

**IN THE HIGH COURT AT CALCUTTA  
CIVIL APPELLATE JURISDICTION  
APPELLATE SIDE**

PRESENT:

**The Hon'ble Justice Subrata Talukdar**

**FMA 273 of 1985**

***Bina Ghosh & Ors.***

***-vs.-***

***Mohanlal Ghosh & Ors.***

|                                    |   |   |
|------------------------------------|---|---|
| For the petitioners                | : | Mr. Pratik Prakash Banerjee<br>Mr. Anirban Ghosh  |
| For the respondent<br>No. 4 series | : | Mr. Saptangshu Basu<br>Mr. Deboprasad Mukherjee<br>Ms. Dipanwita Ganguli<br>Mr. Saikat Chatterjee |
| For the respondent No. 2(a)        | : | Mr. Abhisekh Ghosh  |
| For the respondent<br>No. 3 series | : | Mr. Aniruddha Chatterjee<br>Mr. Sourav Mitra  |
| Heard on                           | : | 17/09/2015; 07/01/2016;<br>11/02/2016 & 25/02/2016  |
| Judgment on                        | : | 15/07/2016  |

**Subrata Talukdar, J.:** This is an appeal challenging the judgment and order dated 26<sup>th</sup> April, 1984 in Title Appeal No. 42 of 1984 (for short TA 42/84) passed by the Ld. District Judge at Howrah remanding a

partition suit back to the Ld. Trial Court with the direction for appointment of a new Partition Commissioner for partitioning the properties in terms of the preliminary decree.

The appellants are the plaintiffs in the suit being Title Suit No. 46 of 1977 for partition of suit properties comprising both '*bastu*' and '*bazar*' lands (hereinafter referred to only as '*bastu*' and '*bazar*' property respectively). The respondents in this appeal are the defendants in the suit.

By judgment and decree dated 29<sup>th</sup> April, 1978 the Ld. Trial Court, being the Court of the Second Subordinate Judge, Howrah, was pleased to decree the suit in preliminary form on contest against the defendants. While so decreeing the Ld. Trial Court declared that the plaintiffs possess one by sixth share in the suit property which were directed to be amicably partitioned within three months from the date of the decree.

Again, by the same preliminary decree the Ld. Trial Court directed the parties to settle accounts from the '*bazar*' property within three months. In the event the suit property (presumably meaning the '*bazar*' property) is not amicably partitioned and the accounts settled within the period of three months, the plaintiffs were granted the liberty to apply for appointment of a Partition Commissioner for effecting the partition and settling the accounts through Court.

Pursuant to the preliminary decree, which is not disputed by either of the parties in this appeal, the Ld. Trial Court appointed a Partition Commissioner and, such Commissioner submitted his report after holding a local inspection. The report of the Ld. Partition Commissioner was considered by the Ld. Trial Court while decreeing the suit in final form vide judgment and decree dated 11<sup>th</sup> February, 1984.

While decreeing the suit in final form the Ld. Trial Court was pleased to, inter alia, hold that the Ld. Partition Commissioner expired on 7<sup>th</sup> November, 1983, that is after filing of his report in Court on the 5<sup>th</sup> of October, 1983. Therefore, there is no scope to bring the Ld. Partition Commissioner for cross-examination and the final decree requires to be decided on the basis of the papers already on record.

The Ld. Trial Court further found that the defendants have taken the objection that the Ld. Partition Commissioner delayed in filing his final report, the map submitted in respect of the report is wrong and the valuation of the property has been arbitrarily fixed. The Ld. Trial Court found that no prayer was made on behalf of the defendants to cross-examine the Ld. Partition Commissioner and, the report of the Ld. Partition Commissioner reflects the evidence of both the plaintiffs and the defendants.

Dwelling on the evidence of DW1 as recorded by the Ld. Partition Commissioner, the Ld. Trial Court put much emphasis on

the fact that DW1 expressed no reservation on behalf of self and the other defendants to accept the shares *qua* the suit property proposed to be allotted by the Ld. Partition Commissioner. Therefore, the Ld. Trial Court found no infirmity in the allotment of the '*bastu*' property in favour of the plaintiffs as a whole and the '*bazar*' property in favour of the defendants as a whole. The Ld. Trial Court further took note of the fact that while allotting the above noted suit properties the Ld. Partition Commissioner was pleased to observe that the '*bazar*' property was valued four times higher than the '*bastu*' property. Accordingly, the suit stood decreed in final form.

Assailing the final decree dated 11<sup>th</sup> February, 1984 the defendants came up by way of an appeal being TA 42/84 (*supra*) which was finally decided on the 26<sup>th</sup> of April, 1984. The Ld. Appellate Court was of the view that the Ld. Partition Commissioner having died before his report could be considered by the Ld. Trial Court, there was no occasion on the part of the defendants to examine the infirmities in the report. The supporting documents connected to the report of the Ld. Partition Commissioner namely, the field book, the evidence, the sketch map etc. were filed on 2<sup>nd</sup> December, 1983 before the Ld. Trial Court without notice to the Court and strangely, after the death of the Ld. Partition Commissioner. The circumstance of such filing remains unexplained and could not be brought to the notice of the Ld. Partition Commissioner (since deceased).

The Ld. Appellate Court also found the assessment of evidence by the Ld. Trial Court to be wrong. To the mind of the Ld. Appellate Court the Ld. Trial Court chose to rely entirely on the evidence filed by and on behalf of the Ld. Partition Commissioner.

Holding that the basic principle of a partition proceeding is to give effect to the existing possession of the parties, the Ld. Appellate Court found error in the method of allotment of the suit property as a whole adopted by the Ld. Partition Commissioner. To the further mind of the Ld. Appellate Court it was incumbent upon the Ld. Partition Commissioner to consider the existing possession of the parties in the '*bastu*' property as well the accounts connected to the '*bazar*' property and thereafter proportion the shares equally between the parties.

Therefore, the Ld. Appellate Court came to the conclusion that the principles of partition having stood violated by the Ld. Partition Commissioner and, such error being adopted in toto by the Ld. Trial Court, the only option left was to remit the suit for fresh consideration by directing the appointment of a new Partition Commissioner.

The judgment and order of remand passed by the Ld. Appellate Court dated 26<sup>th</sup> April, 1984 (*supra*) is under challenge in this appeal.

Arguing on behalf of the appellants, Sri Sabyasachi Bhattacharyya, Ld. Senior Counsel and Sri Pratik Prakash Banerjee, Ld. Counsel raise the following points:-

- i)** That there was no procedural infraction in the carriage of proceeding by the Ld. Partition Commissioner;
- ii)** DW1 had accepted unequivocally on behalf of self and other defendants that the defendants are willing to accept whatever portion of the suit properties are proposed to be allotted to them by the Ld. Partition Commissioner.
- iii)** That in view of the stand taken by DW1 to accept the allotment awarded by the Ld. Partition Commissioner, the more valuable '*bazar*' property stood allotted in favour of the defendants.
- iv)** The defendants did not object to the steps taken by the Ld. Partition Commissioner and, proceeded to file an evasive objection before the Ld. Trial Court which was noticed while decreeing the suit in final form vide judgment and decree dated 11<sup>th</sup> February, 1984.
- v)** It is an admitted position that at all times culminating in the report filed by the Ld. Partition commission it is the plaintiffs who are in possession of the '*bastu*' property and the defendants have separate residence which will be apparent from the summons served in the suit.
- vi)** It is alleged by the defendants that the Ld. Partition Commissioner measured the suit properties using the prismatic compass survey method but, did not file any map for conveying

the entire idea of the suit properties, particularly the 'bazar' property. However, according to the plaintiffs, the Ld. Partition Commissioner assessed the entire properties – both 'bastu' and 'bazar' – and found the entire 'bastu' portion in possession of the plaintiffs excepting the single room which is in occupation of defendant no.2 and used for business purpose.

**vii)** It is also argued by the appellants that the Ld. Appellate Court ignored the fundamental point that the allotment made by the Ld. Partition Commissioner was effectively on consent. Relying on Order 23 Rules 9 & 10 CPC, the appellants highlight the fact that there is no binding requirement that a Partition Commissioner is always required to be examined.

**viii)** Relying on the judgement reported in **2001 (2) SCC 221** in the matter of **D.P. Chaddha vs. T.N. Mishra & Ors.**, Ld. Counsel for the appellants reiterates that rectification of a recording by the Ld. Trial Court cannot be taken recourse to at the appellate stage.

In the facts of the present case there is no ambiguity that the Ld. Partition Commissioner filed the report during his life time and such report recorded the consent of the defendants to both the valuation and the allotment of the suit properties.

In support of the above noted points the appellants rely upon the judgments reported in **AIR 1965 Cal 199** (at **Paragraph 13**) and **AIR 1997 Cal 59** (at **Paragraph 7**).

**ix)** Pointing out to the observations of the Ld. Appellate Court to the effect that the partition must follow the existing possession of the parties, the appellants draw the attention of this Court to the final decree emanating from the report of the Ld. Partition Commissioner to the effect that barring a single room in the 'bastu' property, the rest of the 'bastu' property stood in possession of the plaintiffs. Seeking to rely heavily on the proceedings in CAN 7957 of 2015, which is an application for producing additional evidence, Ld. Counsel for the appellants submits that during pendency of the present appeal there was a grave attempt by the respondents to dispossess the plaintiffs from the 'bastu' property. Such attempted act of dispossession compelled the plaintiffs to approach the Hon'ble Supreme Court by way of a contempt petition and, by order dated 23<sup>rd</sup> February, 2015 the Hon'ble Apex Court was pleased to appoint a Court Commissioner to submit a report.

**x)** Ld. Counsel for the appellants next submits that the report of the Ld. Court Commissioner clearly underscored the fact that the plaintiffs were in possession of the 'bastu' property and, with *mala fide* motive the respondents and their agents forcibly

attempted to dispossess the plaintiffs from the '*bastu*' property. The Ld. Court Commissioner found that none of the evidence sought to be produced by the respondents corroborated any semblance of their possession over the '*bastu*' properties (also generally decided as the suit property). On the contrary several documentary and photographic evidence not only showed that the plaintiffs are in possession of the suit properties but, the defendants attempted to forcibly break into such '*bastu*' property.

- xi)** The Hon'ble Apex Court took strong notice of the report of the Ld. Court Commissioner (supra) and, by further order dated 24<sup>th</sup> April, 2015 in the contempt proceeding recorded the concession made on behalf of the defendants-alleged contemnors that the '*bastu*' property would be handed over to the plaintiffs failing which the plaintiffs shall have the liberty to take all assistance from the jurisdictional Commissioner of Police. Pursuant to the order of the Hon'ble Apex Court dated 24<sup>th</sup> April, 2015 (supra) the portion of the '*bastu*' property forcibly occupied by the defendants was handed over to the plaintiffs in presence of the Ld. Court Commissioner who recorded the same vide his report filed before the Hon'ble Apex Court on the 30<sup>th</sup> of April, 2015.

**xii)** Therefore, Ld. Counsel for the appellant points out that there can arise no question of remand as directed by the Ld. Appellate Court since the Appellate Court itself recorded that the existing possession of the parties *qua* the suit properties requires to be respected. Admittedly, the '*bastu*' property stood in actual, physical possession of the plaintiffs and, such possession was correctly recognised by the Ld. Trial Court while decreeing the suit in final form on the 11<sup>th</sup> of February, 1984.

**xiii)** Ld. Counsel for the appellants accordingly urge this Court to take judicial notice of the subsequent developments as played out before the Hon'ble Apex Court after filing of the present appeal and, such subsequent developments stood corroborated through the application for production of additional evidence under Order 41 Rule 27 CPC.

Arguing for the defendants/respondents Sri Saptangshu Basu, Ld. Senior Counsel and Sri Aniruddha Chatterjee, Ld. Counsel urge this Court to notice the following points:-

**a)** That admittedly the Ld. Partition Commissioner died on 7<sup>th</sup> November, 1983 after filing his report on 5<sup>th</sup> October, 1983. Admittedly again the records of the Ld. Trial Court show that the supporting evidence collected by the Ld. Partition Commissioner in the form of exhibits, sketch map, notesheets etc. were filed subsequently on 26<sup>th</sup> April, 1984. It is not

gathered from the records of the Ld. Trial Court as to how and by whom at the end of nearly six months from the date of the unfortunate demise of the Ld. Partition Commissioner, such documents came to be filed before the Ld. Trial Court.

- b)** Therefore, the Ld. Counsel for the respondents submits that due to the death of the Ld. Partition Commissioner he could not be examined with regard to filing and acceptance of such report. In view of the above noted circumstances, the Ld. Trial Court could not have taken judicial notice of the report of the Ld. Partition Commissioner. Due process demands that the report of the Ld. Partition Commissioner be filed along with its supporting documents and record of such filing be maintained by the Ld. Trial Court. Such due process does not appear to have been followed in the facts of the present case.
- c)** Ld. Counsel for the respondents also seriously questions the principles of valuation adopted by the Ld. Partition Commissioner. Such valuation fails to apply the judicially recognized principles of partibility of both the '*bastu*' and '*bazar*' properties and, derivatively also fails to take notice of the allotment of shares to each of the parties *qua* such partibility. In a clear violation of judicial principles, the Ld. Partition Commissioner allotted as a whole the '*bastu*' and the '*bazar*' properties respectively to either of the parties.

**d)** Supporting the judgements of the Ld. Appellate Court, Ld. Counsel for the respondents argue that in such circumstances it is trite law that an opportunity be granted to examine the Ld. Partition Commissioner under Order 26 Rule 10(2) CPC. However, such examination could not take place since the Commissioner himself was no longer alive.

In support of above noted points the respondents rely on the decisions reported in **AIR 1935 Lahore 501** in the matter of **Nasir Ahmed & Anr. vs. Sarfaraz-ur-Rahman Khan & Anr.** and, **AIR 1957 Cal 19** in the matter of **Gourhari Das & Anr. vs. Jaharlal Seal & Anr.**

**e)** Taking this Court to several pages of the Paper Book, Ld. Counsel for the respondents point out that before the Ld. Partition Commissioner it was suggested on behalf of the defendants that the 'bastu' property be divided among all co-sharers. In the light of the above noted suggestion it cannot be deduced that the reply of DW1 accepting the allotment made by the Ld. Partition Commissioner can be read as a concession. Therefore, when the report of the Ld. Partition Commissioner is itself in doubt, no final decree can issue unless such Partition Commissioner is allowed to be cross-examined. There cannot be in law a joint allotment amongst the co-sharers/parties to the suit of the entire of the 'bastu' and 'bazar' properties

respectively since, such joint allotment negates the essence of a partition between the parties. Therefore, Ld. Counsel for the respondents argue in one voice that the order of remand by the Ld. Appellate Court should not be touched.

- f)** On the application for adducing additional evidence as filed by the appellants before this Court being CAN 7957 (supra), Ld. Counsel for the respondents point out that it is not the stage in this appeal that such application can be entertained. This Court must confine itself to the appreciation of the materials on record *qua* the validity of remand. Therefore, at this stage no additional evidence can be produced or entertained by this Court since, this Court is only required to make up its mind whether remand was justified on the basis of the existing materials on record.

Relying on the decisions reported in ***AIR 1985 Cal 233*** in the matter of ***Sunil Chandra Shosh vs. Hemendra Kumar Dey*** as well as ***AIR 1965 SC 1008*** in the matter of ***The Municipal Corporation of Greater Bombay vs. Lala Pancham & Ors.***, Ld. Counsel for the respondents argue that additional evidence should not be allowed to be produced at the appellate stage for enabling the appellants to make out a new case.

Having heard the parties and considering the materials on record, this Court arrives at the following conclusions:-

- A)** That the Ld. Partition Commissioner died on 7<sup>th</sup> November, 1983, i.e. soon after submitting his report on the 5<sup>th</sup> of October, 1983.
- B)** Admittedly, such report was objected to by filing a written objection on behalf of the defendants before the Ld. Trial Court on the 22<sup>nd</sup> of November, 1983 by raising several points connected to the veracity and the accuracy of such report of the Ld. Partition Commissioner.
- C)** This Court notices that by the judgment and preliminary decree dated 29<sup>th</sup> of April, 1978 (supra) it was accepted by the parties that the plaintiffs have 1/6<sup>th</sup> share in the suit properties (meaning thereby the '*bastu*' property) and second, the accounts of the '*bazar*' property require to be settled amicably. On the failure of the parties to reach an amicable settlement, the Partition Commissioner will both explore the question of effecting partition in the suit (read '*bastu*') property as well as settle the accounts.
- D)** To the further mind of this Court the report of the Ld. Partition Commissioner accepted by the Ld. Trial Court in the final decree

dated 11<sup>th</sup> February, 1984 stands at variance to the preliminary decree dated 29<sup>th</sup> April, 1978 (supra).

- E)** To the further mind of this Court the Ld. Partition Commissioner having died on the 7<sup>th</sup> of November, 1983, the subsequent filing of the supporting evidence before the Ld. Trial Court without a reference point in the record endorsing such filing, is a departure from due process. In the above noted circumstances this Court finds that the respondents have succeeded in making out a case for remand.
- F)** This Court is also of the view that the report of the Partition Commissioner filed on 5<sup>th</sup> October, 1983 was objected to at the earliest point of time by the defendants vide their objection dated 22<sup>nd</sup> November, 1983. Such objection ought to have been treated with the yardstick applied to a partition proceeding by the Ld. Trial Court prior to finalising the decree on 11<sup>th</sup> February, 1984. However, this Court notices that the Ld. Trial Court proceeded to treat the so-called concession of the DW1 before the Ld. Partition Commissioner (since deceased) as sacrosanct and agreed without any reservation to the complete report of the Ld. Partition Commissioner.

- G)** This Court is of the further view that the Ld. Appellate Court correctly appreciated that both the principles of allotment and valuation were not followed by the Ld. Partition Commissioner.
- H)** Before parting with this case this Court is also required to notice the observations made by the Ld. Appellate Court that the basic principle of partition must follow the existing possession of the parties. Reading such observations in the light of the report of the Ld. Court Commissioner appointed by the Hon'ble Apex Court by order dated 23<sup>rd</sup> February, 2015 in the contempt petition, this Court finds that the plaintiffs were sought to be illegally dispossessed during the pendency of this appeal by the defendants and, following the report of the Ld. Court Commissioner read with the solemn order of the Hon'ble Apex Court dated 23<sup>rd</sup> April, 2015, the plaintiffs were put back into possession of the '*bastu*' property on the 23<sup>rd</sup> of April, 2015 in presence of the Ld. Court Commissioner, which has been recorded in the report of the Ld. Court Commissioner on 30<sup>th</sup> April, 2015.

Accordingly, this Court cannot agree to the observations made by the Ld. Appellate Court to the effect that "*it is, however admitted and established fact that both the parties to suit are in possession of the bastu property.*"

In the backdrop of the above discussion the judgment and order impugned of the Ld. Appellate Court dated 26<sup>th</sup> April, 1984 is not interfered with except in respect of the above noted observations that both the parties to the suit are in possession of the 'bastu' property which stand set aside.

Subject to the above noted modification the order of remand stands upheld with the condition that the parties shall maintain possession *qua* the 'bastu' property as on 25<sup>th</sup> April, 2015 in terms of the report of the Ld. Court Commissioner dated 30<sup>th</sup> of April, 2015 until the ultimate disposal of the partition proceeding in accordance with law taking notice of the observations made above.

While taking cognizance of the application for production of additional evidence this Court takes positive notice of the judgement of the Hon'ble Division Bench reported in **CLT 1994 (2) HC 34** in the matter of **Bangshidhar Pal vs. Anil Kumar Pal** which at **Paragraphs 4 and 5** read as follows:-

*"4. In the instant case, one of the two grounds urged on behalf of the applicant/plaintiff falls within Clause (aa). So far as the findings of the Court are concerned, relating to the said ground, the findings may be said to be of factual nature without perversity and as such there is no scope for interference in the present revisional application. So far as the other ground is concerned the same has been argued to be one drawing sustenance from Clause (b). A careful reading of the said Clause (b) indicates that the requirement must be of the Court and Court*

*must hold that such requirement exists if either of the two purposes mentioned in the said Clause constitutes the same.*

*5. The language of the said Clause (b) leaves no room for doubt that any finding by the Court about its requirement can be arrived at only at the stage of pronouncement of the judgement after the hearing is concluded. Mere opportunity of the Court to look at the evidence on record without a judicial consideration by application of its mind in the context of the arguments made on behalf of the contesting parties cannot enable the Court to form any view about its requirement. The decisions of the Supreme Court in the cases of K. Venkataramiah Appellant v. A. Seethamma Reddy and Ors. respondents . The Municipal Corporation of Greater Bombay Appellant v. Lala Pancham and Ors. respondents (AIR 1963, SC 1008), Arjan Singh Appellant v. Kartar Singh and Ors. Respondent (AIR 1951, SC, 153. Natha Singh and Ors. Appellant v. The Financial Commissioner Taxation Punjab and Ors. Respondent , lend support to the above view. The default on the part of a party cannot affect the power of the Court to allow additional evidence when the Court requires the same. It is noticeable that the Clause "for any other substantial cause" is in the nature of a residuary Clause empowering the Court to allow additional evidence if interest of justice so requires though the requirement may not be for enabling the Court to pronounce judgment. It is clear from the aforesaid Supreme Court decisions that whenever there is obscurity in the evidence or any lacuna preventing the Court from coming to a comprehensive conclusion the Court is entitled to invoke its discretion under Clause (b). It is apparent that such infirmity or lacuna cannot be deciphered unless the evidence on record, whether oral documentary, has been considered by the Court judicially and weighed. That is why*

*Court cannot be in a position to form a view under Clause (b) before the hearing of the appeal is concluded and the stage of considering the respective contentions with the records is reached.”*

Furthermore, the Hon’ble Apex Court in **2009 (9) SCC 689** in the matter of **Shub Karan Buba Alias Shub Karan vs. Sita Saran Bubna & Ors.** has, inter alia held at **Paragraphs 5 & 6** observed as follows:-

*“5. ‘Partition’ is a re-distribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them, into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.*

*6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. ‘Separation of share’ is a species of ‘partition’. When all co-owners get separated, it is a partition. Separation of share/s refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.”*

This Court is conscious of the fact that the power of remand by an Appellate Court cannot be exercised at random. However, since the final partition decree has been arrived at by the Ld. Trial Court without following the procedure mandated by law, this Court accepts the remand directed by the Ld. Appellate Court subject to the modifications and conditions directed above.

Both **FMA 273 of 1985** and **CAN 7957 of 2015** stand accordingly **disposed of**.

There will be, however, no order as to costs.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.

**(Subrata Talukdar, J.)**