

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present : The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
&
The Hon'ble Mr. Justice Gaurang Kanth

FAT No. 47 of 2022

Shri Prasanna Kumar Koley and others
-vs-
Sri Biswanath Koley

For the defendants/appellants : Mr. Subhendu Bandyopadhyay,
Mr. Arindam Mitra

For the plaintiff/respondent : Mr. Swarup Banerjee,
Mr. Arindam Chatterjee.

Heard on : December 2, 2024 & December 3, 2024.

Judgment on : December 3, 2024.

Sabyasachi Bhattacharyya, J.:

1. The defendants in a suit for partition have preferred the instant appeal against the *ex parte* final decree of partition passed therein.

2. The learned trial Judge, in the preliminary decree, declared the shares of the parties, which has not been challenged. Subsequently, allegedly without notice to the defendants, the Partition Commissioner, appointed by the trial court behind the back of the defendants, conducted the commission work and filed his final report. It is contended that the Partition Commissioner was never examined, nor was any opportunity of examining the Partition Commissioner afforded to the present defendants/appellants.
3. Learned counsel appearing for the appellants places reliance on Order No. 88 dated March 8, 2018 passed in the suit, whereby the Partition Commissioner was directed to give notice to both sides before holding the commission work.
4. Learned counsel also places reliance on the Partition Commissioner's report itself, where it was categorically stated by the Partition Commissioner that he went to the locale after due service of notice through Registered Post with A/D and the lawyer of the plaintiff and the plaintiff himself identified the suit plot and the plaintiff handed over to him the xerox copy of the plaint and xerox copy of order No. 17 dated June 6, 2006 as well as copies of the preliminary decree and certified copy of a partition deed.

5. It is submitted that it will be evident from the said recording in the Commissioner's report that no notice was served on the defendants/appellants.
6. It is next argued by learned counsel for the appellants that the Partition Commissioner omitted to allot any shares to the parties in LR Dag No. 160, which is a part of the suit property, but allotted shares in LR Dag No. 140, which is not a part of the suit property. Hence, the Commissioner's report is palpably vitiated on such count alone, if not on other counts.
7. It is next argued that as per the average, taking into account the number of parties, each party was to be allotted about 2 Cottahs 10 Chittaks of land whereas much more than the said area was allotted to the plaintiff himself.
8. That apart, it is argued that the the cream portion of the property comprised of a structure was allotted to the plaintiff, which was not not only more than the average area applicable to each of the parties but is comprised of bastu property. In most of the plots, no portion of the pond was allotted to the plaintiff, but the same was left to the allocation of the defendants, which is another illegality in the Commissioner's report as per the appellants.

9. Learned counsel for the appellants takes the court painstakingly through the Commissioner's report and the map annexed thereto, pointing out that the map depicts about 536 square feet allocation of the plaintiff/respondent whereas as per the body of the Commissioner's report, apparently 380 square feet was to be allotted to the respondent.
10. Learned counsel appearing for the respondent contends that the final decree has not been drawn up upon due stamp being affixed in terms of the final decree and as such, there is no final decree in the eye of law.
11. It is further contended that the respondent took out an application for amendment of the plaint schedule to incorporate LR Dag No. 140, which was not permitted by the trial court.
12. Being aggrieved, a revisional application was preferred, which was disposed of by a learned Single Judge of this Court holding that since the final decree had been passed and an appeal has been preferred before the Division Bench, no interference was called for.
13. As such, it is argued that the revisional application was not disposed of on merits and this Court ought to reopen the said order refusing the amendment application of the respondent

and to allow the same in order to do complete justice between the parties.

14. Upon hearing learned counsel for the parties and perusing the materials on record, we find that the preliminary decree was passed on the basis of the schedule of the plaint of the respondent's suit, which did not contain LR Dag No. 140, but included LR Dag No. 160 as part of the suit property.
15. As such, since the final decree was passed on the premise of the preliminary decree, the Partition Commissioner's report is palpably bad as it is, since it included allocations in LR Dag No. 140, which is not a part of the suit property, but omitted to allocate LR Dag No. 160, which, in turn, comprised of a portion of the suit property.
16. Even otherwise, there is substance in the contention of the appellants that the cream portion of the property has been allotted to the plaintiff alone without allocating any portion of the pond/water-body in most of the suit plots to the plaintiff/respondent, which has been left entirely to the lot allotted to the defendants/appellants.
17. In view of such palpable illegality, the Partition Commissioner's report cannot be sustained.

18. That apart, it is doubtful as to whether notice was served before holding the commission work on the defendants, although the submission of the appellants to the effect that the partition commissioner's report itself indicates non-service cannot be accepted. The Partition Commissioner's report recorded that after due service of notice through Registered Post with A/D, the Commissioner went to the locale, which is disjunctive with the rest of the said sentence which speaks about the plaintiff and his lawyer being present at the relevant juncture. Thus, such statement in the report itself does not show that no notice was served on the defendants/appellants before the commission work. However, there is nothing on record to indicate that prior notice was given to the defendants/appellants before the commission work.

19. Be that as it may, the Partition Commissioner's report and the consequential acceptance of the same by the trial court, both are otherwise vitiated on the grounds as indicated above.

20. Insofar as the argument of the final decree having not attained finality is concerned, we are unable to accept such contention.

21. The settled proposition of law might be that no title devolves finally on the basis of a final decree unless proper stamp is affixed thereto in terms of the final decree. However, even we proceed on such assumption, it does not entail that the final decree loses its character as a final decree once it is passed by the court. Once the court passes a final decree, it has binding effect on the parties and conclusively determines the rights and liabilities as well as title of the parties. The subsequent ministerial work left regarding drawing up of a decree and putting the proper stamp thereon does not vitiate the existence of the final decree itself.
22. With regard to the amendment to the schedule of the plaint sought by the respondent, the refusal of such prayer has also attained finality. In the event the order refusing the amendment application had not been unsuccessfully challenged in a revisional application before this Court, we might yet have looked into the veracity of the same under Section 105 of the Code of Civil Procedure. However, such luxury is not available to the respondent at the present juncture after the order of the trial court refusing such amendment was affirmed by the revisional court. Although the primary ground in the revisional court's order might have been the drawing up of

the final decree and a pending appeal, nonetheless, the dismissal of the revisional application was on merits and not merely on any technical ground.

23. Even otherwise, the amendment would be futile, even if granted. In CAN 2 of 2024, filed in connection with the appeal and already disposed of by this court, the respondent had annexed a copy of the partition deed executed between the co-sharers of the predecessors-in-interest of the parties, which was also mentioned in paragraph 2 of the plaint. In the narrative portion of the said deed, LR Plot No. 140 was mentioned as one of the properties previously in the pool of joint properties of the co-sharers of the predecessor-in-interest of the parties. However, ultimately only the property mentioned in the 'Ga' schedule property of the said partition deed was allocated to the predecessors-in-interest of the present parties, which conspicuously does not include LR Dag No. 140 whereas it does contain the other plots mentioned in the plaint schedule.

24. Hence, even from the document relied on by the plaintiff/respondent in his pleadings, by mentioning the same in paragraph 2 of the plaint and annexing a certified copy of the same to CAN 2 of 2024 before this Court, we are of the

opinion that the case sought to be brought in by way of amendment, seeking to incorporate LR Dag No. 140 in the hotchpot of the present suit, is also not tenable in the eye of law or on facts.

25. Accordingly, the amendment sought was rightly refused and the preliminary decree as it already stands, based on the suit property as mentioned in the plaint schedule, still stands.
26. In view of the above discussions, we are of the opinion that the preliminary decree and/or the plaint schedule cannot be permitted to be amended or allowed to be reopened at this juncture.
27. However, since the Partition Commissioner's report and the acceptance thereof is otherwise tainted in law, we hereby set aside the Partition Commissioner's report as well as the final decree and remand the matter back to the trial court for appointment of a fresh partition commissioner.
28. Accordingly, FAT 47 of 2022 is allowed on contest, thereby setting aside the judgment and final decree dated February 22, 2021 passed by the learned Civil Judge (Senior Division) at Seramapore, District: Hooghly in Title Suit No. 371 of 2013 (Old Title Suit No. 41 of 2004). The Partition Commissioner's

report, which was accepted by the said decree, is also set aside.

29. The matter is remanded to the trial court at the stage after passing of the preliminary decree, for fresh appointment of a new Partition Commissioner. Upon such appointment being made, the newly-appointed Partition Commissioner shall hold a partition commission afresh, proceeding to conduct such commission work upon proper prior notice in writing to both sides, and submit a fresh report to the trial Court. The learned Trial Judge shall also give an opportunity to both sides, if they are so willing, to examine the Partition Commissioner.
30. Thereafter, upon being satisfied as to the correctness and legality of the Partition Commissioner's report, a final decree shall be passed afresh and drawn up in accordance with law.
31. It is expected that in view of the long lapse of time in-between, the learned trial Judge shall complete the entire exercise at the earliest, positively within six months from the date of the records of the suit reaching the trial court after being sent down from this Court.
32. The trial court records be sent down by special messenger at the cost of the appellants, which is to be deposited within a week from date.

33. In view of the present judgment and order being in the nature of a remand, no formal decree need be drawn up.
34. Urgent photostat certified copies of the judgment and order, if applied for, be supplied to the parties at an early date.

I agree.

(Gaurang Kanth, J.)

(Sabyasachi Bhattacharyya, J.)