Jayabati Paul Vs Namita Singh

Court: Calcutta High Court

Date of Decision: July 29, 2011

Acts Referred: Partition Act, 1893 â€" Section 4

Citation: (2012) 3 CHN 442

Hon'ble Judges: Tapan Kumar Dutt, J

Bench: Single Bench

Advocate: Jiban Ratan Chatterjee, Supratim Dhar and Sanjay Mukherjee, for the Appellant; Saptangshu Basu and Ayan Banerjee, for the Respondent

Judgement

Tapan Kumar Dutt, J.
This Court has heard the learned Advocates for the respective parties.

This Second Appeal arises out of a Suit for partition.

The learned Trial Court decreed the said suit in terms of the report of the learned Commissioner and the learned lower Appellate Court dismissed

the appeal which was preferred by the principal defendant against the judgment arid decree of the learned Trial Court.

Challenging the judgment and decree passed by the learned lower Appellate Court the principal defendant has preferred the instant Second

Appeal.

2. The suit property is two storied building having two blocks and such blocks are connected by corridor. The northern block is under occupation

of the plaintiffs/respondents and the southern block is under occupation of the principal defendant/appellant. There is no dispute that a preliminary

decree was passed in the Partition Suit where it was declared that the plaintiffs have fifty percent share in the suit property and the defendant also

has fifty percent share in the suit property. The preliminary decree was passed in the year 1974 and in terms of the said decree a partition

Commissioner was appointed and he submitted his report after holding the commission work. Unfortunately, the report had to be rejected since

the learned Commissioner who was initially appointed to do the commission work died and another learned Commissioner was appointed who

submitted a final report after holding the commission work and in terms of such report the learned Trial Court decreed the suit being Title Suit No.

61 of 1998.

3. The learned Trial Court found that the major portion of the entire premises is let out to different tenants and partition, on the basis of possession

of the parties and according to their convenience, cannot possibly be done. The plaintiffs did not file any objection to the Commissioner''s report

and prayed for acceptance of the Commissioner''s report. The principal defendant/appellant feud her objection to the Commissioner''s report and

submitted that the property is partible. The learned Trial Court found that there is no inconsistency or contradiction in the learned Commissioner''s

report and according to the said report the suit property cannot be partitioned equally according to the respective possession and convenience of

the parties and the passage between the two blocks also cannot be partitioned. The learned Trial Court by judgment and decree dated

29.06.1998 decreed the said suit.

4. The principal defendant/appellant preferred an appeal being Title Appeal No. 220 of 2000 and the learned lower Appellate Court by judgment

and decree dated 10.08.2001 dismissed the said Title Appeal and affirmed the judgment and decree of the learned Trial Court. The learned lower

Appellate Court found that the learned Commissioner has already opined that the suit property can not be partitioned and there is no inconsistency

and/or contradiction in between the sketch map and the report prepared by the learned Commissioner. The learned lower Appellate Court found

that the principal defendant was ready to accept the map prepared by the Commissioner but not the Commissioner''s report. The learned lower

Appellate Court was of the view that the stand taken by the principal defendant cannot be supported when there is practical predicament in

partitioning the suit property by metes and bounds. The learned lower Appellate Court agreed with the finding of the learned Trial Court.

5. The learned Advocates for the respective parties agreed to file a true copy of the Commissioner''s report and accordingly the learned

Advocates for the respective parties certified to the effect that the copy which was filed before this Court is a true copy of the Commissioner''s

report. The said true copy of the Commissioner''s report should be kept with the records of the case. It appears from the Commissioner''s report

that the learned Commissioner gave his reasons in details as to why in his opinion the suit property could not be partitioned. The practical aspect of

the matter has been discussed by the learned Commissioner in his report. It appears that this aspect of the matter involves pure questions of fact

and the learned Commissioner has given his reasons for holding as to why the suit property cannot be partitioned and both the learned Courts

below have concurrently found that there is nothing to interfere with the learned Commissioner''s report. This appeal has been heard after

formulation of three grounds. The grounds are:

i. whether or not the learned Courts below erred in accepting the learned Commissioner''s final report when the Learned Commissioner''s report

does not disclose that the learned Commissioner made any attempt to ascertain the market value of the suit property at the time when the

commission was held?

ii. whether or not the learned Courts below erred in accepting the Commissioner''s finding that if the property is partitioned then it would be

impossible to have separate rooms, bath, privy spaces in the suit property according to the Calcutta Municipal Corporation Rules, when the

learned Commissioner has not cited which particular Rule of the Municipal Corporation concerned would stand in the way?

iii. Whether or net the learned Courts below should have also considered the question whether or not the defendant/appellant is also entitled to her

share of the rents collected by the plaintiffs from the suit property, particularly, from the tenants who have been inducted by the plaintiffs?

6. It appears that the principal defendant had purchased half share in the entire property in the year 1972 and the defendant/appellant is the

stranger purchaser.

7. The learned Advocate for the defendant/appellant submitted that the Commissioner''s report is not sacrosanct and the learned Courts below did

not consider the written objection to the Commissioner''s report. He cited a judgment reported at S.S. Munna Lal Vs. S.S. Rajkumar and Others,

. In paragraph 8 of the said reports, the Hon''ble Supreme Court was pleased to observe, inter alia, that when the Trial Court appoints a

Commissioner for the purpose of partitioning a property the Trial Court does not abdicate its functions to the Commissioner who is merely called

upon to make proposals for partition on which the parties would be heard and the Court would adjudicate upon the proposals in the light of the

decree and the contentions of the parties. The Hon''ble Supreme Court was further pleased to above serve that the proposals of the Commissioner

cannot from their very nature be binding upon the parties nor the reasons in support thereof. There cannot be any dispute with regard to such

proposition of law.

8. In the present case, it appears that the Commissioner has not failed to apply his mind and after assessing the situation prevailing at the suit

property came to the conclusion that the suit property cannot be partitioned and he also gave his reasons therefore. The learned lower Appellate

Court and also the learned Trial Court considered the Commissioner''s report and came to the finding that there is no necessity to interfere with

such report. This appears to this Court to be a purely a question of fact. The learned Advocate for the plaintiffs/respondents cited a decision

reported at Bharatha Matha and Another Vs. R. Vijaya Renganathan and Others, in support of his submission that the High Court should not

interfere with the concurrent findings of fact by the learned courts below unless such findings are perverse.

9. In the instant case the learned Courts below have considered the materials on record and came to their conclusions that the suit property cannot

be partitioned and there is no reason to interfere with the Commissioner''s report. Thus it cannot be said that such findings of the learned Courts

below are perverse. It is true that the Municipal Corporation Rules have not been cited and/or specifically mentioned by the learned Commissioner

but the absence of such details cannot vitiate the findings made by the learned Courts below as it appears that an assessment was made with

regard to the nature and the description of the suit property by both the learned Courts below and the practical of the situations was also noted by

the learned Courts below. The learned Trial Court has considered the matter in greater details and the learned lower Appellate Court has also

considered the situation but since it was affirming finding of the learned Trial Court it might have chosen not to go into greater details of the matter.

Nonetheless, both the learned Courts below have made and assessment of the situation prevailing at the suit property and came to a finding of fact

that the suit property cannot be partitioned. Since this Court is of the view that such finding of fact by the learned Courts below is not perverse, this

Court is not inclined to upset such concurrent finding of fact that the suit property cannot be partitioned.

10. The learned Trial Court by its decree directed the parties to inform the Court whether one of them is willing to purchase the share of the other

at Rs. 64,000/-.

11. The learned Advocate appearing on behalf of the principal defendant/ appellant submitted that the learned Commissioner came to the valuation

as recorded in its report without any proper basis. The cited a judgment reported at 2005(2) CLJ 227 and reference was made to Paragraph 5 of

the said reports. It appears that in the said reports the Hon''ble Court was pleased to set aside the Commissioner''s report on the ground that the

said report was given practically on the basis of no evidence.

12. The learned Advocate for the defendant/appellant is correct in his submission that there should be a proper basis of valuation of the suit

property by the learned Commissioner and unless there is a proper basis of valuation, the valuation made by the Commissioner cannot be

accepted.

13. The learned Advocate appearing on behalf of the plaintiff/ respondents submitted that the Commissioner, in the instant case, had considered

the purchase deed of the defendant/appellant but the Commissioner gave higher valuation than what appears in the purchased deed of the

defendant. According to him it cannot be said that the Commissioner did not follow any basis while coming to the conclusion with regard to the

valuation. However, he also submitted that if according to conscience of this Court, this Court feels that valuation of the suit property should be

done again by the learned Commissioner according to the established legal principles then in that event such revaluation may be done. But such

revaluation should be on the basis of the market value of the suit property as it was on the day when the learned Trial Court had directed the

parties to make their offer of purchase in its decree dated 29.06.98. He also cited a judgment reported at Krishi Utpadan Mandi Samiti Sahaswan

District Badaun through its Secretary Vs. Bipin Kumar and Another, in support of his submission that if the defendant/appellant has made under-

valuation in her deed of purchase the defendant/appellant cannot get a premium out of it. The learned Advocate for the plaintiffs/ respondents cited

a decision reported at Gautam Paul Vs. Debi Rani Paul and Others, , in support of his submission that the Court should make a valuation of the

transferred share belonging to the stranger-transferee. It appears that the defendant had purchased the property in the year 1972 and the Trial

Court decreed the suit in the year 1998 and the learned lower Appellate Court has passed the impugned decree in the year 2001. But the learned

Commissioner proceeded on the basis of the valuation of the defendant''s share in the suit property as it was indicated in to defendant''s purchase

deed of 1972. Since the learned Trial Court had directed the parties to make their offer of purchase in the year 1998, this Court is of the view that

the valuation of the suit property could not have been done on the basis of the deed of 1972.

14. The learned Trial Court''s decree merged with the decree of the learned lower Appellate Court in the year 2001. In that event, this Court is of

the view it would be proper to make a valuation of the suit property on the basis of the market value of the suit property as it existed in the year

2001 and, thereafter, the parties may be given liberty to make their offer of purchase of the other''s share. It appears that the learned Advocate for

the appellant was justified in making his submissions that there has not been a proper valuation of the suit property.

15. It may be recorded hare that at the initial stage of hearing of this appeal, the learned Advocate for the appellant had made a tentative proposal

that the appellant is willing to purchase the share of the plaintiffs/respondents if the valuation made by the Commissioner is accepted. In view of

such submission, the learned Advocate for the plaintiffs/respondents made his submissions to the effect that an application u/s 4 of the Partition Act

was filed by the plaintiffs but such application was ultimately not disposed of. Both the learned Advocates also cited some reported decisions in

this regard.

16. The learned Advocate for the appellant cited Gautam Paul Vs. Debi Rani Paul and Others, and the learned Advocate for the respondents had

cited Sri Surendra Nath Achar and Another Vs. Sri Ram Chandra Hazra and Others, in this regard, but, subsequently, the learned Advocate for

the appellant resiled from his submission with regard to the tentative offer of purchase and submitted that the principal defendant/appellant is not

inclined to make an offer to purchase the share of the plaintiff/respondents and such offer was not made in the learned Courts below.

17. In such circumstances, both the learned Advocates agreed that there is no necessity to consider such reported decisions as noted above in this

regard. Accordingly, this Court feels that there is no necessity to consider the aforesaid reported decisions with regard to section 4 of the Partition

Act in any details.

18. With regard to the question as to the defendant''s right of collection of rents from he suit property the learned Advocate for the

plaintiffs/respondents submitted that since the defendant has fifty percent share in the suit property, her right to collect rents cannot be disputed but

at the same time it has to be remembered that the defendant/appellant is also required to make her share of payments including statutory payments

which had to be incurred for the purpose of maintaining the suit property.

19. In view of the discussions made above, this Court is of the view that the matter should be sent back to the learned lower Appellate Court for

the purpose of calculation of the market value of the suit property, as indicated above, and also for the purpose of calculation of the amount of

rents which the defendant may be found entitled to, commensurate with her share in the suit property, and also the expenses which had to be

incurred for proper maintenance of the suit property including statutory payments.

20. In such circumstances, the judgment and decree passed by the learned Courts below in so far as it relates to the valuation of the suit property

is set aside. The finding of the learned Courts below that the suit property cannot be partitioned is not interfered with by this Court and the said

findings of the learned Courts below with regard to the impracticability of the suit property being partitioned shall stand. The matter is remanded

back to the learned lower Appellate Court only for the limited purpose of ascertaining the market value of the suit property and also ascertaining

the principal defendant''s share in the collection of rents from he suit property and also the expenses which were required to be made in respect of

the suit property and after such valuation and/or amounts are ascertained, as indicated above, the learned lower Appellate Court will give

appropriate directions in this regard. The learned lower Appellate Court shall apply the proper tests with regard to the valuation of the suit

property and after the valuation is done the learned lower Appellate Court shall take into consideration the fact that the plaintiffs/appellants had

already made and application in terms of the learned Trial Court''s Order whereby they expressed their willingness to purchase the share of the

defendant/appellant but the price of such purchase shall be as it may be fixed by the learned lower Appellate Court after it makes a fresh valuation

of the suit property. The learned Advocate for the plaintiffs/respondents has drawn the attention of this Court to order No. 348 dated 13.08.98

passed in the said T.S. No. 61 of 1998, in support of his submission that the plaintiffs had filed the aforesaid application. The learned lower

Appellate Court shall also pass an appropriate order with regard to the defendant/ appellant''s claim in respect of her share in the collection of rents

and the learned lower Appellate Court shall make necessary adjustments with regard to the expenses which were required for the purpose of

maintaining the suit property against the defendant/appellant''s claim with regard to collection of rents in respect of the suit property.

21. The appeal is thus disposed of by modifying the judgment and decree passed by the learned Courts below to the extent indicated above.

22. The learned lower Appellate Court shall try to dispose of the matter after remand as early as possible but preferably within one year from the

date when this order along with the lower Court records reach the learned lower Appellate Court concerned.

23. There will be no order as to costs. Urgent xerox certified copy of this judgment/if applied for shall be given to the parties as expeditiously as

possible on compliance of all necessary formalities.