

**IN THE HIGH COURT AT CALCUTTA
(Civil Appellate Jurisdiction)
APPELLATE SIDE**

Present:

The Hon'ble Justice Supratim Bhattacharya

FMA 993 of 2017

With

IA NO: CAN 3 of 2019 (Old No: CAN 8454 of 2019)

Deb Ranjan Mallick

Vs.

Ashoke Kumar Mallick

For the Appellants : Mr. Rwitendra Benerjee
Mr. Shibasis Chatterjee
Mr. Sandip Kundu
Mr. Aritra Roy Chowdhury

For the Respondent : Mr. P. Das
Ms. Madhumita Patra
Mr. Narayan Saha

Heard On : 08.04.2024

Judgement Delivered On : 03.07.2024

Supratim Bhattacharya, J.:

1. The instant miscellaneous appeal has been preferred by the appellant/defendant being aggrieved by and dissatisfied with the Judgment and decree dated 06.03.2017 passed by the Ld. Additional District Judge, 1st Court Hooghly, in Title Appeal No. 22 of 2016.
2. Through the impugned judgment the Ld. First Appellate Court has passed an order to the effect that the title appeal be and the same is allowed on contest without cost thereby setting aside the judgment and decree dated 16.01.2016 passed by the Ld. Civil Judge (Sr.

Divn.), 1st Court, Hooghly passed in Title Suit No. 384/1995. Through the said order the suit has been remanded back to the Ld. Trial Court with the direction to hold partition commission only on the point of construction of a separate septic tank and drain by the respondent to discharge the foul water generated from the allotted portion of the respondent and if necessary to award owelty to the affected party for such relocation and construction of septic tank and drain.

3. Facts before the Trial Court

The instant lis involves partition of the suit property. The plaintiff Ashoke Kumar Mallick who is the respondent herein has instituted the instant lis in the year 1995 against the defendants namely Hukum Chand Mallick , Smt. Jyotsna Mallick, Smt. Aparna Mallick and Debranjana Mallick who is the appellant herein.

After adjudication, preliminary decree was passed by the Ld. Trial Court declaring that the plaintiff namely *Ashoke Kumar Mallick* has $\frac{1}{2}$ share in the suit property while the defendant No.1 namely *Hukum Chand Mallick* has $\frac{1}{4}$ share and the remaining defendants namely *Smt. Jyotsna Mallick, Debranjana Mallick and Smt. Aparna Mallick* altogether have $\frac{1}{4}$ share in the suit property.

- 4.** Ultimately after transfer of undivided shares by the co-sharers through registered deed, presently *Debranjana Mallick*, the appellant/defendant and *Ashoke Kumar Mallick* the

respondent/plaintiff are the owners of *moiety* share in respect of the suit property.

5. Earlier the Trial Court had appointed a Partition Commissioner who had submitted his report suggesting the allotments.
6. The Ld. Trial Judge had accepted the report of the Ld. Partition Commissioner holding that there is no infirmity in the report.
7. Against the said order of the Ld. Trial Court an appeal was preferred and the Ld. First Appellate Court had held that the allotments were not made in blocks, as a result of which the report of the Ld. Partition Commissioner was not accepted. The Ld. First Appellate Court had remanded the suit back to the Ld. Trial Court.
8. Against the order of the Ld. First Appellate Court a miscellaneous appeal had been preferred before the Hon'ble Court being FMA No. 995 of 2013.
9. The Hon'ble Division Bench came to the finding that the First Appellate Court had rightly held that the allotments were not made in blocks and therefore the report of the Ld. Partition Commissioner was not just and proper. The Hon'ble Division Bench thereby affirmed the order of remand passed by the Ld. First Appellate Court and had requested the Ld. Trial Judge to appoint a partition commissioner preferably who was appointed earlier in the instant lis and had directed the Ld. Trial Court to obtain a report from the Ld.

Commissioner taking into consideration that the plaintiff and the defendant have moiety shares in the property mentioned in the suit.

- 10.** After the passing of the said order the self same Ld. Partition Commissioner namely Ranjit Kumar Bodhak was appointed by the Ld. Trial Judge, who had submitted the earlier report dated 07.02.2005, to furnish a fresh report to give effect to the partition of the suit property in blocks.
- 11.** Thereafter the Ld. Commissioner has submitted the second report on 03.12.2013.
- 12.** The defendant filed written objections on 24.01.2014 and 24.04.2015 against the Commissioner's report.
- 13.** In spite of objection been filed by the appellant/defendant No.3 against the report of the Ld. Partition Commissioner, the report of the Ld. Partition Commissioner was somehow accepted. Accordingly the suit has been decreed finally in terms of the report of the Commissioner dated 03.12.2013 and the reports of the Commissioner dated 07.02.2005 and 03.12.2013 along with the sketch map annexed have been made part of the final decree.
- 14.** Against the judgment and decree passed by the Ld. Trial Court the appellant herein preferred an appeal being Title Appeal No. 22 of 2016. The said Title Appeal was heard by the Ld. Additional District Judge, 1st Court Hooghly and after considering the reports of the Ld. Partition Commissioner dated 07.02.2005 and 03.12.2013 the Ld.

First Appellate Court has once again remanded the suit back to the Ld. Trial Court with a direction to hold partition commission only on the point of construction of separate septic tank and drain by the respondent to discharge the foul water being generated from his allotted portion and if necessary to award owelty to the affected parties for such relocation and construction of septic tank and drain. Against this order of remand passed by the Ld. First Appellate Court the instant miscellaneous appeal has been preferred on several grounds.

- 15.** Heard the Ld. Counsels representing the appellant and the respondent.
- 16.** The Ld. Counsel representing the appellant has submitted during his exhaustive argument that
 - i)** Field survey was not held by the Partition Commissioner. The report of the partition commissioner dated 03.12.2013 is only a modification of the earlier report dated 07.02.2005.
 - ii)** The Ld. Counsel has further submitted that though the appellant has been allotted share in the ground floor but no privy has been allotted to him.
 - iii)** He has further submitted that as per valuation 63 per cent of the property has been given to the respondent while the appellant has been allotted only 37 per cent.

- iv)** He has further submitted that vide order No. 97 the Ld. Trial Judge had directed the Ld. Partition Commissioner to file a report.
- v)** He has further submitted that the appellant has been allotted 1812 sq. ft. whereas the respondent has been allotted 2626 sq. ft.
- vi)** The Ld. Counsel has further submitted that the sum of Rs. 86,000/- which has been calculated as owelty is not at all sufficient to construct a privy and a stair case.
- vii)** The Ld. Counsel has also submitted that in spite of several opportunities offered to the Ld. Partition commissioner and in spite of issuance of summon to the partition commissioner he had not turned up to adduce evidence, as such there has been no scope for cross examining the Ld. Commissioner.
- viii)** He has further submitted that in spite of the date being fixed for filing examination-in-chief on affidavit the said Partition Commissioner had not turned up and ultimately vide order dated 24.04.2015 the Ld. Trial Judge had been pleased to fix 15.05.2015 for argument as regards to the acceptance of the report of the Partition Commissioner. Thereafter the report of the Partition Commissioner dated

03.12.2013 along with the sketch map has been ultimately accepted on 16.01.2016.

- ix)** He has further submitted that the Ld. First Appellate Court instead of setting aside the entire judgment which was passed without considering the provisions of Order XXVI Rule 14 CPC, the suit has been remanded on a limited point. Banking upon the aforesaid facts and circumstances the Ld. Counsel has prayed for allowing the instant appeal by setting aside the impugned order.

17. The Ld. Counsel representing the respondent has submitted the following:

- i)** That the Ld. Partition Commissioner has performed his function in accordance with law.
- ii)** He has further submitted that it is the general rule that the commissioner should try to maintain the existing possession of the parties as far as practicable.
- iii)** He has further submitted that a stair case may be kept joint for the common use of all or some and it may be so that the common passage has to be kept which cannot be partitioned, which has been followed by the Ld. Partition Commissioner.

- iv)** He has further submitted that the appellant Debranjana has been allotted the front portion and more covered space than has been allotted to the respondent.
- v)** He has further submitted that partition has been made in the manner best suited for the building.
- vi)** Ld. Counsel has further submitted that the Ld. Partition Commissioner has expired soon after the passing of the final decree.
- vii)** The Ld. Counsel has further submitted that the order of remand is not in the interest of justice, on the other hand end of justice can be sufficiently provided otherwise.

18. Considering the submission of the Ld. Counsels and on perusal of the record including both the reports dated 07.02.2005 and 03.12.2013 filed by the Ld. Partition Commissioner, it is apparent that the moot point to be considered in this instant appeal is as to whether the First Appellate Court has come to the correct finding or not.

19. From the submission of the Ld. Counsels representing the appellant it transpires that the Ld. Counsel has alleged that as regards to valuation 63 per cent of the property has been allotted to the respondent on the other hand the appellant has been allotted only 37 per cent of the total value of the suit property.

- 20.** It is fact that the Ld. Partition Commissioner namely Ranjit Kumar Bodhak who has filed both the reports one dated 03.12.2013 and the other dated 07.02.2005 had been time and again directed by the court to appear and adduce evidence as regards to the report dated 03.12.2013 filed by him. Summon was also sent to the Ld. Partition Commissioner but the Ld. Partition Commissioner had not turned up and placed himself for cross-examination, so the appellant did not have the opportunity to cross-examine the Ld. Partition Commissioner.
- 21.** It also transpires that ultimately the said report dated 03.12.2015 filed by the Ld, Partition Commissioner has been accepted without his evidence in spite of severe objection raised on behalf of the appellant.
- 22.** It appears that the objection raised by the appellant reaches the root of partition and shakes the basis of partition by claiming that 63 per cent of the valuation of the property has been allotted to the respondent while 37 per cent of the property has been allotted to the appellant.

Keeping apart the fact of valuation allotted to the parties it is fact that the Ld. Partition Commissioner had not turned up to adduce evidence which shakes the authenticity of the report dated 03.12.2013 filed by the Ld. Partition Commissioner.

When the author of a document does not tender himself to adduce evidence as regards to the said document, the said document cannot be taken into consideration. In this instant lis as the Ld. Partition Commissioner had not tendered himself to adduce evidence so doubt arises as regards to the authenticity and validity of the said report dated 03.12.2013 filed by the Ld. Partition Commissioner.

In view of this Court the report dated 03.12.2013 filed by the Ld. Partition Commissioner ought not to have been accepted.

In this regard this Court relies upon a judgment passed by a coordinate bench of this Hon'ble Court in FMA 273 of 1985 in the case between Bina Ghosh and ors. Vs. Mohanlal Ghosh and ors. Delivered on 15.07.2016 which inter alia states as follows:

“This Court is also of the view that the report of the Partition Commissioner filed on 5th October, 1983 was objected to at the earliest point of time by the defendants vide their objection dated 22nd November, 1983. Such objection ought to have been treated with the yardstick applied to a partition proceeding by the Ld. Trial Court prior to finalising the decree on 11th February, 1984. However, this Court notices that the Ld. Trial Court proceeded to treat the so-called concession of the DW1 before the Ld. Partition Commissioner (since deceased) as sacrosanct and agreed without any reservation to the complete report of the Ld. Partition Commissioner.”

As such this Court is not at one with the order of final decree passed by the Ld. Trial Court relying on the report of the Ld.

Partition Commissioner and the order of the Ld. First Appellate Court as regards to the order of remand directing to hold partition commission only on the point of construction of separate septic tank and drain by the respondent to discharge the foul water.

As discussed above the order of the Ld. First Appellate Court requires interference.

The Ld. Trial Court is directed to appoint a fresh Ld. Partition Commissioner, as because it has been submitted on behalf of the respondent that the said Ld. Advocate Commissioner namely Ranjit Kumar Bodhak has expired, to hold partition commission afresh in respect of the suit property.

Both **FMA 993 of 2017** with **IA No. CAN 3 of 2019 (Old No. CAN 8454 of 2019)** stand accordingly **disposed of** and the order of the Ld. First Appellate Court dated 06.03.2017 delivered in Title Appeal 22 of 2016 is hereby **set aside**.

23. FMA 993 of 2017 is thus **allowed**.

24. Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.

25. Urgent Xerox certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Supratim Bhattacharya, J.)