

**IN THE HIGH COURT AT CALCUTTA  
ORDINARY ORIGINAL CIVIL JURISDICTION  
ORIGINAL SIDE**

**Present:**

**THE HON'BLE JUSTICE HARISH TANDON**

**&**

**THE HON'BLE JUSTICE MADHURESH PRASAD**

**APOT 78 of 2023  
With  
EC 171 of 2014  
CS 3 of 2005  
IA no. GA 1 of 2023  
GA 2 of 2023  
GA 3 of 2024**

**Pratik Kumar Bhattacharyya  
Vs.  
Somesh Chandra Bhattacharyya & Ors.**

**Appearance:**

For the Respondent no. 1 : **Mr. Pratik Kumar Bhattacharyya,**  
**Appellant**  
**[in person]**

**Mr. Deep Narayan Mukherjee, Adv.**  
**Mr. Subrata Das, Adv.**  
**Mr. Debayan Ghosh, Adv.**

For the KMC : **Mr. Gopal Chandra Das, Adv.**  
**Ms. Piyali Sengupta, Adv.**

For the Defendant nos. 2[a], : **Mr. Shaunak Ghosh, Adv.**  
**Mr. J. Mandal, Adv.**  
2[b], 2[c]

For the Respondent no. 6 : **Ms. Chama Mookherjee, Adv.**  
**Mr. Avijit Mookherjee, Adv.**  
**Ms. Chandrani Ghosh, Adv.**  
**Ms. Monisha Chatterjee, Adv.**

Judgment on : **07.10.2024**

**Harish Tandon, J.**

The intra-Court appeal arises from a judgment and order dated 2<sup>nd</sup> March, 2023 passed by the Single Bench in EC no. 171 of 2014 directing the judgment-debtor nos. 1a to 1c to execute the deed of conveyance in respect of the Premises no. 88/2A, Rafi Ahmed Kidwai Road, Calcutta – 13 and also in respect of the Lot – B and Lot – C of the final decree and handover the possession in respect of Lot – A in favour of the decree holder, subject to the payment of owelty money in terms of the settlement leading to the passing of the alleged final decree. The judgment-debtor no. 1 has preferred the instant appeal before this court taking several points, some of which are decided earlier and some are connected with the earlier points and sought to reopen the issues at the execution stage.

The facts so unfurled are more or less undisputed which in order to decide the points are adumbrated hereinafter. Undisputedly, Sukumar Bhattacharya filed a partition suit i.e. CS 3 of 2005 against his two brothers namely, Pran Kumar Bhattacharya and Sunil Kumar Bhattacharya for partition and separation of the properties comprised in the said suit. Four properties were the subject matter of the said suit namely, Premises no. 80/2A, Rafi Ahmed Kidwai Road, Kolkata-700013, 55, Sri Aurobindo Sarani, Kolkata-700005, Premises no. 222, Berry in Villa, 224 Batasia Cart Road, Ghoom, Darjeeling and Plot no. 55, Monteviot Building Estate at Kurseong. The partition suit was decreed in preliminary form on 08.03.2005 on the

consent of the parties by declaring shares in respect of the aforesaid properties. Obviously, there was no dissent in the shares held by the aforesaid three brothers who claimed to have inherited the aforesaid properties upon the death of the predecessor. After the preliminary decree, the Trial Court directed the appointment of the Commissioner of partition to submit the report within the stipulated time. Undisputedly, the partition Commissioner filed the report in terms of the said order dated 08.03.2005 on 31<sup>st</sup> August, 2006. Before the Court proceed to consider the report of the partition Commissioner filed in terms of the order passed in the said suit after the preliminary decree, the matter came up before the Court on 19<sup>th</sup> December, 2007 when the Court was apprised of the fact that the parties have entered into a terms of settlement duly signed by them and their respective advocates and, therefore, the decree may be passed in terms of the said terms of settlement. Since the parties have compromised by executing the terms of settlement, the Court passed a decree on the basis thereof and directed the department to draw up the decree expeditiously. Pursuant to the said direction, the decree is drawn up in terms of the terms of settlement so arrived. The said terms and conditions provides certain payments by the plaintiff to the original defendant no. 1 which, in fact, was paid and duly received by a party to the proceeding. Interestingly, the original defendant no. 1 filed an application being GA 1361 of 2008 for appointment of the receiver to obtain the sanction of the building plan in respect of the 80/2A, Rafi Ahmed Kidwai Road, Kolkata-700013 and simultaneously, prayed for an injunction against the original plaintiff and the defendant no. 2 from making any construction in respect of the property

being 55, Sri Aurobindo Sarani, Kolkata-700005. Amidst the pendency of the said application, the original defendant no. 2 i.e., Sunil Kumar Bhattacharya died but the heirs of the said deceased defendant were not brought on record immediately.

The original defendant no. 1 took out an application being GA 1493 of 2009 in the said suit seeking to recall the order dated 19.12.2007 on the basis thereof the decree was drawn up recording the terms of settlement and also challenged the report of the valuer and surveyor as well as the partition Commissioner with further declaration that the terms of settlement is illegal. The said original defendant no. 2 prays for an *interim* order in the said application which was declined on 22<sup>nd</sup> June, 2009 with the *prima facie* finding that the moment the terms of settlement has been signed by the parties and the moneys have been received and the letter of allotment is also issued on the basis thereof, It is not fit case to pass an *interim* order. It was further observed that the partition Commissioner had no occasion to justify the report as the parties voluntarily agreed by entering into a compromise in the form of terms of settlement which led to an inescapable conclusion that any objection to the Commissioner's report is waived. Immediately after the passing of the said order, the original plaintiff filed an application being GA 2719 of 2009 seeking an order for registration of the conveyance in respect of the Lot – B and C of the said terms of settlement. The said GA 1493 of 2009 filed by the original defendant no. 1 was listed before the Court on 11<sup>th</sup> January, 2010 and it was thought that the opinion of the Kolkata Municipal Corporation is necessary and a direction was passed to submit the same

before the Court. The Assistant Engineer (Civil) of the Building Department of the Kolkata Municipal Corporation submitted the report dated 10.02.2010 indicating that a demolition proceeding was brought in respect of a premises which is under consideration and the proposal for construction of the staircase and the others to make Lot – B self-sufficient has not been submitted by the owner of the Lot- B and in the event, the same is submitted the corporation may consider the same subject however, to the mutation of the names of owners of the Lot – B portion. Taking into account the disclosure made in the said report, the direction was passed upon the original defendant no. 1 to make an application before the Kolkata Municipal Corporation for sanction of the plan relating to the construction in the proposed Lot - B within fortnight from the date and the corporation was also directed to consider the said application in accordance with law. Immediately after the said order, an application being GA 2944 of 2010 was filed by the original defendant no. 1 seeking to review the earlier order as indicated above which was eventually dismissed on 14<sup>th</sup> September, 2010. The defendant no. 1 preferred an appeal being APO no. 423 of 2010 against the order dismissing the said application for review which was disposed of on 2<sup>nd</sup> February, 2011 with the categorical finding that the earlier objections so raised by the said defendant with regard to the mutation of the Lots allotted in favour of the co-sharers shall be deemed to have been withdrawn and a direction was further passed upon the said defendant no. 1 to submit an application for mutation in respect of his allotted portion on the basis of the said consent decree before the Kolkata Municipal Corporation and on such application being filed the Corporation will pass an appropriate order

in this regard. The Division Bench further passed an order that in the event the mutation of the respective Lots are done by the Corporation, the further exercise shall be done by the respective parties in the following:

**“After the mutation of the respective lots by the Kolkata Municipal Corporation authorities the appellant herein within two weeks thereafter will submit a plan for the purpose of construction of staircase, kitchen, water reservoir and toilet in the lot allotted to him in terms of the consent decree before the competent authority of the Kolkata Municipal Corporation in the prescribed form and manner and the concerned authority of the Kolkata Municipal Corporation will take appropriate decision for sanctioning the said plan within a period of four weeks from the date of submission of the plan by the appellant herein. The appellant herein will complete the construction work in his lot in terms of the sanctioned plan within a period of twelve weeks from the date of sanctioning the building plan by the Kolkata Municipal Corporation authorities.”**

Ultimately the Division Bench held:

**“We also make it clear that allottees of Lot – A and Lot – C will be at liberty to carry on construction works in terms of sanctioned building plan in respect of their respective lot without interfering with the rights of the appellant herein in terms of the consent decree in any manner whatsoever.”**

The application being GA 1361 of 2008 and GA 1493 of 2009 which were pending before the Single Bench was disposed of in terms of the order of the Division Bench as quoted above on 07.03.2011 in the following:

**“G.A. No. 2719 of 2009 seeks to implement the consent terms. Since the extent to which the consent terms can be implemented would depend on the outcome of the present exercise being carried out pursuant to the appellate Court order of February 2, 2011, let G.A. No. 2719 of 2009 appear in the monthly list of August, 2011. In the meantime, the collector will not return the drawn-up decree that has been sent for assessment of stamp duty.”**

The said order was further challenged in APO 423 of 2010 by the said original Defendant no. 1 and an application filed therein was disposed of on May 2, 2011 in the following:

**“Having heard the learned Counsel appearing for the parties and considering the facts and circumstances of this case, we dispose of this application by directing the Kolkata Municipal Corporation authorities to complete the mutation proceedings and provide assessee number to the different lot holders in compliance with the earlier order passed by this Court without any further delay.”**

The application and appeal being APO 423 of 2010 appeared before the Division Bench on 8<sup>th</sup> June, 2011 wherein the original defendant no. 1

apprised the Court that the Kolkata Municipal Corporation authorities have refused to take necessary steps for separation of the proposed Lot – B which impedes the said appellant to submit any plan for the purpose of construction of staircase, kitchen, water reservoir and toilet in the concerned law. On the basis thereof, the Division Bench directed the parties to maintain status-quo as on the date in respect of the entire property and further restrained the Corporation from giving effect or further effect to the order of apportionment already passed in respect thereof until further order. The Division Bench passed further order on 28<sup>th</sup> June, 2011 in the following:

**“In the aforesaid circumstances, the appellant herein is directed to submit the proposed building plan in respect of lot ‘B’ directly with the Director General (Building), Kolkata Municipal Corporation with other relevant papers and documents as are necessary and available with the said appellant so that the Director General (Building) can process the said building plan and pass necessary order with regard to sanction of the said building plan at an early date. The Engineer and/or LBS appointed by the appellant herein will submit the building plan in terms of this order to the Director General (Building) within a period of three weeks from date positively.**

**Needless to mention, the Director General (Building) will take necessary steps immediately after submission of the proposed**

**building plan by the appellant herein so that the necessary sanction can be granted at an early date.”**

Amidst the pendency of the said appeal an application was taken out by the original defendant seeking to enforce the consent decree dated 19<sup>th</sup> December, 2007. The Single Bench *vide* order dated 25<sup>th</sup> January, 2012 observed that the dispute revolved around the property comprised in 88/2A, Rafi Ahmed Kidwai Road and not in respect of other properties and, therefore, there is no impediment on the part of the executing Court to direct the part execution of the said decree and in respect of the other properties and appointed the Special Officer to draw up a plan to indicate the construction, alteration work etc. to effect the partition of the other properties in accordance with the consent decree and also to take symbolic possession thereof. Ultimately, the said APO 423 of 2010 came up for final disposal before the Division Bench on 10<sup>th</sup> December, 2012 and was dismissed. Since the decree was not drawn up in terms of the order dated 19.12.2007, an application was taken out by the original plaintiff being GA 2889 of 2013 for a direction upon the Department to issue a certified copy so that the entire Stamp Duty as assessed by the Collector may be deposited. The said application was disposed of on 24.09.2013 directing the Department to issue the certified copy of the decree dated 19.12.2007. After obtaining the certified copy, the execution case no. 171 of 2014 was levied before the Court at the instance of the original plaintiff. The executing Court directing the parties to bear the Court fees in commensurate with their shares and ultimately on being made aware that the original defendant no. 1

has not paid his share directed to pay the same immediately and in the event of failure his bank account and other property shall be attached.

The said order was assailed by the original defendant no. 1 in APOT 389 of 2014 before the Division Bench which came up for consideration on 4<sup>th</sup> September, 2014. The Division Bench observed that there is no grounds made out in the said appeal warranting interference with the said order for the reason firstly, the execution case is pending and all points which are sought to be raised therein can be raised in the execution proceeding and secondly, the other points are already considered and decided in GA 3344 of 2010 corresponding the APO no. 423 of 2010 and therefore cannot be re-agitated. However, a leave was granted to take all such points before the executing Court. Such leave gives impetus to the original defendant no. 1 to take out an application under Section 47 of the Code of Civil Procedure raising all sorts of objections which was registered as GA 3022 of 2014. The said application was dismissed on 16<sup>th</sup> November, 2015 by the executing Court with the following findings.

**“The decree is a compromise decree for partition. The reference to construction in the said decree only refers to those constructions which would make each of the partitioned parts of the premises independent and capable of separate enjoyment. In my opinion, the decree does not provide for making substantial constructions as the defendant no.1 has indicated in his proposed**

**plan. Substantial constructions may be carried out by any of the parties only after partition in terms of the decree, in my opinion.**

**Furthermore, the import of the expression ‘construction’ to be made in the premises was considered by the Division Bench of this Court in its judgment and order dated 10<sup>th</sup> December, 2012 where the Division Bench explained the following:**

**“We have noticed that time and again the Division Bench of this Court had passed orders to ensure that the parties to the compromise decree implement the terms of the settlement without prejudice being caused to any one of them. The Division Bench had directed the defendant No.1 to submit a plan so as to make Lot B habitable. It appears however, that defendant No.1 submitted a plan which was for constructing a new building on Lot B and it is in these circumstances that the competent authority refused to sanction the same. The import of the order dated 24<sup>th</sup> February, 2011 passed by the Division Bench of this Court is unambiguous inasmuch as the plan which the defendant No.1 was to submit was for the construction of a staircase, a kitchen, a water reservoir and a toilet in Lot B which fell to the share of Defendant No.1 under the consent terms. Instead of submitting such a plan, Defendant No.1 submitted a plan depicting the construction of a building at the rear end of Lot B and for connecting the same to the existing structure. It is in**

**these circumstances that sanction for such a construction was denied.”**

**Most importantly, the defendant no.1 has received Rs. 10 lakhs from the plaintiff for agreeing to take Lot B under the decree. Furthermore, he is entitled to further amounts as owelty. Having so agreed by signing the compromise and having acted upon it, the defendant no. 1 is stopped from challenging the decree itself as inexecutable.**

**I come to a conclusion that there is no defect in the decree whatsoever which makes it inexecutable. Hence, the application GA No.3022 of 2014 under Section 47 Code of Civil Procedure is dismissed.”**

In the meantime, both the original plaintiff and defendant no. 1 died and their heirs were brought on record. In the interregnum, an appeal was taken out assailing an order dismissing an application under Section 47 of the Code of Civil Procedure before the Division Bench being APOT 96 of 2019. The said appeal was dismissed on 4<sup>th</sup> September, 2009 in the following:

**“Mr. Pratik Bhattacharyya, appearing in person, has submitted that the order passed GA No. 3419 of 2006 cannot be read as a final decree since the first paragraph of the order records “There will be a decree in the final form ....”. The terms of settlement records that the parties have entered into a settlement and the**

**suit is decreed in part partitioning the properties in Schedule-A, B, C and D. There cannot be any dispute that from a reading of the terms of settlement, in so far as the properties in Schedule-A, B, C and D are concerned, there is a decree in the final form. In respect of the said properties, the decree is final between the parties. However, this issue was not before us, but since argued by the parties for the sake of clarification, we have made the aforesaid observation. The necessary amendment shall be carried out within a period of three weeks from date. Copies of the amended copy of the plaint shall be served upon Mr. Bhattacharyya.”**

Subsequently, the objection as to the maintainability of the execution case was raised before the executing Court when the matter was listed on 18<sup>th</sup> August, 2022 wherein the submissions of the decree holder was recorded that in view of the dismissal of the application under Section 47 of the Code of Civil Procedure, maintainability of the execution proceeding has been set at rest. Ultimately, the Court directed the matter to be listed on the next date. The said order was challenged before the Division Bench in APOT 158 of 2022 which was dismissed on 8<sup>th</sup> September, 2012 with the observation that since the executing Court has not decided the matter on merit and if any point is raised, the same shall be decided by the executing Court. The order dismissing the said appeal was assailed before the Supreme Court in special leave to appeal **(c) no. 17234 of 2022** wherein the leave was not granted as the Apex Court was of the view that the matter

if disposed of at an earliest would sub-serve the justice. Pursuant to the said direction of the Apex Court, the execution case is disposed of by passing the impugned order which is the subject matter of challenge in the instant appeal.

Several points are raised at the behest of the appellant not only touching upon the nature of the decree passed on 19<sup>th</sup> December, 2007 but also the competence of the Court to grant such decree on the basis of the terms of settlement having signed by the respective advocates and not by the parties. A plea was further taken that in absence of any substitution having made within the statutory period of limitation, the proceeding abated and, therefore, all the orders passed therein is non-est. It is sought to be contended before us that the moment the terms and conditions embodied a period within which the entire exercise has to be completed and the said period having expired the terms and conditions dies by efflux of time and cannot be executed. A plea relating to the mutation of the names by the Kolkata Municipal Corporation is also raised in the instant appeal.

On the other hand, the respondents contested the said proceedings by taking a firm decision that all such plea were raised at different stages of the execution proceedings as well as in the intra-court appeals filed before the Division Bench and having decided cannot be reopened. It is further submitted that in view of the categorical observations made by the executing Court as well as in an application under Section 47 of the Code of Civil Procedure, such points are set at rest and cannot be reopened by the appellants. It is further submitted that the liberty having granted to the

appellant to raise all points to be decided by the executing Court does not mean that the point which has already been decided can be re-agitated as such liberty has to be construed as a liberty to raise all points permissible in law.

The sequel of event as discerned from the facts involved in the instant proceedings leads to an inescapable conclusion that an attempt is made since the date of passing a decree on the basis of the terms of settlement to thwart the same. A person shall not be permitted to approbate and reprobate at the same time, at one hand the original defendant no. 1 is assailing the decree passed on the basis of a terms of settlement to be non-est yet, he received the money in terms of the said settlement which was also taken note of by the Division Bench in one of the intra-court appeal filed by the original defendant no. 1. A person who acted on the basis of the terms of settlement shall be precluded from challenging its validity at the subsequent stage of the proceedings. Interestingly, the point is sought to be raised that the word “decree” to be passed on the terms of settlement cannot be construed as a final decree in absence of the word “final” having incorporated therein. The aforesaid point was agitated almost in all the proceedings including the intra-court appeal before the Division Bench and it has been categorically held that the said decree is passed in final form and in fact, an order was also passed for drawing up of the decree. There is a misconception in the mind of the appellant that the word “decree” does not connote the final decree when admittedly such decree was passed after the preliminary decree on the basis of the terms of settlement entered into by

and between the parties. The Division Bench have categorically held that the terms of settlement was duly signed by the parties as well as their respective advocates and, therefore, it is not open to the substituted legal representative to take a plea contrary thereto. The recording of the facts and the findings unless interfered with by the higher forum is sacrosanct and binds the parties. The partition suit having a special feature where more than one decree is permissible. Till date the parties have not challenged the preliminary decree passed on consent but the challenge appears to have been made after a further decree is passed on the basis of terms of settlement. The Court has to construe the nature of the decree not only on the basis of a context in which it is so passed but also at the stage of the proceedings. The Court passed an order directing the drawing up of a decree on the basis of the terms of settlement arrived between the parties despite the report submitted by the partition Commissioner which would in unequivocal term implied the passing off a final decree and not mere paper decree. Since the Division Bench has already held that the decree was issued in final form and such point has already been decided cannot be reopened at the subsequent stage of the proceedings. The moment the preliminary decree is passed in a partition suit, it does not invite any concept of abatement in absence of bringing the legal representatives on the death of the parties. Even in earlier stage of proceeding, the Court has reiterated the aforesaid principles and simultaneously, brought the heirs on record so far as the plaintiff and the defendant no. 1 is concerned which cannot be revisited at the stage of the execution of the decree. Several orders were passed by the executing Court as well as the Division Bench to

remove the difficulties faced by the parties in implementing the final decree yet because of the conduct of the defendant no. 1 and after his death his heirs including the appellant herein, it has not reached to its final destination. It is a classic example of well known notion that “real trouble starts after getting the decree”. The appellant appears to have taken all sorts of objections either tenable or not to thwart the execution of the final decree and re-agitating and/or reopening the issue which are already been decided conclusively. The plea of *res judicata* not only applies between the different proceedings but has its equal applicability at the different stages of the same proceedings. The original defendant no. 1 filed an application under Section 47 of the Code of Civil Procedure raising issues on the execution, discharge and satisfaction of a decree and having failed to achieve the desired result cannot be permitted to reopen the issues solely on the ground of a liberty having granted by the Division Bench to agitate all points and in the event it is so agitated to be decided on merit. Though the liberty was given to take points which are permissible in law but such liberty cannot be construed that the nuances of law applicable in this regard shall be discarded. The liberty appears to be misused by taking a circuitous rout in reopening the issues which were conclusively determined by the executing Court as well as the Appellate Court. Even if for argument sake we accept the contention of the appellant that certain points were not raised in an earlier stage of the proceedings yet, Explanation IV to Section 11 of the Code of Civil Procedure applies and such point would be barred by constructive *res judicata*. All such points were available at the time when an application under Section 47 of the Code of Civil Procedure was filed and having not taken cannot be

permitted to be taken at the subsequent stage of the proceedings. Several orders were passed by the executing Court as well as the Appellate Court in due execution of the decree in final form which does not appear to us to have been passed without jurisdiction.

We, thus, do not find that the points so agitated before us are tenable in law.

The appeal is thus dismissed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

**(Harish Tandon, J.)**

I agree.

**(Madhuresh Prasad, J.)**

**Later:-**

After the judgment is pronounced in the open Court, the appellant appearing in person prays for stay of the operation of the judgment.

We gave an anxious thought to the same and do not find any justification in staying the operation of the order.

The prayer is thus refused.

**(Harish Tandon, J.)**

**(Madhuresh Prasad, J.)**