

**In the High Court at Calcutta
Constitutional Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

**F.A.T. No. 303 of 2021
IA No: CAN 2 of 2024**

**Sri Hemarun Sanyal alias Himarun Sanyal
Vs.
Sri Hirak Sanyal and others**

For the appellant	:	Mr. Arindam Banerjee Ms. Kirty Keshari
For the respondent nos.1, 2, 5 & 7	:	Mr. Sourav Sen, Mr. Ashis Kumar Datta
Hearing concluded on	:	19.11.2024
Judgment on	:	25.11.2024

Sabyasachi Bhattacharyya, J.:-

1. The present appeal has been filed by defendant no. 1(i) against a final decree of partition.
2. One Saroj Basini Debi was the original owner of the property. She had four sons, namely, Hemendra Lal, Hirendra Lal, Hemanta and Hiron Lal, and one daughter, namely Gita Ghatak. The defendants in the suit are the descendants of Hirendra Lal. The rest of the lineage of Late Saroj Basini Debi are the plaintiffs.
3. By the preliminary decree, the plaintiffs' joint share was declared to be four-fifth in the suit property and the defendants together, one-fifth of

the same. No challenge was preferred to be preliminary decree and the defendant no. 1(i)/appellant concedes to such shares.

4. The primary ground of challenge to the final decree is that the appellant was in possession of the suit property, including a vacant plot of land to the south of the suit building, which is immediately adjacent to the portion of the suit property allotted to him. It is argued that the said plot has been allocated to a different set of parties without adhering to the possession, which is against the principle of demarcation of shares in a partition suit.
5. Secondly, the original entrance to the premises allocated to the appellant has been sealed off in favour of a different set of parties, thereby restricting the entrance to the appellant's plot to an entrance at the south-western corner originally meant for use of the helping hands of the household.
6. Thirdly, it is argued that the partition commissioner, in his report, allocated separate shares *inter se* between the plaintiffs as well as the defendants, which is beyond the preliminary decree, which granted shares for the plaintiffs and defendants as a whole, respectively four-fifth and one-fifth in the property.
7. Fourthly, the vacant space at the south of the premises actually measures around 300 Sq.Ft. but has been shown in the final report of the Commissioner as 627 Sq.Ft. It is argued that the initial report of the Commissioner, which was subsequently discarded in favour of the second, depicted the actual measurement. Such alteration in measurement affects the valuation of the property as well.

- 8.** Learned counsel for the appellant next contends that the suit property has not been properly valued in respect of each of the lots in which it has been divided, thus not accounting for the owelties.
- 9.** It is argued further that the plaintiff no. 7 has been left out from the allocation of shares, which erroneously increases the shares of the others. Thus, such allocation is unlawful and could be potentially subject to a future challenge by the affected party.
- 10.** Learned counsel also argues that the open terrace as well as the vacant plot have been allocated to one of the parties who does not reside at the premise. It is argued that all the co-owners have common rights over the said open spaces, at least the roof. Thus, allocation of the open roof exclusively to one of the parties would not be of any significance to such party, since no meaningful construction is possible on the same, whereas it leaves the other co-sharers without any access to a common space and free air and light.
- 11.** Lastly, it is contended that the KMC road adjacent to the property has been shown as a common passage in the Partition Commissioner's report, which was accepted by the trial Court.
- 12.** Learned counsel for the respondent controverts such allegations and argues that only the appellant is unhappy with the allotments, whereas similar grounds are available to the other co-sharers as well. It is argued that since the property is located in an old area of the city, space is at a premium and as such, for the allocation between the parties, certain adjustments had to be made by all the parties.

- 13.** Insofar as the entrance to the appellant's portion is concerned, it is argued that the south-western entrance allocated to the appellant is sufficient for the purpose of user of his plot and as such cannot furnish a ground for challenge. Insofar as allocation of the vacant space at the southern side is concerned, it is contended that the demarcation has been made in a justified manner. The lot allotted to the appellant is sufficient and commensurate with those allotted to the other co-sharers. It is argued that the argument of the appellant previously occupying such vacant space is neither here nor there, since upon a final decree being passed and allotments being made between the parties, each of the parties have to sacrifice some portion in exchange of others.
- 14.** The same logic, it is argued, applies to the open roof. The party to which the open roof has been allotted does not express any grievance to the same and it is not for the appellant to speak for such party by saying that no construction can be made thereon. The other co-sharers have also not got extra free space and the appellant cannot claim a special right to free air and light or vacant space as such. The measurement of the vacant space tallies between the reports of the Partition Commissioner and hence, in the absence of any evidence to the contrary, cannot be said to have been vitiated.
- 15.** It is argued that no KMC road has been shown as common passage of the parties.
- 16.** Learned counsel for the respondent places reliance on the Partition Commissioner's report to show that the Commissioner had duly

evaluated each of the lots and it has been left open in the final decree for owelties to be adjusted if the parties so desire.

- 17.** The original plaintiff no. 7, Gita Ghatak, had died during the pendency of the litigation and her heirs have been renumbered in the array of parties in the suit. Thus, there was no plaintiff no. 7 at the time of passing the decree and all parties have been allotted shares duly by the Commissioner.
- 18.** Lastly, the *inter se* individual allotment of lots to each of the parties is well within the broader outline of shares declared in the preliminary decree and cannot affect the appellant adversely in any manner whatsoever.
- 19.** In reply, learned counsel for the appellant controverts the allegations of the respondents and further points out that during pendency of the litigation, the predecessor-in-interest of the appellant and defendant no. 1-series, Late Hirendra Lal, died leaving behind a Will which has been since probated. As per the Will, the appellant is now the sole owner of the share of Late Hirendra Lal and the other defendant no. 1-series do not have any right thereto.
- 20.** Upon hearing learned counsel for the parties, we arrive at the following conclusions:
- 21.** One of the grounds of challenge in the present appeal is that the area of the vacant space at the southern side of the suit premises was depicted erroneously in the Partition Commissioner's report. We find from a perusal of both the reports of the Partition Commissioner, contrary to the arguments of the appellant, that the consistent measurement of the

said vacant space shown is 627 Sq.Ft. There is not a scrap of paper on record to indicate that such measurement was erroneous and/or that the actual area of the said space is 300 Sq.Ft. Thus, we do not find any reason to interfere with the Partition Commissioner's finding on such count.

- 22.** Secondly, a bare perusal of the Partition Commissioner's report shows that valuations were made by the Commissioner individually for each of the lots allocated to the parties. In fact, the Partition Commissioner's report, which was accepted by the learned Trial Judge in the final decree, clearly specifies that difference of value may be adjusted by way of mutual settlement towards owelty money. Thus, the appellant's argument that there was no valuation of lots is incorrect, as evident from the face of the records.
- 23.** The argument that the plaintiff no. 7 was not allocated any share is also misdirected. The original plaintiff no. 7, Gita, died during the pendency of the suit and was duly substituted. In the final decree, the array of parties shows that there is no plaintiff no. 7, after recasting the cause title consequent to the demise of the original plaintiff no. 7. Hence, no question arises of plaintiff no. 7 not being allotted any portion of the property. In fact, a perusal of the Partition Commissioner's report shows that all the parties to the suit were duly allocated separate demarcated shares by dividing the property into lots. Hence, such contention of the appellant also fails.
- 24.** Insofar as the entrance of the appellant being sealed off, we do not find merit in such contention. A clear, unhindered entrance has been

provided to the demarcated portion allocated as lot-‘B’ to the appellant at the south-western end of such property. The argument of the said entrance being originally used for entry of domestic helps is not impressive. As long as a clear entrance is provided to the lot of each of the parties by virtue of allotment of different portions of the property to them, no grievance can be entertained on such count. The mere perception of convenience of the appellant cannot be a good ground of challenge to the decree, since the luxury of having two entrances has not been afforded to any of the parties in respect of their separate allotted portions. There is no reason why the appellant should be an exception.

- 25.** The appellant also argues that the original possession in respect of the suit property has not been honoured. Although it is a matter of custom that the Partition Commissioner tries to adhere to the existing possession while allotting shares, the said practice is not an absolute proposition set in stone and possession is only honoured insofar as practicable in the ultimate analysis. A certain amount of *quid pro quo* is implicit in allotment of shares in a final decree of partition, since the wishes of all parties cannot be satisfied by the Partition Commissioner. As long as clearly demarcated and roughly equal areas of property are allotted to each of the parties, none of the parties can insist upon the original possession being retained. In fact, as and when a final decree of partition is passed and final allotment of shares are made, there will inevitably be some shifting of the existing possession and exchange of allotments between the parties. The fancy of the appellant for open air

and light should be equally applicable to all parties. None of the other parties have been allotted extra open space. The available vacant portion at the southern end of the suit property as well as the open terrace on the second floor has been allotted to a particular party in detriment of all the others. It was for the party who has been allocated only the open terrace and the vacant portion to register a grievance if such party had any. Having been allocated a separate portion of the property commensurate with the allocations of other co-sharers, it does not lie in the mouth of the appellant to stake a further claim for common open space which is not available to the other co-sharers.

- 26.** In any event, since a ground-floor portion of the suit-property has been allocated to the appellant as lot-‘B’, just as has been allocated to another co-sharer by way of lot-‘C’, it would be an unwarranted intrusion on the privacy of the other co-sharers who have been allocated lots on the first floor if access was granted to the appellant through such portions to the open terrace at the roof. Even the first floor allottees, who would otherwise have direct access to the open terrace, have been deprived of such access by the allocation of lots. Since the first floor allottees do not raise any objection in respect thereof, the grievance of the appellant, who has been allotted a ground floor portion, cannot be heard on such score. In any event, common spaces have been left for all the parties to have access to their respective demarcated portions in terms of the Partition Commissioner’s final report and the map annexed thereto. Thus, such objection of the appellant to the final decree cannot also be entertained.

- 27.** Insofar as a KMC road being allegedly shown as common passage is concerned, the said contention has not been substantiated by any cogent material from the end of the appellant to show that the 12-feet wide road adjacent to the suit-premises is actually a KMC road. Moreover, the 12-feet wide road has been merely depicted in the map annexed to the Partition Commissioner's report as a common access to the respective lots of the parties. The said passage has not been allotted to the share of any of the parties as such.
- 28.** Lastly, the appellant has argued that the preliminary decree merely declared shares jointly for the plaintiff (four-fifth) and for the defendants (one-fifth) respectively, whereas the Partition Commissioner has allotted demarcated portions to each of the parties individually, which is more detailed than the preliminary decree.
- 29.** However, we do not find any reason for the appellant to be aggrieved by such demarcation. The demarcation of individual lots for each of the parties, being the plaintiffs and the defendants, *inter se*, is within the broader outline of the preliminary decree and, rather than being beyond the preliminary decree, adds more substance to it. Such demarcation of individual lots for the parties is within the outer perimeter of the preliminary decree and not *de hors* the said decree.
- 30.** We do not find any plausible grievance of the appellant on such count, more so, since all the co-sharers have accepted the same and such a demarcation is not contrary to the preliminary decree; rather in aid of it.

31. In such view of the matter, the appellant fails on all the grounds urged in the appeal.
32. Accordingly, F.A.T. No. 303 of 2021 is dismissed on contest, thereby affirming the judgment and final decree dated September 29, 2021 passed by the learned Civil Judge (Senior Division), Tenth Court at Alipore, District: South 24 Parganas in Title Suit No. 76 of 2005.
33. Consequentially, CAN 2 of 2024 is also disposed of.
34. A formal decree be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)

Later

After the judgment is passed, on the prayer of learned counsel for the respondents, the trial court records are directed to be sent down immediately by special messenger at the cost of the respondents, to be put in within a week from date.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)

