

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

**The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
And
The Hon'ble Mr. Justice Supratim Bhattacharya**

F.A. No. 57 of 2023

**Sri Pradip Das @ Pradip Kumar Das and Others
Vs.
Sri Pranab Das @ Sri Gopal Das and Another**

For the appellants : Mr. Partha Pratim Roy,
Mr. Tanmoy Mukherjee,
Ms. Sulagna Mukherjee

For the
respondent no. 1 : Mr. Prabal Kumar Mukherjee, Sr. Adv.,
Mr. Sanjay Mukherjee,
Mr. Priyadip Paul

Heard & reserved on : 12.03.2026

Judgment on : 17.03.2026

Sabyasachi Bhattacharyya, J.:-

1. The present first appeal arises out a preliminary decree of partition passed in a suit filed by the plaintiff/respondent no. 1 against the defendant nos. 1 to 3/appellants and defendant no. 4/proforma respondent. The appellants assail the impugned judgment and decree on three-fold grounds:
 - (i) Premises No. 138, Motilal Nehru Road, Kolkata-700 029 has been included within the hotchpot of the partition suit despite it being a *debuttar* property;

- (ii) One of the joint properties of the parties, comprised in Premises No. 138A, Motilal Nehru Road, Kolkata-700 029, has been omitted from the hotchpot of the partition suit, thus rendering the suit bad for partial partition; and
- (iii) The learned Trial Judge mechanically directed accounts to be taken, without framing any issue on the same and without taking into consideration the fact that the appellants have spent more money on maintenance, repairs and payment of taxes of the suit property than the rental income from the same.

2. Addressing the first ground first, learned counsel appearing for the appellants draws the attention of the Court to Schedule-I of the plaint, where Premises No. 138 has been included. It is pointed out that PW-1 (the plaintiff/respondent no.1), in his cross-examination, admitted that Premises No. 8A, Hazra Lane has now been renumbered as 138, Motilal Nehru Road. From one of the deeds of trust, marked collectively as Exhibit- 'C' in the suit, bearing Deed No. 4669 for the year 1943, it is seen that Premises No. 8A is one of the properties dealt with in the said deed, which is in the nature of an *Arpannama*, dedicating the said property along with others to deities. It is contended that the law is well-settled that *debuttar* properties belong to deities and are impartible by their *shebait*s.

3. Learned counsel for the appellants next places reliance on both Schedules I and II of the plaint, which omit Premises No. 138A, Motilal Nehru Road. However, the PW-1, in his evidence, admitted that Premises No. 8B, Hazra Lane has since been renumbered as Premises No. 138A and 139A, Motilal

Nehru Road. Placing reliance on the Schedule of the other trust deed, bearing Deed No. 4558 of 1943, which is also marked collectively as Exhibit- 'C', it is submitted that the said property formed a part of the said Deed and was admitted to be joint between the parties. The same, however, has not been included within the subject matter of the suit.

4. Thirdly, learned counsel places the contents of Paragraph No. 13 of the plaint, where the plaintiff/respondent no. 1 averred that there are several shop rooms in the suit properties, which are now occupied by the monthly tenants and that the defendant nos. 1-3/appellants are collecting monthly rent from the said tenants.
5. In reply thereto, in Paragraph No. 13 of the written statement, the defendant nos. 1-3/appellants stated that they are all along paying "all sorts of" Corporation Taxes, electric bills and other statutory outcomes for maintenance and management of the properties and repairing of the building as and when required and also making necessary expenses and that the "meager income from the old monthly tenants" cannot fulfill the maintenance expenditure of the suit properties.
6. In his cross-examination, PW-1 admitted that all payments in respect of the suit property have been made by the defendant nos. 1-3/appellants. Despite the same, the learned Trial Judge mechanically awarded a preliminary decree for accounts, upon declaring that the plaintiff is entitled to get such a decree, without mentioning the expenditure for the suit property also to be included in the said accounts. Moreover, no issue was framed on the dispute raised by the appellants to the effect that the expenditure incurred

by the appellants for the suit property exceeds the rental income received by them from the said property.

7. Learned counsel appearing for the plaintiff/respondent no.1 places reliance on the provisions of Order XX, Rule 17 of the Code of Civil Procedure (for short, "the Code") to indicate that the court is required to stipulate the modalities for accounts and, in the present case, ought to have provided for due adjustment for the expenses incurred by the appellants for the suit property while directing accounts.
8. Learned senior counsel for the respondent refutes the arguments of the appellants and contends that Order XX, Rules 16 and 17 of the Code, read in conjunction, permit the court to pass a preliminary decree on accounts and for the modalities to be fixed later. As such, it is argued that there was no irregularity or illegality in the learned Trial Judge directing accounts.
9. Learned senior counsel also controverts the arguments of the appellants on the ground of omission of certain joint properties and inclusion of a *debuttar* property and submits that the learned Trial Judge, upon adverting to all the materials, came to justified conclusion which ought not to be upset in the appeal.
10. Upon considering the submissions of the parties, the following issues fall for consideration:
 - (i) Whether the suit is bad for partial partition;
 - (ii) Whether the impugned judgment is vitiated by inclusion of a *debuttar* property, which is impartible by its very nature;

- (iii) Whether the learned Trial Judge erred in law in directing accounts to be taken without taking into consideration the expenses incurred by the appellants and/or without formulating any specific issue thereon.

11. The above issues are decided in the following manner:

(i) Whether the suit is bad for partial partition

12. The Schedule of the plaint of the partition suit, from which the present appeal emanates, is set out below:

- “I. *All that piece and parcel of the land measuring an area of 10 (ten) Cottah more or less together with building standing thereon situated at and being premises no.8B, 8C, and 8D and formerly known as premises no.8, Hazra Lane, holding no.74 and 75 and presently known as premises nos..138, 139A, 140A and 141A, Motilal Nehru Road, previously P.S. – Tollygunge at present Lake, Kolkata – 700029.*
- II. *All that piece and parcel of the land measuring an area 11 (eleven) cottahs more or less together with building, standing thereon, situated at and being premises No.121a, 121B, 121C, 121D, and formerly known as premises No.121, Monoharpukur Road and presently known as Satyendra Nath Mazumder Road, under P.S. Tollygunge, Present P.S. Lake, District – South 24 Parganas.”*

13. It is seen that in Schedule-I, Premises No. 138, Motilal Nehru Road has been included, which was formerly Premises No. 8B, Hazra Lane. The plaintiff, as

PW-1, in his cross-examination dated May 2, 2014, admitted categorically that Premises No. 8B, Hazra Lane has been renumbered as two plots, bearing Premises Nos. 138A and 139A, Motilal Nehru Road.

14. Two trust deeds, respectively bearing nos. 4558 and 4669, both of the year 1943, were collectively marked as Exhibit-‘C’ in the suit. Whereas Deed No. 4558 makes certain arrangements in respect of its subject properties, which are admitted to be joint properties of the parties, Deed No. 4669 is in the nature of an *Arpannama*, dedicating the property which is the subject-matter thereof to deities, thus, rendering the character of such properties as *debuttar* property.
15. Premises no. 8B, Hazra Lane forms a part of Deed No. 4558 of 1943 and is admittedly a joint property. In view of the specific admission of PW-1 as indicated above, Premises No. 8B, Hazra lane has now been renumbered as 138A and 139A, Motilal Nehru Road. However, Premises No. 138A is conspicuous by its absence in the Schedule of the plaint. Thus, the suit would otherwise be rendered as bad for partial partition in view of the non-inclusion of Premises No. 138A, Motilal Nehru Road (which is admittedly a joint property of the parties), unless such omission were to be rectified.

(ii) Whether the impugned judgment is vitiated by inclusion of a debuttar property, which is impartible by its very nature

16. Insofar as Plot No. 8A, Hazra Lane is concerned, PW-1 admitted in his cross-examination dated May 2, 2014 that the same has been renumbered as 138, Motilal Nehru Road. However, the said premises is included within the

Schedule of Deed No. 4669 of 1943, which vests the said property, along with others, in deities, thereby making it a *debttar* property. It is well-settled that a *debttar* property vests in the deity and is not owned by its *shebait*s. Thus, by its nature, such a property is impartible at the behest of the *shebait*s.

17. However, the said plot, bearing Premises No. 138, Motilal Nehru Road, has been included within the hotchpot of the suit, which is a glaring error but is curable in nature.

(iii) Whether the learned Trial Judge erred in law in directing accounts to be taken without taking into consideration the expenses incurred by the appellants and/or without formulating any specific issue thereon

18. The plaintiff, as PW-1, in his cross-examination dated May 26, 2014, categorically admitted that all the payments in respect of the suit property have been made by the defendant nos. 1 to 3 (present appellants).
19. From the averments made in Paragraph No. 13 of the amended plaint, it is found that the plaintiff/respondent no. 1 has alleged that there are several shop rooms in the suit premises which are occupied by the monthly tenants and the defendant nos. 1 to 3/present appellants are collecting the monthly rent from the said tenants.
20. Such allegations are controverted in Paragraph No. 13 of the written statement filed by the defendant nos. 1 to 3/present appellants. As per the

version of the appellants, they have all along been “paying corporation taxes, electric bills and other statutory outgoings in all concerned departments for maintenance and management of the property and repairing of the building as and when required by making necessary expenses which has become so exorbitant nowadays that the meagre income from the old monthly tenants cannot fulfil the maintenance expenditure of the suit properties”.

- 21.** Thus, although the appellants do not deny that they are collecting rents from the tenants, simultaneously they contend that the income from the tenants is meagre and is less than the expenditure actually incurred by the appellants for the upkeep and repair of the suit building as well as payment of taxes in respect thereof.
- 22.** Read in such context, along with the admission of the PW-1 in his cross-examination to the effect that all the payments in respect of the suit property are being made by the defendant nos. 1 to 3/present appellants, there cannot be any manner of doubt that for a preliminary decree of accounts to be passed, the court had to take into consideration the expenditure incurred by the appellants and not merely confine such accounts to the income from rents collected by the appellants from the tenants at the suit property.
- 23.** As regards non-framing of any specific issue on the relief of accounts and/or on the dispute raised by the appellants regarding their payment of the expenses for the suit property, although not specifically framed, such issue has been addressed not only in the arguments but also in the evidence of the parties, as discussed above.

- 24.** It is well-settled that even if an issue is not formally framed, such non-framing does not vitiate the resultant judgment if both parties address such issue, have an opportunity to deal with the same during arguments and none of the parties are taken by surprise.
- 25.** The above tests are satisfied in the present case, as evident from the records. Thus, the non-framing of a specific issue on the disputes on accounts is not fatal to the impugned judgment.
- 26.** However, it cannot be denied that the learned Trial Judge, before directing accounts to be taken in a cursory manner, ought to have also included the element of adjustment for expenses, if any, borne by the defendant nos. 1 to 3/present appellants for the maintenance and repairs as well as other expenses of the suit building.
- 27.** Insofar as the contravention of Order XX Rule 17 of the Code is concerned, the said provision empowers the court to give special directions with regard to the mode in which the account is to be taken even by subsequent order, after passing of the preliminary decree. Thus, merely because such modality was not incorporated in the preliminary decree itself, the impugned judgment cannot be said to be erroneous in law.
- 28.** Whereas Rule 16 of Order XX of the Code envisages that the court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit in cases where an account should be taken, Rule 17 of Order XX provides that the court may, either by the decree directing such account to be taken or by any subsequent order, give special

directions with regard to the mode in which the account is to be taken or vouched.

- 29.** The basic parameter as stipulated in Rule 16 has not been violated by the learned Trial Judge in directing accounts to be taken by way of a preliminary decree. In fact, the error in the impugned judgment is not on account of violation of Rules 16 and 17 of Order XX of the Code as such, but in not specifically indicating that the expenses incurred by the defendant nos. 1 to 3/present appellants, which is admitted by PW-1 in his cross-examination, are also to be included in such accounts.

CONCLUSION

- 30.** Upon hearing learned counsel for the parties, it is noted that the contentions of the defendant nos. 1 to 3/present appellants could not effectively controverted by the plaintiff/respondent no. 1. Also, on a bare perusal of the pleadings and evidence of the parties, as discussed above, there cannot be any manner of doubt that Plot No. 138A, Motilal Nehru Road, which is admittedly a joint property of the parties, was omitted from the plaint Schedule and that Plot No. 138, a *debuttar* property, has been erroneously included within the same.
- 31.** Also, the direction for accounts in the impugned judgment ought to have incorporated a specific reference to the expenses incurred by the defendant nos. 1 to 3/present appellants for the suit property, along with the rental income earned by them therefrom.

- 32.** Another infirmity in the impugned judgment and decree is pointed out by learned counsel for both the parties to the effect that the impugned judgment and decree only refers to a preliminary decree being passed in favour of the plaintiff, without specifying the respective shares of the parties, which is the *sine qua non* of a valid preliminary decree of partition.
- 33.** On the basis of the pleadings of both parties, it is found that the admitted position is that the plaintiff and the defendant no. 4 are entitled to one-fourth share each in the suit property, whereas the defendant nos. 1 to 3/present appellants, jointly, are entitled to half share of the same. If subdivided among themselves, the defendant nos. 1 to 3/present appellants, thus get one-sixth share each in the said property. The omission to enumerate such shares specifically also tantamounts to an error of law as well as fact in the impugned judgment.
- 34.** The court cannot but also take notice of the fact that the suit is pending for over a decade, since the year 2012, and this is the second round of litigation between the parties in respect of the self-same suit, as the matter was remanded on appeal to the trial court on an earlier occasion. Therefore, instead of relegating the parties to a further remand, this Court is of the opinion that, applying the provisions of Order XLI Rule 24 of the Code, this court, sitting in appeal, ought to finally determine the suit and bring it to a terminus, since the evidence on record is sufficient to enable this Court to do so.
- 35.** Section 107(2) of the Code clothes the appellate court with the same powers and enables it to perform as nearly as may be the same duties as conferred

and imposed by the Code on courts of original jurisdiction in respect of suits instituted therein.

- 36.** Again, Section 153 of the Code provides that the court may, at any time and on such terms as to costs or otherwise as it may think fit, amend “any defect or error in any proceeding in a suit”; and “all necessary amendments” shall be made of the purpose of determining the real question or issue raised in or depending on such proceeding.
- 37.** A conjoint construction of Sections 107 and 153 of the Code empowers this court sufficiently to amend the records, including the Schedule of the plaint as well as the relevant portions of the impugned judgment and decree, to rectify the errors as discussed hereinabove, in order to save the parties from a further round of excruciating litigation; more so since the defects are otherwise of a technical and curable nature.
- 38.** Accordingly, F.A. No. 57 of 2023 is partially allowed, thereby modifying the impugned judgment and preliminary decree dated April 24, 2019 passed by the learned Civil Judge (Senior Division), Ninth Court at Alipore, District: South 24-Parganas in Title Suit No. 29052 of 2012 as well as the Schedule of the plaint of the aforementioned suit to the following effect:
- (a) The Schedule of the plaint as well as the impugned decree of the aforesaid suit is amended to the effect that, in Item No. “I” of the Schedule, Premises No. “138” shall be read as “138A”.
 - (b) In the ordering portion of the impugned judgment, the following portion shall be deleted:

“The plaintiff do get a preliminary decree for accounts against the defendant nos.01 to 03. On the account of failure on the part of the defendant nos.01 to 03 to render accounts within 60 days from the date of decree, the plaintiff will be at liberty to proceed as per procedure of law, after filing of adequate court fees.”

Instead, the following will be incorporated:

“The plaintiff do get a preliminary decree for accounts against the defendant nos.01 to 03, which will incorporate the income earned as well as the expenditure incurred by the defendant nos.01 to 03 in respect of the suit property. In the event of failure on the part of the defendant nos.01 to 03 to render such accounts within 60 days from the date of preliminary decree, the plaintiff will be at liberty to proceed as per the procedure of law after depositing adequate court fees.”

- (c) The following shall be included immediately after the first paragraph of the ordering portion of the impugned judgment and the decree, that is, after: *“that the suit be and the same is decreed in preliminary form against the defendant nos.01 to 04 on contest without costs”*:

“It is hereby declared that the plaintiff and the defendant no.04 respectively are entitled to one-fourth share each in the suit property. The defendant nos.01 to 03, jointly, are entitled to a half share of the suit property, which comes to one-sixth share each of the said defendants.”

(d) The timelines for making amicable partition of the suit properties by metes and bounds and for rendering accounts will be deemed to commence from the date of this judgment.

39. There will be no order as to costs.

40. A formal decree be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Supratim Bhattacharya, J.)