

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3120 of 2009

SUBHASH CHANDRA SEN (D) THR. LRS. AND ORS. ... APPELLANTS

VERSUS

NABIN SAIN (D) THR. LRS.

... RESPONDENTS

J U D G M E N T

S. ABDUL NAZEER, J.

1. Nabin Sain alias Nabin Chandra Sen filed a suit against Subhash Chandra Sen and others for partition of his 3/5th share in the suit schedule property. On 06.08.2001, trial court passed a decree granting the plaintiff 3/5th share in the suit schedule property on the following terms:

“This suit coming on this day for final disposal before Sri R.D. Kundu, Ld. Judge, Bench VIII in the presence of Sri J.M. Saha, Advocate for the plaintiff, and of Sri Debrata Sen, Advocate for the Defendant. It is ordered and decreed that the suit be and the same is decreed on contest but without any costs. It is decreed that the plaintiff do get a decree for partition holding that he has got 3/5th share in the suit property and the defendants have

got 2/5th share therein. It is further ordered that lot 'A' property as shown in the sketch map filed by the plaintiff be allotted to the plaintiff and the lot 'B' property be allotted to the defendants. 4 ft. common passage to the east of the Lot 'A' property would be kept open and the parties be permitted to raise boundary wall, the costs of which would be borne by the parties in equal share. Both the plaintiff and the defendants be allotted one tamp each for getting supply of Municipal Water. The sewage system and water supply system of the lot B property do pass through 4' ft. common passage and both the parties shall bear their respective costs for making arrangement of sewage system, pipe line system for supply of Municipal water. It is further ordered that if a door is fixed on the southern end of the common passage both parties would be at liberty to have keys for the said lock that may be used for closing the door and keeping the same in safe position."

2. The appeal filed by the plaintiff challenging this decree was dismissed by the High Court on 05.11.2003. The defendant filed an application before the trial court in the said case for amendment of the decree directing the sketch map submitted by the plaintiff on 06.02.2001 to be marked as an exhibit and part of the judgment and decree by effecting necessary corrections, in order to make the decree executable. The trial court by order dated 06.09.2006 allowed the said application as under:

"Ordered that the petition dated 18.08.2006 filed by the defendants is hereby allowed on consent but without cost. Let the sketch map submitted by the plaintiff alongwith his petition dated 06.02.2001 be made part of the judgment and

decree. Judgment and decree be amended accordingly.”

3. The plaintiff challenged the said order before the High Court of Calcutta. The High Court by its order dated 05.02.2008 has allowed the revision and set aside the order dated 06.09.2006 of the trial court. During the pendency of these proceedings, both the plaintiff and the 1st defendant died and their LRs have been brought on record at different stages. The LRs of the 1st defendant and other defendants have filed this appeal challenging the order of the High Court.

4. Learned counsel for the appellants submits that the appellants/defendants filed an application on 06.02.2001 praying that the suit may be partitioned in terms of the plan annexed to the application. However, by oversight the said plan was not exhibited. The plan demarcates the common area. The court had passed a decree by consent. Since the plan was not exhibited, difficulties arose for execution of the partition decree. Therefore, the court below has rightly allowed the application. The High Court on certain assumptions has set aside the said order. Learned senior counsel appearing for the respondents submits that three sketch maps have been produced at different stages in the suit. Therefore, the High Court has rightly directed the parties to file a joint petition indicating their intention regarding allotment of their property as per their shares by producing a sketch duly drawn by competent person. This order of the High Court does not call for interference.

5. We have carefully considered the submissions of the learned counsel appearing for the parties. There is no dispute as to the share allotted by the trial court in favour of the parties. The plaintiff was allotted $3/5^{\text{th}}$ share and the defendant was allotted $2/5^{\text{th}}$ share in the suit schedule property. It is clear that the sketch map relied on by the trial court was produced by the plaintiff showing the frontal 'A' lot property containing his $3/5^{\text{th}}$ share delineated with yellow border and 'B' lot property showing defendants' $2/5^{\text{th}}$ share delineated with red border. The application filed by the plaintiff producing the aforesaid map reads as under:-

“Most Respectfully Sheweth:

1. That the plaintiff, as per direction of the Court is submitting a settlement Plan alongwith copy in Court this day marking annexure 'A' to the petition and $2/5^{\text{th}}$ share with red border with a statement.

In the circumstances, it is prayed that on the basis of the said settlement plan, partition of the suit property may be made by the Learned Court for ends of justice.

And for this, your petitioner as in duty bound shall ever pray.

Dated: 06.02.2001

Sd/-
Plaintiff”

6. It is clear that the plaintiff had also produced two other maps on 20.2.2001 and 12.6.2001. The plaintiff had sought partition of the suit property in terms of the plan produced on 6.2.2001 which is evident from the application referred to above. As such, the plaintiff cannot be permitted to say that the map produced with the application dated 6.2.2001 was not the map filed by him. It is not possible

to give effect to the partition decree without a sketch map of the suit schedule property. At the time of passing the judgment and decree, the trial court should have made the said map as a part of the decree so that the partition could have been effected as per the said sketch. No party should be allowed to suffer for the error of the court. In the circumstances, the trial court has rightly made the plan a part of the decree for effecting partition. We are of the view that the High Court was not justified in setting aside the said order.

7. Hence, this appeal is allowed. The order of the High Court impugned herein is set aside and the order of the trial court dated 06.09.2006 is restored. There will be no order as to costs.

.....J.
(N.V. RAMANA)

.....J.
(S. ABDUL NAZEER)

New Delhi;
April 19, 2018.