

**(1992) 09 CAL CK 0028**

**Calcutta High Court**

**Case No:** Criminal Revision No. 534 of 1992

Dipak Kumar Chakraborty

APPELLANT

Vs

Prasanta Kumar Chakraborty

RESPONDENT

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**Date of Decision:** Sept. 15, 1992

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 147

**Citation:** (1993) 2 ILR (Cal) 130

**Hon'ble Judges:** Amal Kanti Bhattacharji, J

**Bench:** Single Bench

**Advocate:** Kamalesh Bhattacharya, for the Appellant; P.K. Nandi, for the Respondent

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### **Judgement**

Amal Kanti Bhattacharya J.

1. These two Revisional applications Nos. 534/92 and 1255/92 are directed against the same order of an Executive Magistrate, Barrackpore, passed in a criminal proceeding" u/s 147, Code of Criminal Procedure. The parties are near relatives, to be precise, uncle and nephew, who are fighting between themselves over the right of the user of a staircase in a residential building. The said building being the joint property of four brothers was partitioned among themselves on the basis of a compromise decree passed with the consent of all the brothers in an earlier Title Suit No. 54/1975 of Fifth Court of Subordinate Judge, Alipore. By the said compromise decree the residential house was partitioned by metes and bounds on the basis of a Commissioner's report and an accompanying map. The parties having agreed to the terms of the compromise there was a smooth partition so far as two brothers are concerned. Subsequently, one of the brothers, namely, Sudhansu Kumar Chakraborty died and his heirs inherited his share. The dispute, however, arose over the user of the staircase which was mentioned to be used in common by the two brothers Sudhansu and Prasanta. While the heirs of Sudhansu claimed that this was a temporary arrangement pending the construction of separate staircases

by all the brothers according to the terms of the compromise decree, the contention of Prasanta is that the common user was made to be a permanent feature in the compromise decree.

2. The dispute arose when Dipak Chakraborty, son of Sudhansu Chakraborty, fixed an iron gate at the entrance of the staircase. The uncle Prasanta was apparently annoyed at the action of his nephew and approached the Executive Magistrate for starting a proceeding under s: 147, Code of Criminal Procedure, alleging that his right of common user of the staircase was blocked by his nephew. The contention of Dipak was that by virtue of the terms of the partition decree, the other party was to construct a separate staircase for his use and that he had acquired an obsolete right were the staircase existing at the time of partition. The learned Magistrate who heard the petition u/s 147, Code of Criminal Procedure, passed a preliminary order on December 31, 1991, directing Dipak to keep the door open during the day-time so that the staircase might be used by both the parties. By a final order dated January 28, 1992, he ordered that both the parties will enjoy the staircase as per his previous order. Apparently, both the parties were dissatisfied with the order of the learned Executive Magistrate. One party thought that the order was bad as the other party had no right to use the staircase at all and the other party's contention was that the right of user ought to have been declared during the day and night, that is, absolutely for the whole time.

3. Both parties have based their respective claims on the basis of the same partition decree. Each has tried to interpret the terms of the compromise decree to be in his favour and, hence, it is necessary to examine the terms of the decree before the respective claims of the parties can be properly considered.

4. Section 147, Code of Criminal Procedure, provides that whenever an Executive Magistrate is satisfied that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land and water within his local jurisdiction, whether such right be claimed as an easement or otherwise he will start a proceeding, hear both parties and consider the evidence put forth by them in support of the respective claims, and if it appears to him that such right exists, he may make an order prohibiting any interference with the exercise of such right. The cryptic order of the learned Magistrate does not show in extensive terms if any evidence was considered by him, but it is clear that he came to a finding that a right existed in favour of Prasanta which prompted him to give a direction to keep the gate open during the day time. But without a precise declaration of any such right, apparently his order led to an anomaly, each party, being in confusion about the existence of the right claimed by him. Thus each party was evidently dissatisfied with the order and there is no doubt that there could be no order declaring the rights of both parties to use the staircase at different times. As both parties are aggrieved against the same order and have filed two revision petitions against each other, both the petitions are heard analogously.

5. Mr. Kamalesh Bhattacharjee speaking for the nephew Dipak submits that a persual of the compromise petition on the basis of which the final partition decree was passed clearly shows that the intention of the parties was to partition the property in four equal shares by metes and bounds creating absolute title in favour of each of them. He particularly refers to els. 4 and 11 of the terms and conditions of the petition of compromise which read as follows:

4. That each party shall be the absolute owner in respect of his share allotted to him as per the schedule described in the plan annexed hereto and protect, preserve and maintain common passages supports, common walls, septic tanks water-tap and/or electric connections affecting concerning respective /mutual/ common interest.

11. That, each of the parties hereto shall within two years from the date of the Court's order make necessary constructions and erections for staircase, bath-room, kitchen, privy, water and electric connections and other rooms and passage and structures for making his lot self-contained and independent of any other, lot at his own cost and, expenses. During this period all parties thereto shall be entitled to use the facilities of bathroom, privy, passages, staircase etc, free of charge and obstruction.

6. Clause 4 quoted above shows that the intention of the parties was that each of them shall be the absolute owner in respect of the share allotted to him as per schedule described in the plan annexed to the compromise petition. Paragraph 11 on the other hand provides that each of the parties shall within two years from the date of the Court's order make necessary constructions and erections for staircase, bath-room, kitchen, water and electric connections and other rooms and passage and structures for making his lot self-contained and independent of any other lot at his own cost and expenses. The said clause further shows that the parties intended that during the transitional period of two years all parties shall be entitled to use the facilities of bathrooms, privy, passages, stair-case, etc free of charge and obstruction. Again, Clause 13 of the terms provides that a penalty of Rs. 5 per day shall be levied for non-fulfilment of the terms Nos. 11 and 12.

7. Undoubtedly the afore-mentioned clauses tend to prove that the parties plainly intended that their allotted portions should be independent of other co-sharers in all respects including the use of privy, bath-room, staircase, kitchen, water and electric connections etc. But Mr. B. K. Nandy, the learned Advocate for the uncle Prasanta, aptly refers to another clause in the terms and conditions, namely, Clause 28 which has reasonably cast a shadow over the right of exclusive user of the stair-case by the heirs of Sudhansu. Clause No. 28 reads as follows:

28. That party IV shall have the right of use of the staircase over plot No. (3) and cost of maintenance and repair of the staircase shall be borne equally by parties I and IV.

Evidently Clause 28 is directly opposed to els. 4 and 11. This is a bombshell on the alleged claim of absolute right of ownership" of the staircase by the heirs of

Sudhansu. Taken as it is, it must be held that Prasanta has on the face of this clause an apparently good reason to claim the right of user of the staircase- in common with his nephew. The matter is evidently puzzling. The question, therefore, is did the parties actually agree to have Separate and absolute possession of the lots allotted to each of them in all respects or did they have an intention to have common user of the staircase by two of the parties, i.e. by parties No. I and iv ? The matter is clearly difficult and the intention should, therefore, be gathered by an examination of-the compromise petition as a whole.

8. The partition by metes and bounds ensures that the lots allotted to each co-sharer shall have more or less the same value and shall agree with the equity among themselves. In the instant case, it appears that the commissioner has valued the partible property at Rs. 1,60,000 (Rupees one lakh sixty thousand) and the value of the share of each co-sharer has been fixed at Rs. 40,000,00 (vide Clause 36 of the compromise petition). Clause 37 of the compromise petition shows in details the different portions allotted to each party and the four lots, A, B, C, D, have been described in details under the said clause. Mr. Nandy draws the attention of the Court to lot D which has been specifically allotted to Prasanta and submits that he has been allotted the lot with all the benefits, rights, duties and obligations over and relating to all common walls, common passages, common users of septic tanks, staircase, ways, paths, passages and drains etc. He lays stress on the word "staircase" and submits that the right of Prasanta over the staircase has been specifically recognised in this lot. But Mr. Bhattacharjee refutes this claim by pointing out that these common rights have been specifically mentioned in connection with enjoyment of all the lots allotted to the four parties. He argues that the same words have been used in relation to the lots of each party and certainly this does not signify that each party has a right of common user of staircase, passages etc. Indeed it is not the claim of the parties that all of them will have the right of common user of the staircase as per description of the lots in the compromise petition. Hence, this argument of Mr. Nandy has no force and it does not support the claim made by his client in respect of the common user of the staircase.

9. In the map appended to the decree also the respective lots allotted to each of the parties have been shown in different colours and reference has been given to the portions allotted to each party including their right of common user of the portions kept common. The right of common user of the staircase by parties Nos. 1 and 4 has not been mentioned in the map. In the description of the lots allotted separately to each party also there is no separate mention of the common user of the staircase by parties Nos. 1 and 4. If the intention of the parties was to have the partition effected subject to the common user of the staircase as claimed by Prasanta on the basis of Clause 28, is it not expected that the same should have been specifically mentioned in the lots allotted to parties 1 & 4 ? It must be held that according to the terms of els. 4 and 11 the intention of the parties was to allow separately allotted portions to

each of them absolutely and independently- of one another. In that context what intention can be attributed to Clause 28 of the agreement ? If it is argued that els. 4 and 11 were subject to Clause 28, the same should have been expressly noted either in the body of the aforesaid clause or in the description of the different lots allotted to relevant parties. There ought to have been reference to this common user in the map also. Certainly Clause 28 is directly opposed to Clause 11, and if Clause 11 is accepted to be an essential term of the agreement, Clause 28 must be interpreted harmoniously with that clause. The only interpretation of. Clause 28 in that context is that the right of common user mentioned in that clause is subject to the other essential clauses. In other words the said right, is to be exercised in consonance with other clause and not in derogation to them. Any other interpretation of the clause would render Clause 11 ineffective and would impinge the basic idea of separate possession by partition by metes and bounds. The Commissioner has not recorded any reason whatsoever as to why in the partition decree where separate possession has been arranged for the different co-sharers there was a necessity for inserting a clause for the common user of the staircase by only two of the co-sharers. It has not been stated that there was no scope of raising any construction of the staircase so far as party No. 4 was concerned. There is also no explanatory note for making a special provision for the common user of the staircase by only two of the parties even though the same has not been mentioned in the description of the lots allotted to them. Considering all these facts and giving due and anxious consideration for the intention of the parties in effecting the partition by compromise. I hold that the claim of Prasanta for the common user of the staircase for good cannot be sustained.

10. For all the above reasons the order passed by the Magistrate cannot be sustained. As I have held that the intention of the parties was to have separate possession of their allotted lots including the staircase, the claim of Prasanta over the disputed staircase cannot stand. Both the revision petitions are, therefore, disposed of as follows:

The right of exclusive user of the heirs of Sudhansu Chakraborty over the disputed staircase is upheld. The Executive Magistrate's order to the contrary is set aside. Prasanta Chakraborty is allowed four months' time to construct a separate staircase of his own on his allotted lot as per Clause 11 of the terms of compromise petition annexed to the partition decree. During this period the heirs of Sudhansu Chakraborty shall allow him to use the staircase in common with them.