

22.04.2024  
Sl. No.24(DL)  
srm

**C.O. No. 703 of 2024**  
**Kartik Chandra Mandal**  
**Versus**  
**Sri Uttam Kumar Maity & Ors.**

Mr. Ramkrishna Roy  
...for the Petitioner.

Mr. Mridul Kanti Sasmal  
...for the Opposite Parties.

1. The revisional application arises out of an order dated January 24, 2024 passed by the learned Civil Judge (Senior Division), 2<sup>nd</sup> Court at Tamluk, Purba Medinipur, in Title Suit No.78 of 2013.
2. By the order impugned, the learned court rejected the objection filed by the defendants with regard to the report filed by the partition commissioner, after the preliminary decree was passed in Title Suit No.78 of 2013. By the alleged report, the commission sought to partition the suit property by metes and bounds. The learned court was of the view that the partition plan of the commissioner indicated that the area allotted to the defendants was nearer to the pathway required for ingress and egress into the suit property, from the public

road. The defendants had benefited more than the plaintiff in so far as the position of the area allotted to them. The written objection filed by the defendants did not have any merit.

3. In the cross-examination dated February 8, 2007, it was admitted by the PW1 that defendants Kartik Mondal and Bijali Mondal were in possession of the property, but there was nothing to establish that Kartik and Bajali were in exclusive possession of the entire house on the suit land.
4. The petitioner, who is one of the defendants, contends that the principle governing partition by metes and bounds required the partition commissioner to allot the shares to the parties by maintaining as far as practicable, their existing possession. In the present case, the defendants were in possession of the house on the suit land and as such, allotment of the said house should have been made in favour of the defendants. The vacant land should have been allotted to the plaintiff.
5. The learned Advocate for the plaintiff submits that in the preliminary decree the fact that the plaintiff was in possession of the dwelling house has been recorded. Learned Advocate further relies on the cross-examination

of the survey commissioner at the instance of the defendants and submits that the survey commissioner had stated that the plaintiff was in possession of the suit land. There is nothing on record to show that the defendants were in exclusive possession of the structure.

6. The finding of the learned trial judge on this issue is contrary to the stand of the defendants. The relevant portion is quoted below:

“In the cross-examination dated 08-02-2007, it has been admitted by the PW-1 that defendants Kartik Mondal and Bijali Mondal are in possession of the homestead of the suit land. The PW-1 Bishnupada Maity further admitted that the two storied house is situated on the northern portion of the suit land. But nowhere it has been established that defendants Kartik Mondal and Bijali Mondal are in exclusive possession of entire homestead of the suit land.”

7. Upon perusal of the preliminary decree, it appears that the learned court held that the record as well as the evidence of the PW-1 and PW-2 indicated that the plaintiff had been possessing the suit land by constructing a house thereon.
8. It also appears that the learned court, upon perusal of the RS record of rights, found that the suit plot was recorded in the name of Satish and Bishnupada, each having 8 annas share. The preliminary decree records that the defendant DW-1 had stated in his evidence that he had

no objection if the plaintiff got a decree for 8 annas share in the suit plot as had been recorded in the RS record in favour of the plaintiff. Accordingly, the learned court held that the plaintiff had satisfied the court that he had a half share/8 annas share, in the suit property.

9. The shares have been declared by the preliminary decree.

As per the evidence, the related documents and the report of the commissioner, it is seen that the suit plot No.1451 approximately measured 1710 sq. link. An area of 855 sq. link had been allotted to the plaintiff and an area of 855 sq. link had been allotted to the defendants.

As per the partition plan prepared by the commissioner, the area allotted to the defendants was nearer to the public road which was more beneficial. This was the specific finding of the learned trial court.

10. The contention of the defendants of exclusive possession

in the structure, was not accepted by the learned court.

The court was of the view that the evidence did not reflect so. Under such circumstances, the court found that there was no cogent evidence to establish that the entire two-storeyed house was situated in the northern part of the suit land. Accordingly, learned court did not find any reason to allow the objection of the defendants.

11. The principle of law urged by Mr. Roy with regard to retention of the respective possession of the co-sharers at the time of effecting partition by metes and bounds, is a well-settled principle. This Court, upon appreciation of the evidence and the partition commissioner's report as also the preliminary decree, finds that the learned trial judge had rightly held that there was nothing on record to establish that the defendants were in exclusive possession of the structure. Thus, there was no requirement on the part of the commissioner to allot the structure to the defendants. The finding in the preliminary decree that the evidence of the PW-1 and PW-2 indicated that the plaintiff was in possession of the structure, has also gone unchallenged.
12. Under such circumstances, the order impugned is upheld. The findings of fact, based on the commissioner's report and on evidence, cannot be re-appreciated by this Court under Article 227 of the Constitution of India.
13. The revisional application is, thus, disposed of.
14. There shall be no order as to costs.
15. Parties are to act on the basis of the server copy of this order.

**(Shampa Sarkar, J.)**