

(2012) 12 CAL CK 0047

Calcutta High Court

Case No: C.O. No. 2123 of 2010

Sukumar Mullick and Others

APPELLANT

Vs

Barun Mullick and Others

RESPONDENT

Date of Decision: Dec. 10, 2012**Citation:** (2013) 2 CALLT 523 : (2013) 2 CHN 314**Hon'ble Judges:** Prasenjit Mandal, J**Bench:** Single Bench**Advocate:** Asit Baran Raut, Mr. Asit Kumar Chowdhury and Mr. Tuhin Subhra Raut, for the Appellant; Jahar Chakraborty and Mrs. Sabita Mukherjee Roychowdhury, for the Respondent**Final Decision:** Dismissed

Judgement

Prasenjit Mandal, J.

This application is at the instance of the plaintiffs and is directed against the Order No. 56 dated May 3, 2010 passed by the learned Judge, City Civil Court, 3rd Bench, Calcutta in Title Suit No. 1529 of 2002 thereby rejecting an application for local inspection. The predecessor-in-interest of the present plaintiffs instituted a suit being Title Suit No. 1529 of 2002 against the opposite party No. 1 and other proforma opposite parties for declaration that the plaintiffs and the proforma defendants are the joint and absolute owners in respect of Lot "B" schedule property being the premises No. 7A Ratan Sarkar Garden Street, Kolkata, permanent injunction restraining the defendant from creating any obstruction and/or interference in respect of Lot "B" property together with common areas and facilities as mentioned in the plaint of the said suit, mandatory injunction directing the defendant to restore brick-built partition wall, removal of water supply pipe, etc. The plaintiffs have contended that the said suit was filed as a consequence of the final decree passed in the suit for partition and administration being No. 88 of 1978 in the Hon'ble High Court, Calcutta against the father of the defendant and against one Madan Mohan Mullick and Smt. Raj Laxmi Mullick. According to the plaint, the

said suit was decreed in final form on the basis of compromise and the report of the Partition Commissioner on May 10, 1985 and by the said final decree, the plaintiffs were allotted Lot "B" property. The defendant was allotted Lot "A" property. A partition wall had been constructed between Lot "A" and Lot "B". A separate staircase in Lot "B" property was also constructed as per final partition decree. Thereafter, on October 12, 2001, the defendant with his men and agents dismantled the said pucca brick wall and kept various goods/articles for business purpose in the courtyard of the "B" schedule property by encroaching thereof without the consent and permission in writing of the plaintiffs. The defendant is also making obstructions by various means. He is also making construction of a latrine on the ground floor of the Lot "B". So, the suit for the relief was filed by the predecessor-in-interest of the plaintiffs.

2. The defendant is contesting the said suit denying the material allegations raised in the plaint. It is the specific contention of the defendant that the earlier suit for partition and administration was not decreed finally and the same is still pending. At this stage, the present suit is not maintainable. The relief as sought for in the application for local inspection cannot be granted because if such relief is granted, it will amount to fishing out evidence. So, the application should be dismissed.

3. By the impugned order, the learned Trial Judge has rejected the application for local inspection. Being aggrieved, this application has been preferred.

4. Having heard the learned Advocates for the parties and on going through the materials-on-record, I find that admittedly, a suit for partition and administration being No. 88 of 1978 was filed in the Hon'ble High Court, Calcutta by the father of the plaintiffs against the father of the defendant, Bhola Nath Mullick, and others. The said suit was decreed on compromise in the preliminary form. Then a Partition Commissioner was appointed and he submitted his report. The contention of the petitioners is that the said earlier suit was decreed in final form on May 10, 1985, appearing at Page Nos. 55, 56, and accordingly the property mentioned in Lot "B" had been allotted to the plaintiffs. The present suit was filed because of mischievous actions on the part of the defendant as stated above. The defendant has totally denied that the earlier suit had been finally disposed of, but, from the materials filed by the petitioners as Annexure "A" to the application, it appears that the earlier suit was decreed in final form though it is specifically denied. It also appears that the Receiver appointed was also discharged from the suit after the final decree was passed.

5. Anyway, on perusal of the materials-on-record, I find that the local inspection for the present suit was sought for on the following points:-

The point for local inspection:

I) Whether there exists any partition wall on the ground floor demarcating Lot "A" and Lot "B" (Xerox copy the certified copy of such plan with colour RED is annexed

hereto.

ii) To note whether there is any sign of existence of any previous partition wall demarcating Lot "A" and Lot "B" on the ground floor.

iii) To note whether the soil water pipe line coming out from the upper floor of the Lot "A" has diverted and/or passed through the portion of Lot "B".

iv) To note whether there exists any low height staircase in the common passage and/or right of way and to take measurement thereof and also to prepare the sketch plan of the same.

v) To note whether the drinking water pipe line of Lot "A" has been passed through the Lot "B" portion.

vi) To note whether the fiber glass roof on the top floor of Lot "A" has been extended and/or projected in the area of Lot "B" property.

vii) To prepare a sketch map of the ground floor comparing with the sketch map annexed with this application.

viii) To note all other feature or features at the time of holding local inspection.

6. The petitioner has prayed for appointment of an Advocate Commissioner for holding inspection on the points noted above. If the points as mentioned in the application are considered one by one, it would reveal that the Advocate Commissioner is to determine whether there exists any partition wall on the ground floor demarcating Lot "A" and Lot "B" property and existence of any previous partition wall demarcating Lot "A" and Lot "B" on the ground floor, diversion of soil water pipe line coming from upper floor of Lot "A" through Lot "B", existence of low height staircase in the common passage, if any, its measurement whether the fiber glass roof on the top floor of Lot "A" has been extended and/or projected in the area of Lot "B", etc. Therefore, in my view, the application for local inspection is nothing, but, to fishing out evidence to be used by the plaintiffs afterwards in support of the plaint case. The plaintiffs are required to prove their own case by production of evidence. Sometimes, the situation demands for local inspection to see the condition, extent of construction or demolition of any construction, etc. which are available only by spot inspection of the same and not based on enquiry. Sometimes, it may be difficult for an Advocate Commissioner to come to a conclusion whether there was an old partition wall or not. Therefore, it is apparent that the application has been prepared in such a form so as to collect evidence in support of the plaint case by holding inspection at the plot. So, such an attempt of fishing out evidence from the commission is not permissible in law. The learned Trial Judge has also expressed doubt whether the earlier suit of partition and administration was disposed of finally and whether allotment had been made as claimed by the plaintiffs. Anyway, these are the matters to be decided at the time of trial.

7. It may be noted herein that though the Title Suit No. 1529 of 2002 was filed in the year 2002 for declaration, injunction and other Reliefs, the application for local inspection was filed in the year 2009 only, i.e., after lapse of 7 years, when the suit was fixed for peremptory hearing. So, this is nothing but an attempt to fishing out evidence from inspection as far as possible from the Commissioner to be appointed. So, the object of filing of the application is very much clear. Had the plaintiffs' intention to bring the clear picture of the "B" schedule property by spot inspection before the Court, it could have been brought attention of the learned Trial Judge at the time of the filing of the suit in the year 2002 when the construction or installation of the soil water pipe line, etc., were alleged to have been done. The newly installation, if any, could have been detected at that earlier stage of the suit. The plaintiffs/petitioners did not adopt such a recourse earlier but at the time of peremptory hearing of the suit.

8. On the basis of the materials-on-record, I am of the view that the learned Trial Judge has rightly rejected the application for local inspection on the ground that the plaintiffs have adopted a separate path to collect materials in the suit and that there is doubt if the final decree has been passed in the Suit No. 88 of 1978 of the Original Jurisdiction, High Court, Calcutta.

9. Mr. Asit Baran Raut, learned Advocate appearing for the petitioners, has referred to the decision of [Satyanarayan Das and Another Vs. Prabhunath Keshri \(Shaw\) and Another](#), . In support of his contention, that proposed inspection is not a means to collect evidence and in appropriate case, inspection may be allowed. He has also contended that this case is based on the earlier decision of [The Institution of Engineers \(India\) and Another Vs. Bishnu Pada Bag and Another](#), as to the guiding principles for granting commission for local inspection.

10. With due respect to Mr. Raut, I am of the view that in the facts and circumstances of the present case, the application for local inspection has been rightly rejected on the grounds noted above. So, this decision will not help to Mr. Raut's clients.

11. In that view of the matter, I am of the opinion that the learned Trial Judge has rightly addressed the issue. There is no illegality and/or material illegality in the impugned order.

12. The application is, therefore, dismissed.

13. Considering the circumstances, there will be no order as to costs. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.