(1967) 03 CAL CK 0017

Calcutta High Court

Case No: None

Debabrata Mallick		APPELLANT
	Vs	
Angur Bala Mallick		RESPONDENT

Date of Decision: March 21, 1967

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 54
- Partition Act, 1893 - Section 3

Citation: 71 CWN 543

Hon'ble Judges: S.K. Datta, J

Bench: Single Bench

Advocate: M.N. Banerjee, Tapas Kumar Banerjee and C.R. Datta, for the Appellant;Gouri Mitter and H. Dhar, for the Respondent

Judgement

S.K. Datta, J.
This is an application made by the Defendant Smt. Angur Bala Mallick for setting aside the return of the Commissioner of Partition dated the 7th January, 1967 and other incidental reliefs.

2. There are four joint properties, (1) Premises Nos. 28 and 29, Biplabi Rash Behari Street, also formerly known as Canning Street having an area of 2 Cattahs and 4 Chattacks with a frontage of 38 feet 6 inches. There is a partly single, partly double storied and a corrugated iron shed thereon. (2) Premises No. 13, Shibtolla Street situated in Burrabazar having an area of 2 Cattahs 1 Chattack with a frontage of 30 feet 6 inches. There is a partly single storied and a partly double storied structure thereon. (3) Premises No. 4/A, Latu Mallick Lane having an area of 3 Cattahs 9 Chattacks with a frontage of 47 feet. There is a partly two storied, three storied building and a R.T. shed standing on it. (4) Premises known as Mohan Kanan at Deoghar having an area of 3 Bighas 14 Chattacks 5 Sq.feet. There is a structure or building at one end of the said land.

3. At present there are two co-owners, Debabrata Mullick and Sm. Angur Bala Mallick. On the 23rd day of March, 1966 a preliminary decree was made whereby it was stated inter alia - "And it is further ordered and decreed that the said Commissioner do make a division of the said properties into two equal parts or shares and make the same by metes and bounds where he shall see occasion with power to him to award compensation in money by way of equalizing the said partition."

4. On the 25th December, 1966 Mr. S.R. Dasgupta, Commissioner of Partition accepted a scheme whereby he allotted a half portion of premises Nos. 28 and 29, Biplabi Rash Behari Street (Canning Street) entirely of premises No. 13, Shibtolla Lane in Burrabazar, entirely of Mohan Kanan at Deoghar to the Plaintiff Debabrata Mallick and the other half portion of premises Nos. 28 and 29, Biplabi Rash Behari Street and the entirety of premises No. 4A, Latu Mallick Lane, Calcutta, to the Petitioner Smt. Angur Bala Mallick.

Mr. Gouri Mitter, learned Counsel, appearing for the Respondent submitted that the words ''by metes and bounds'' do not mean that each property should be divided into two parts. It only means that the measurements and boundaries should be given. This meaning, according to hi, is in consonance not only with the ordinary dictionary meaning of the world but also of the meaning ascribed to it in Order 26, Rule 14 which deals with the Commissioner of Partition. This construction of the order will be, according to him, consistent with the law of the land. Hence, according to him, the Commissioner did follow his mandate and rightly accepted the scheme which provided inter alia for allotment of entire properties or property to the parties with a provisions for owelty money.

5. The words "that the said Commissioner do make a division of the said properties into two equal parts or shares" may be said to be ambiguous for the word ''each'' is absent after the words "a division of." Therefore, the words "and make the same by metes and bounds" and in particular the words ''metes and bounds'' are decisive in this matter. The words ''metes and bounds'' mean ascertained or set apart - by measurement and boundary according to a standard English dictionary.

6. Rule 13 of Order 26 when read with Section 54 of the CPC suggests that the Commissioner is called upon to divide each property Rule 14 of Order 26 in terms refers to only one property. It is in that context that the words in the rule "shall prepare and sign reports appointing the share of each party and distinguishing each share (or if so directed by the said order) by metes and bounds". Hence the words ''metes and bounds'' refer to the physical partition of the one property into two parts or shares.

7. In my opinion, the user of the words ''by metes and bounds'' in the clause and "shall make the same by metes and bounds" after the words "into two equal parts or shares" convey the sense that each property should be divided into parts or shares. The words "where he shall see occasion with powers to award compensation in money by way of equalizing the said partition'' strengthens the conclusion. Hence, this contention advanced on behalf of the Respondent as to the construction of the order is rejected.

8. In this view of the matter, the question whether the Court can in a partition suit take recourse to inherent jurisdiction becomes academic for the Court authorities the Commissioner only to partition each of the properties into two equal parts.

Be that as it may, it is necessary to express my views on the matter as it has been argued at some length before me. It was held in several cases immediately after the Partition Act of 1882 that the Court has no inherent jurisdiction. This view was recently followed by a Bench of this Court presided over by G.N. Das, J. in (1) Nitya Gopal Samanta Vs. Pran Krishna Dau and Others, . This was more recently followed by Mallick, J., who had great experience of the partition suits in this Court. there is, however, a different trend of decisions in this Court. On an earlier Bench case presided over Sir Ashutosh Mukherjee, J. it was indicated that the Court can invoke its inherent jurisdiction in a proper case though on a careful scrutiny of the case it appears that their Lordships invoked Section 3 of the Partition Act though it was not applicable. Be that as it may, in more recent times S.B. Sinha, J. following the Allahabad case expressed the view that the Court has inherent jurisdiction. (2) Pannalal Dutta v. Hrishikesh, 86 CLJ 144. This view was accepted by Bachawat, J. as he then was in 90 CLJ 147. Hence, it may be said that those decisions have been overruled. In the case of (3 T.S. Swaminathaudayar Vs. The Official Receiver of West Tanjore, the Supreme Court deals with owelty money. Nonetheless, it seems to me that the observations make room for the application of the inherent jurisdiction of the Court in a partition suit. If this be the true reading of the Supreme Court case, then the point no longer offers any difficulty. It is however not necessary for me to express a firm view in the matter in this case for the Court did not exercise its inherent jurisdiction and the Commissioner of Partition in the absence of a direction from the Court cannot invoke inherent jurisdiction. Assuming that the Commissioner was correct in the construction of the order it is necessary to consider whether the scheme is in terms of the order as understood by him in the facts of this case.

9. Mr. Gouri, the learned Counsel appearing for the Respondent submitted that the Court should not embark into that question after delegating its power to the Commissioner of Partition and the Commissioner of Partition having given his decision on the point, until and unless the Court finds that the Commissioner of Partition has exceeded his jurisdiction. In this connection, he relied upon a decision reported in AIR 1940 3 (Privy Council) at page 6. In my opinion, it is putting the case too high that the Court cannot in any case interfere with the decision of an offer to whom it has delegated its power though he does not exceed his jurisdiction. In my opinion, if on the facts the Court finds that the discretion was exercised wrongly contrary to the well known principles, the Court has a right to interfere. But the Court will not interfere only because it feels that the mater may have been disposed of in a different way. In order to appreciate the facts it is necessary to set out certain relevant facts. Mr. S.R. Dasgupta, Commissioner of Partition, appointed under the said decree dated 23rd of March, 1966 appointed Mr. S.K. Dutta, Engineer and Surveyor.

10. On the 11th July, 1966 Mr. S.K. Dutta, Engineer and Surveyor stated that Lattu Mallick Lane and Canning Street properties are divisible. Thereafter, on the 18th July 1966, Mr. S.K. Dutta, Engineer and Surveyor, reported to Mr. S. R. Dasgupta that premises No. 13, Shibtolla Street can also be divided into two parts, northern and southern. Thereafter at a meeting held on the 30th August, 1966 Mr. Chowdhury insisted that each and every property should be divided equally and scheme be framed accordingly. Mr. Mallick on the other hand stated that it will be practically impossible to divide Shibtolla property by metes and bounds. As there were various tenants, such division will impair the valuation of the property. He, therefore, suggested that the scheme be framed keeping the Shibtolla property in its entirety in one lot. Thereupon the Commissioner directed Mr. Dutta to frame two schemes as one as suggested by Chowdhury and the other as suggested by Mr. Mallick. On 3rd September 1966 the house known as Mohan Kanan at Deoghar was walked over and surveyed. Thereafter on or about the 16th day of September, 1966 Mr. S.K. Dutta filed two sets of returns - scheme No. 1 which kept premises No. 13 Shibtolla Lane intact as suggested by Mr. Mallick and scheme No. 2 which proceeded on the basis that each and every property should be divided into two parts or shares.

11. Thereafter, the Commissioner of Partition called more than one meeting to discuss the two schemes, at the meeting held on the 10th October 1966 it appears that the Petitioner was willing not to raise any kind of objection including objection as to valuation if he was given lot B of the first scheme which includes the divided portion of premises Nos. 28 and 29 Biplabi Rash Behari Road, 13 Shibtolla Lane and Mohan Kanan at Deoghar.

12. At the meeting held on the 12th October 1966 at the initial stage of the proceeding Mr. Mallick after reserving his observation as to valuation of the Deoghar property and divisibility of premises No. 13, Shibtolla Street expressed his client''s desire to accept lot B of the first scheme even at the cost of giving up the claim of owelty money amounting to Rs. 9176. At the last stage of the same meeting Mr. Mallick, possibly having regard to the attitude of Mr. Chowdhury, Solicitor for Smt. Angur Bala Debi, accepted the scheme No. 1 without any objection. At the next meeting held on the 28th September 1966 Mr. Mallick accepted the valuation of the Deoghar property. Thereafter, the last meeting was held on 23rd December, 1966 when the allotments were made as indicated before.

13. There were some criticisms of the procedure adopted by the Commissioner of Partition. They need not detain us for they are not sufficient by themselves to induce me to set aside the return.

14. There are two important features of the report which require examination. Mr. S.K. Dutt, Engineer and Valuer appointed by the Commissioner of Partition reported that each of the Calcutta properties is divisible in more or less two equal parts or shares. He does not seem to have made any report as to Deoghar property regarding its divisibility. There is, however no doubt in my mind that the Deoghar property is capable of being divided

into more or less two equal parts or shares. The Canning Street property was divided into two parts. In my opinion, again there was no sufficient reason not to divide the Deoghar property particularly when neither party objected to it. In my opinion, there was no sufficient reason not to divide Latto Mullick Lane property particularly when there was no objection to it. The difficulties adverted to by the Commissioner of Partition in respect of Latto Mullick Lane property are ordinary incidents or partition of a property which was never intended to be enjoyed separately. Moreover, neither party, not even the Plaintiff objected to its partition. There was vehement objection to the partition of premises No. 13, Shibtola Lane in Burrabazar inspite of the report of Mr. S.K. Dutta, Engineer and Surveyor. The Commissioner of Partition was evidently influenced by the report of Mr. P.C. Chatterjee who was not called as a witness and/or who was not offered as a witness. The Commissioner did not further hear or call upon Mr. S.K. Dutt to answer the questions raised by Mr. P.C. Chatterjee before coming to a conclusion though in fairness to the Commissioner of Partition it must be said that he requested Mr. S.K. Dutta to be present at these meetings and that Mr. S.K. Dutt in a note given in scheme No. 1 has observed that this scheme has got the merit of creating no post partition troubles with tenants and others. Assuming however, that premises No. 13, Shibtolla Lane could not be partitioned, in my opinion, that was not a sufficient reason not to partition Deoghar property or Latto Mallick Lane property. That might have been a reason for giving 13 Shibtola property to one party and giving owelty money in entirety to the other party. Hence, from this point of view, the report, in my view, cannot stand.

15. These is another aspect of the report. Mr. Chowdhury did not accept the valuation rightly or wrongly at any point of time because his contention was right or wrong that the Commissioner of Partition was bound to divide each and every property and in such a case the question of valuation was immaterial. In my view, even assuming it was so the question of valuation had to be gone into at least in determining whether owelty money was payable or not because it is hardly conceivable that there can be exact partition of two parts in such a way that the valuation will be exactly the same. Mr. Mallick again did not expressly accept the valuation at any time except as to Deoghar property. The meetings were no doubt called for discussing the two schemes but as it appears from the discussion valuation rested in the background. In my opinion, valuation which is a very important part of a partition should have received more pointed attention from the parties.

16. In my opinion, the valuation of Burrabazar property that is to say, premises No. 13, Shibtala Lane is far from satisfactory. It may be said that the Court should not express its views when a surveyor has been appointed and he had expressed his views. In my opinion, the Court cannot shut its eyes to the ordinary things of life which are happening around it and take shelter under a report though it feels that great injustice may be caused by the same. In this case the land at Canning Street was valued at Rs. 50,000/- per cattah. The premises No. 13, Shibtala Lane, however, was valued at Rs. 25,000/- per cattah. It seems to me that this valuation when compared with the Canning Street property valuation is relatively very low. This is not only impression but this is evident

from the proceedings before the Commissioner of Partition. The Petitioner who was so insistent that each and every property should be divided into two parts, was willing to accept scheme No. 1 if lot No. B which included premises No. 13, Shibtala Lane in its entirety was given to him. Likewise, it is evident from the next meeting that the Plaintiff who did not express his mind on the earlier day made up his mind on a further consideration of the matter and took a very definite and positive stand. They said that they are prepared to accept the same Lot B which included Burrabazar property, that is to say, premises No. 13, Shibtala Lane. Not only that, they are prepared to forego the owelty money and they were prepared to forego their objections as to the valuation of Deoghar property if such allotments were made to them. In any event, it is patent from the conduct of the parties that they did not consider that the two lots under scheme No. 1 were equally balanced. It would be manifestly unjust to confirm the report in such circumstances particularly when the question of valuation was not properly or satisfactorily gone into before the Commissioner of Partition. In my opinion, the attitude of Mr. Chowdhury, Solicitor appearing for Sm. Angur Bala Devi was far from exemplary. He should have made his comments on the valuation of the properties including the lot as per scheme No. 2 and also his comments as to scheme No. 1 together with the valuation. It seems to me that if he had taken a reasonable attitude as one would expect from an officer of the Court then much of the difficulties might have been avoided.

Be that as it may, in my opinion, the return should be set aside and is set aside and the Commissioner of Partition is directed to file a fresh return within four months from date. The Plaintiff shall bear and pay all the costs thrown away including the costs of this application. Certified for two Counsel.