

61 **18.11.
2024**

Ct. No. 08

Ab

**SA 109 of 2024
IA No. CAN 7 of 2024**

Sikha Basak and others

Vs.

Bijoy Kumar Sengupta and others.

**Mr. Amit Baran Dash,
Ms. Ankana Sarkar.**

... for the appellants.

Both the Courts have held that the plaintiffs have miserably failed to prove that the passage, as shown in the Schedule-B, is an integral part of the property shown in Schedule-A to the plaint.

The plaintiffs/appellants claimed right, title and interest on the basis of the deed of purchase from the admitted owners, namely, Bibhuti Bhusan Roy and Prabhabati Devi. It is further averred in the plaint that they used to enjoy the 2 ft. wide passage on the western side of the property for whitewashing and the repair work and any construction made by the defendants/respondents at the adjacent property, which admittedly belong to them, would not only impaired a free access to light but will also obstruct the air.

Paragraph 5 of the plaint also indicate that the said passage is being used for such purposes and, therefore, any construction made by the defendants/respondents after obtaining the building plan by disclosing the false facts is not in tune with the law. It is further averred that the construction of a verandah covering the said passage being illegal to be demolished.

Admittedly, the defendants/respondents did not contest the proceeding by adducing the evidence. A suit was posted at the ex parte board and on the basis of the evidence including the report submitted by the Survey Commissioner it was held that the plaintiffs/appellants have miserably failed to prove the said passage to be a

part of the property, which they claimed to have purchased from the aforementioned admitted owners. The first Appellate Court concurs with the view of the Trial Court and dismissed the said appeal.

The Counsel for the appellants vociferously submits that the Court ought to have considered the case in a pragmatic manner where the vendor of the plaintiffs/appellants was found to have used such passage. He further submits that the Commissioner's Report, in fact, suggests that the property shown in Schedule-B is part and parcel of the property shown in Schedule-A and, therefore, the findings of both the Courts in this regard are factually incorrect. He, thus, submits that the Court ought to have taken into consideration that the right to use the said passage is also claimed by the plaintiffs/appellants and, therefore, it raises a substantial question of law for admission under Order XLI Rule 11 of the Code of Civil Procedure.

After perusing the plaint, which is succinctly adumbrated herein above, the primary relief claimed by the plaintiffs/appellants is a decree for declaration that the alleged 2 ft. wide passage is a side space of the plaintiffs' property and is a part and parcel of the property so purchased. A further declaration is sought in relation to the construction made at the premises owned by the defendants/respondents. There is no further declaration sought for in relation to the sanction given by the Municipality.

The plaint is silent on any relief based upon the right to use the land either by prescription or by necessity. In absence of any such relief having claimed in the plaint and the fact that the plaintiffs/appellants asserted such passage to be an integral part of the property described in Schedule-A to the plaint, we do not find any substance in the stand not only for the appellants that the Court is not denuded of power to mould the reliefs but it is preposterous to suggest that

the Court shall pass a decree not prayed for in the garb of changed circumstances, more particularly, when such circumstances do not happen in course of hearing.

The concept of moulding the relief can only be pressed in action in the event the parties by their conduct have altered the situation and the principal relief claimed therein becomes inappropriate or obliterated. Such concept cannot be applied for granting the independent relief unconnected and/or unrelated to the principal relief, as the Court cannot make out a case for the parties.

So far as the Commissioner's report is concerned, we had an occasion to peruse the same and do not find that the said Commissioner in unequivocal terms indicated that the passage is an integral part of the property described in Schedule-A. It is a trite law that the plaintiffs have to prove their own case and cannot seek relief solely on the weakness of the defendants' defence. Even if the defendants have failed to prove the claim made by way of defence, it does not *ipso facto* makes the case made out by the plaintiffs to have been proved and the decree cannot be passed by the Court in absence of any cogent evidence adduced by the plaintiffs.

Both the Courts have interpreted the Commissioner's report and have also taken into account the evidence adduced by him as 2nd witness, which cannot be said to be infirm or contrary thereto.

We, thus, do not find any involvement of substantial question of law in the instant appeal. The appeal and the connected application being CAN 7 of 2024 are dismissed under Order XLI Rule 11 of the Code of Civil Procedure.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)

