such a way that both got property in front of the main road.

15. In the aforesaid facts and circumstances, this Court does not find any illegality in the impugned judgment and decree of the learned courts below nor does it find any substantial question of law involved in the instant Second Appeal, which is, accordingly, dismissed at the stage of hearing under Order XLI Rule 11 of the Code of Civil Procedure.

(Khatim Reza, J)

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