

01.04.2024

Item no. 20

Dd

CO. 2883 of 2022

**Shyam Sundar Chatterjee & Ors.
Vs.
Tarak Nath Chatterjee**

Mr. Indra Nath Mukherjee,
Mr. Arijit Chatterjee,
... .. For the Petitioners

Ms. Shohini Chakraborty,
Ms. Prajaaini Das,
... ..For the opposite party

1. The revisional application arises out of an order dated June 17, 2022 passed by the learned Civil Judge, Senior Division, Serampore, Hooghly. By the order impugned, the learned Judge rejected the application under Section 47 of the Code of Civil Procedure being Misc. Case No. 07 of 2021. The said application was filed in connection with Title Execution case No. 10 of 2014.

2. The partition suit amongst the petitioner nos. 1 and 2 and the opposite party was decreed in final form on May 20, 2009. Challenging the aforementioned decree, a First Appeal being FA 421 of 2009, was filed before this High Court. By the judgment and decree dated August 27, 2019, the final decree was modified, but the allotment of the shares and other portions of the partition Commissioner's report were not interfered with. The

modification was that the defendant no. 2 who is the petitioner no. 2, would not be required to pay the owelty money to the plaintiff.

3. The petitioners filed an application challenging the executability of the decree by filing an application under Section 47 of the Code of Civil Procedure which was registered as Misc. Case No. 07 of 2021. The points raised before the learned Executing Court with regard to the execution, discharge and satisfaction of the decree were as follows:-

(a) Whether Judgement Debtor No. 2 (Madan Mohan Chatterjee) should be entitled to a separate passage for egress and ingress as a matter of right, from the portion which he had been using.

(b) Whether Judgement Debtor No. 2, as a co-owner, could be deprived of his right of egress and ingress on the ground that he was a bachelor.

(c) Whether the Decree Holder could encroach the common passage which still existed on Premises No. 175, C. S. Mukherjee Street.

(d) Whether the Decree Holder could prevent the Judgement Debtor No. 2 from using a common passage which was impartible and could not be partitioned according to Hindu law.

4. Mr. Mukherjee, learned advocate appearing for the petitioners submits that the learned Executing Court failed to exercise jurisdiction conferred upon him by law, by rejecting the application, instead of calling for

evidence with regard to the user of the common passage. The order was erroneous and passed in wrongful exercise of jurisdiction. According to Mr. Mukherjee, the decree could not be executed as the common passage could not be partitioned. The common passage existed since inception and was used by all co-sharers. As has been well-established by different judicial decisions, such common passage is impartible. Mr. Mukherjee further contends that the finding of the learned Executing Court that the defendant no. 2/petitioner no. 2 did not require a separate passage as he was a bachelor, was perverse. The final decree was passed declaring $1/3^{\text{rd}}$ share of each of the parties and each party including the defendant no. 2 was entitled to a separate allotment and separate entrance.

5. It is also contended that even if the partition commissioner's report was inspected by the High Court when the question of allotment of a common passage was concerned, whether the decree could be actually executed in absence of any separate passage for one of the share-holders was in doubt. The effect of partition by metes and bounds meant severance of joint ownership and allotment of definite, separate, specific share with specific boundaries, to each co-owner. Each of the brothers who have been allotted their shares must be entitled to a separate entrance from the main road for his ingress and egress, instead of depending on the mercy of another. The learned trial Judge, the executing Court and

the High Court had erred in holding that as the defendant nos. 1 and 2 were contesting the suit jointly, enjoying the property as a group, an entrance to the portion allotted to the defendant no. 2 was not required. According to Mr. Mukherjee, such a decree, could not be treated as a final decree, as the jointness had not severed and there was no question of discharge and satisfaction, of the decree.

6. Under such circumstances, it is urged that instead of rejecting the application under Section 47 of the Code of Civil Procedure, the learned Trial Judge ought to have allowed the parties to lead evidence on the existence of a passage allotted to the decree holder and the correctness of allotment of a common passage to the defendant no. 1 and the defendant no. 2. It is further contended by Mr. Mukherjee that only because the Special Leave Petition, arising out of the decision of the High Court in FA 421 of 2009 was dismissed, the dismissal would not be a decision on the executability of the decree. The purpose of Section 47 of the CPC was for the executing court to ascertain whether the decree, as passed by the learned Courts, could be satisfied to its fullest extent. The effect of the final decree herein, was that each of the brothers got their separate, demarcated and specified portion in the common property on paper only.

7. Ms. Shohini Chakraborty, learned advocate appearing for the decree holder/plaintiff submits that the defendants wanted to reopen the correctness of the final

decree and the order of the Hon'ble Division Bench. The issue with regard to the allotment of the 4ft. wide common passage jointly to the defendant nos. 1 and 2 was raised in the first appeal. The Hon'ble Division Bench considered the same and accepted the proposition of the partition Commissioner with regard to allotment of the common passage to the defendant nos. 1 and 2 as fair, just and equitable.

8. It is contended that the question of the defendant no. 2 being a bachelor and entitled to a separate entrance would be of no consequence at the moment as the share of the defendant no. 2 had been gifted to the petitioner no. 3, who is also a party in the execution proceeding and the daughter of the defendant no. 1. The common interest of the defendants is evident from such action of the defendant no. 2. It is further contended that the learned trial Judge had recorded that no evidence had been adduced by the defendant no. 2. The defendant no. 2 did not file any written statement and the partition Commissioner was of the opinion that allotment of the vacant space to the plaintiff would be more convenient as the plaintiff could build his own dwelling house on the said land, instead of being given allotment of a portion on which there was a two storied dilapidated structure in the middle. The question that the defendant no. 2 did not require a separate entrance, has been answered by the partition Commissioner and the Hon'ble Division Bench, *inter alia*, holding that as the defendant no. 2 was a

bachelor, and lived together with the defendant no. 1, he did not require a separate entrance. Such issue has now become academic as the defendant no. 2 has already transferred, his portion to the daughter of the defendant no. 1, who is also a party to the proceeding. It would be an absurd proposition for the defendants to now claim that the defendant no. 1 and his daughter should have separate entrance. Moreover, the common passage as per the map indicates that both the shares allocated to defendant nos. 1 and 2, can be accessed through that passage. Moreover, the Hon'ble Division Bench noticed that the common passage was blocked by a construction and a separate entrance with a 12ft. wide gate, had been constructed. The Division Bench noted that during the commission work also, there was a common passage for use the defendant by nos. 1 and 2.

9. In find that the learned executing court did not accept the contention of the petitioners that a 9ft. x 24ft. common passage had been allotted to the decree holder. When the Commissioner was being cross-examined, no question with regard to existence of another passage, measuring 9ft. x 24ft, had been put to the Commissioner. Even no suggestion with regard to such passage had been made. In the absence of any proof of existence of another 9ft. x 24ft. wide passage, the issue could not be revived. The learned Executing Court further held that the decree was not a nullity. It was executable. The decree did not lack inherent

jurisdiction. The executing court could not go beyond the decree. The grounds raised by the petitioners were found to be not tenable in law.

10. The first three questions with regard to allotment of a separate passage to the defendant no. 2 has now become an academic exercise as the daughter of the defendant no. 1 has been gifted the share of the defendant no.2. Secondly, whether the suit property had a common passage since inception was not proved. Neither before the partition Commissioner nor before the High Court, was such issue raised. Moreover, the partition commissioner was not cross-examined on such point.

11. Finally, the Hon'ble Division Bench of this Court while modifying the final decree, without interfering with the allotments, made the following observations :-

"There is no specific written objection by the defendant no. 2 that he is aggrieved by the proposed allotment in this regard. It is an admitted position that the defendant No. 1 and the defendant No. 2 have resided together. The defendant No. 2 is a bachelor. He resides with the defendant No. 1 only and for all practical purposes, the defendant Nos. 1 and 2 represent one group opposing the allotment of the plaintiff. Under such circumstances, a common passage amongst themselves, namely, defendant Nos. 1 and 2 naturally would not cause inconvenience than holding the common passage jointly with the plaintiff against whom they are together and jointly contesting.

The plaintiff filed the suit for partition as he felt inconvenience in enjoying the suit property jointly with the defendant Nos. 1 and 2. It is also clear from the respective maps submitted by the parties that the defendant No. 1 raised no dispute in respect of the portion allotted to the defendant No. 1. Only the portion allotted to defendant no.2 is disputed. The plaintiff and the defendant No. 2 both sought for allotment of the vacant portion. The plaintiff sought for that portion as he did not want to keep any portion in joint possession with the defendants and to have an exclusive possession in one side the building. The defendant No. 2 did not adduce any evidence regarding his need. However, it is clear that the defendant Nos. 1 and 2 reside together. We accept the submission made on behalf of the plaintiff that if the plaintiff is allotted the middle portion as suggested by the defendants then the plaintiff would be caught in between the two brothers who are living jointly and in future this is likely to cause inconvenience to the plaintiff in peaceful enjoyment of his portion. The plaintiff is likely to face some inconvenience which he faced while possession the suit property jointly with the other defendants. The defendant no. 2 does not support the plaintiff in the suit. Although, it appears to have been raised before the learned Trial Judge as well as before the Commissioner that there is no existence of 4' wide common passage on the southern side of the building, the documents reveal that the said passage

existed till December, 2004 while work of Commission was in progress. Besides, the said passage was used by the defendant No. 1 and his family and also their tenant for ingress and egress in into their property. It is an admitted position that the tenant has vacated the portion under his occupation in favour of the defendant No. 1 in early December, 2004 and thereafter the defendant No.1 appears to have blocked the said passage and made an opening through the Northern side with a 12ft. gate after submissions on the Commissioner report. The Commissioner has inspected the suit property. The property in question is situated in Dag No. 3461 and 3462 along with pucca building standing on both plots appertaining to Municipal Holding Nos. 172 and 175 of C.S. Mukherjee Street within Konnogar Municipality. Plot No. 3462 is on western side southern lane and plot No. 3461 is on the eastern side southern by lane. On consideration of the respective allotment suggested by the parties, the Commissioner allotted common passage to the defendant nos. 1 and 2 because there is no separate ingress and egress for the defendant No.2. We have already recorded our reasons for agreeing to the allotment of common passage to the defendant Nos. 1 and 2 to be used jointly by both of them and we feel under the facts and circumstances of the case, it was just and equitable that there was no necessity for allowing a separate passage for ingress and egress of the defendant Nos. 1 and 2. The water connection falls on the portion allotted to

the plaintiff and, accordingly, the Commissioner has allowed the defendants to take the water connection to their respective portion from the common passage at their own cost. The plaintiff and the defendant no. 2 were to make to privy of their respective portion at their own cost. The defendants would take electric connection and water connection at their own cost to their respective portion from the common passage. The dwelling house was given to the defendant Nos. 1 and 2. The plaintiff for his own living would construct his dwelling house in his portion at his own cost. However, to facilitate the entire thing and considering the fact that it would take some time to give effect to the said partition both the parties were allowed to enjoy the privy, water connection and electricity facility one year from the date of final decree. The Commissioner has considered relevant sale deed of adjacent plots for the purpose of determining the owelty money and has assessed the amounts to be paid by the defendant Nos. 1 and 2 to the plaintiff towards owelty as both of them got arrears in excess of their allotment in terms of money. The defendant No. 1 was directed to pay to the plaintiff Rs. 1,03,038.67/- and the defendant No. 2 would be required to pay a sum of Rs. 52,971.67/-. The Commissioner has also noted in the report that the tenanted shade has already been removed.

12. The Division Bench only interfered with the direction upon the defendant no. 2 to pay owelty money to the plaintiff on the ground that

the portion allotted to the defendant no. 2 was in a dilapidated condition and substantial costs would be incurred for repair of the same.

13. Mr. Mukherjee submits that the plaintiff/decreed-holder is still occupying the portion allotted to the defendant no. 2 and he has not complied with the decree. It is submitted by Ms. Shohini Chakranorty that as the plaintiff is not in a position to take over the possession of the vacant land due to the litigation, the plaintiff could not start construction of his own house. If such issue is raised, the Executing Court shall decide and pass necessary orders.

14. The learned executing court shall proceed in accordance with law and complete the execution and dispose of the same within the next three months. Lot of time has elapsed since the decree attained finality.

15. In the decision of ***Bhoj Raj Garg vs. Goyal Education and Welfare Society & ors. decided in Special Leave Appeal No.19654 of 2022***, the Hon'ble Apex Court held as follow:-

"The complaint of the petitioner is that the Execution Court is not abiding by the directions issued by this Court in the decision in ***Rahul S. Shah Vs. Jinendra Kumar Gandhi & Ors., reported in (2021) 6 SCC 418***. In the said decision, it was held as follows:-

'42. All Courts dealing with suits and execution proceedings shall mandatorily follow the below mentioned directions:-

2. The Executing Court must dispose of the Execution Proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.'

This means that it becomes the duty of the Execution Court to dispose of the execution proceedings at the earliest and since this Court has directed that the Execution Court must dispose of the execution proceedings within six months from the date of filing, which can be extended only by recording reasons in writing for such delay, this direction is meant to be observed. This would mean that every effort should be made to dispose of the execution petition within the said time limit and the Execution Court should have reasons for not being able to dispose of the execution petition. The Execution Court is duty bound to record reasons in writing when it is unable to dispose of the matter."

16. In ***Rahul S. Saha (supra)***, it had been categorically held that execution cases should be completed expeditiously. The Hon'ble Apex Court noted the sorry state of affairs and how the provisions of law were being misused to delay execution proceedings.

17. Under such circumstances, this Court is of the opinion that the learned Executing Court has not acted with material irregularity. The impugned order is not perverse.

18. CO 2883 of 2022 is **disposed of** accordingly, without any interference with the order impugned.

19. All the parties are to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)