

Ct.
No.
652

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akb

**30.04
2024**

C.O. 2117 of 2021
Fansur Rahaman
-Versus-
Esrail Sekh & Ors.

Mr. Partha Pratim Roy
Mr. Anirban Das **...For the Petitioner**

Mr. Usof Ali Dewan
Mr. Asif Dewan **...For the Opposite Party No. 1**

Learned Counsel for the petitioner and learned Counsel for the opposite party No. 1 are represented. Affidavit-of-service in respect of service of notice upon the opposite party Nos. 2 to 5, filed on behalf of the petitioner is taken on record.

Petitioner and the pro-forma opposite parties as plaintiff filed a partition suit, being Partition Suit No. 47 of 2007 against the principal opposite parties herein. It has been alleged in the plaint that the plaintiffs and the defendants are co-owners in respect of the suit property and in spite of repeated requests the defendants are not interested to effect amicable partition and plaintiff's further case is defendant No. 5 at the instigation of the defendant Nos. 1 to 4 are trying to make construction, covering best portion of the suit property which compelled the plaintiffs to file the aforesaid suit.

In the said suit plaintiffs filed an application for injunction restraining the principal defendants from making any construction pending disposal of the suit. Learned Trial

Court by an order dated 29th February, 2008 was pleased to dispose of the said injunction application directing both the parties to maintain status quo as regards nature and character of the suit property till disposal of the suit.

Thereafter the plaintiffs filed an application seeking permission to repair the existing boundary wall over the suit plot No. 1944. Learned Trial Court by an order dated 17th March, 2017 was pleased to allow the said application granting permission to the plaintiffs to effect repairing work in presence of an Advocate Commissioner.

It is further submitted that thereafter the Advocate Commissioner submitted a report contending that due to resistance on the part of the defendants, the repairing work could not be carried out and he further reported that without the police help the aforesaid order dated 17th March, 2017 cannot be given effect.

Accordingly, petitioner by an application dated 7th May, 2017 prayed for police assistance for effecting repairing work. Learned Trial Court by an order dated 17th September, 2019 was pleased to appoint a fresh Advocate Commissioner with a direction to file a report, as the Court was of the view that the plaintiff has not specified as to which portion the repairing work is actually needed. Aforesaid newly appointed Advocate Commissioner

submitted a report mentioning specifically the portion in respect of which the repairing work is required. Thereafter Court below had taken up the petitioner's application for police help and by the impugned order, Court below was pleased to reject the petitioner's application for police help.

Mr. Anirban Das, learned Counsel appearing on behalf of the petitioner submits that the learned Court below has erred in rejecting the petitioner's prayer without considering the fact that the Advocate Commissioner in his report has specifically mentioned that without the police help, the order regarding repairing work in the aforesaid boundary wall, situated over plot No. 1944, can not be carried out. The Court below acted illegally and with material irregularity in not implementing its own order. The Court below ought to have considered that the defendant was not aggrieved by the order of repairing dated 17th March, 2017, nor they have prayed for any modification or recalling the said order, relating to repairing over plot No. 1944. Learned Court below failed to consider that there was willful and deliberate violation of the liberty granted to the petitioner by the Trial Court while making the repairing work. Accordingly, the petitioner has prayed for setting aside the order impugned.

Mr. Usof Ali Dewan, learned Counsel appearing

on behalf of the opposite party No. 1 contended that he is a co-sharer in respect of plot No. 1944. However, he contended that in the name of repairing work, plaintiff must not be allowed to make any new construction over the suit property which can cause prejudice to the other co-sharers of the suit plot for their egress and ingress and also joint possession.

I have considered the submissions made on behalf of both the parties. On perusal of the prayer made on behalf of the petitioner, it appears that the repairing work has been sought for over the plot No. 1944. It further appears that the Court below by its order dated 17th March, 2017 was pleased to allow the plaintiffs' prayer for repairing the boundary wall dated 12th April, 2016 and also appointed one Advocate for the purpose of ensuring that the repairing work, as sought for by the plaintiffs can be carried out without changing nature and character of the suit property. However, the said Commissioner thereafter reported with a specific allegation that without the police help, repairing work of the boundary wall can not be carried out, in compliance with the aforesaid order as they were resisted by the defendants / opposite parties.

Thereafter, the plaintiffs filed an application for police help on 7th May, 2017. However, in the meantime by

an order dated 7th September, 2019 learned Court below held that it is not clear as to which portion the repairing work is to be undertaken in the wall over the suit plot No. 1944 and he accordingly appointed a fresh Commissioner for submitting a report to bring the topography of the suit property. Accordingly newly appointed Advocate Commissioner Mr. N. Das submitted a report on 5th April, 2020 where learned Commissioner specifically mentioned that portion of the boundary wall in three sides got damaged, in respect of which plaintiffs' have sought for repairing work.

Thereafter the Court below had taken up the plaintiffs' application for police help and by the impugned order the Court below rejected the plaintiffs' prayer for police help on the ground that the plaintiff has not filed a separate Miscellaneous case seeking police help and the plaintiff could not show that there is any apprehension of violation of law and order, if the plaintiff tries to carry out repairing work and in this context he refused to rely earlier commissioner's report, as sole evidence.

Having considered the facts and circumstances of the case, I am agreeable with Mr. Das that when the Court has passed the order allowing plaintiff to make the repairing work, it is the duty of the Court to see that the order of the Court is duly complied and honoured. However, in the

present case from the order sheet it is not clear as to whether the Commissioner who was appointed vide order dated 17th March, 2017 has been released or not since a new Advocate Commissioner was appointed by a subsequent order dated 14th November, 2019. Said order dated 17th March, 2017, should be carried out in the presence of an Advocate Commissioner, so that in the name of repairing work, nature and character of the suit property could not be changed by the plaintiffs as observed by the Trial Court.

In such view of the matter, present application, being C.O. 2117 of 2021 is hereby disposed of giving liberty to the plaintiff/petitioner to pray before the Court below for appointment of a fresh Advocate Commissioner if the earlier Commissioners have been released to comply the order No. 106 dated 17th March, 2017 passed by the Court below and in the event of filing such application before the Court below, the Court below will appoint a fresh Advocate Commissioner and to pass necessary direction so that it's own order No. 106 dated 17th March, 2017 be not flouted.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)