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(1977) 02 AHC CK 0027

Allahabad High Court

Case No: Second Appeal No. 482 of 1975

Smt. Premwati	APPELLANT
Vs	
Smt. Shanti Devi and Another	RESPONDENT

Date of Decision: Feb. 10, 1977

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 13, 100

Citation: AIR 1977 All 276 : (1977) AWC 176

Hon'ble Judges: M.P. Mehrotra, J

Bench: Single Bench

Advocate: G.P. Bhargava, for the Appellant; Santosh Kumar and A.K. Banerji, for the Respondent

Final Decision: Dismissed

Judgement

M.P. Mehrotra, J.
This second appeal arises out of an application for the preparation of a final decree in a suit for partition. After the preliminary decree had been passed defining the shares of the parties an application was moved for the preparation of the final decree. A commission was issued to the civil court Amin for the preparation of the partition scheme. He submitted the scheme and both the parties filed objections. The objections filed by the plaintiff were not pressed but those by the defendants were pressed. Both the courts below, however, rejected the objections made by the defendants. Now, in this second appeal the defendant, Smt. Premwati, has come up and in support of the appeal Shri G. P. Bhargava has made his submissions. Shri Santosh Kumar has made his submissions in opposition and on behalf of the plaintiff-respondent. Two contentions have been raised in support of the appeal. Firstly, it is said that looking to the width of the property, which is only about 13" 11" it was not convenient to partition the property and instead recourse ought to have been had to Section 2 of the Partition Act, 1893. The second contention is that the partition scheme should have been so modified that the plaintiff should have got

the shop which was already in her occupation and the defendant should have been allotted the rest of the house. In my opinion, in view of the fact that I am sitting in the second appeal these contentions cannot be accepted. Obviously, it is for the courts below to decide the manner and the mode in which a property should be partitioned and I do not think that any question of law arises in the instant case. A more or less convenient mode of partition of property is not a question of law but a question to be decided on the facts and circumstances of the case. So far as the first contention concerned, it has to be noticed that before the trial court no objection was taken on behalf of the appellant that the property was not capable of being conveniently partitioned. In fact, she herself pressed for an alternative manner of partitioning the property. This objection was also not taken before the lower appellate court. In this appeal also in the application which was made to this court on 24th February 1975, it was stated "The main submission of the defendant-appellant is that the plaintiff may be paid compensation for the balance of her share in the entire property and take the shop occupied by him." It is obvious that this position is destructive of the contention that the property is not capable of being partitioned. The property is admitted to be capable of partition but the manner of partition suggested is a different one from that which was suggested by the Amin. At no stage was an application u/s 2 made to the court and that is pre-requisite for the invocation of the said provision of law. In this view of the matter, the appeal has no force and it is dismissed. In the circumstances of the case, there will be no order as to costs.

2. The record of the court below is directed to be sent down immediately.