

Tushar Kanti Bose and Others

Vs

Savitri Devi and Others

Civil Appeal No. 9494 of 1996

(K. Ramaswamy, G. B. Pattanaik JJ)

25.07.1996

JUDGMENT

G.B. PATTANAİK, J. –

1. Leave granted.

2. This appeal is directed against the judgment dated 25-9-1995 passed by the Division Bench of the Calcutta High Court dismissing the appeal which had been filed against the judgment of the learned Single Judge dated 9-5-1988 passed in Matter No. 64 of 1950.

3. There are mass of facts and several litigations pending between the parties but it is not necessary to go into those controversies for disposing of the present appeal. Suffice it to state that the appellants had purchased Premises No. 22/IC, Monoharpukur Road, Calcutta from Ballygunge Estate Pvt. Limited in course of a liquidation proceeding pursuant to a court sale dated 2-5-1974 and the sale deed in question had been executed on 16-8-1974. After purchasing the property they were also in possession of the same. The respondents are the owners of Premises No. 22/ID which they had purchased also from Ballygunge Estate Pvt. Limited as early as on 13-1-1953. The appellants filed an application before the liquidator on 23-8-1977 seeking leave of the Company Judge for demarcation of the property and an order to that effect was passed directing Ballygunge Estate Pvt. Limited to demarcate the purchased property of the appellants as per deed of conveyance. The respondents then filed an application for an order of injunction on the ground that on the garb of demarcation the appellants are trying to encroach upon the portion of the property which the respondents had purchased and are in possession thereof since 1953. Ultimately, the learned Single Judge after considering the several orders, passed by the Civil Judge in civil suits between the parties as well as the reports of the Engineers, Surveyor and Special Officer appointed by the High Court and the officer-in-charge of the local police station, came to the conclusion that the appellants had made two holes on the wall so as to have access to the portion in occupation of the respondents and the appellants have raised a wall and dispossessed the respondents from a portion in respect of which there was already an order of injunction by the Alipore Court. After coming to the aforesaid conclusion the learned Single Judge directed by an order of mandatory injunction to close down the holes and remove all obstacles and restore back possession of the portion to the respondents which was to be done under the supervision of Shri Anjan Chakraborty who was appointed as the Special Officer. Against the aforesaid order the appellants moved the Division Bench of the Calcutta High Court which was registered as Appeal No. 340 of 1988. On 20-5-1988 the Division Bench passed an order of status quo as on that date. On 12-11-1991 the Division Bench in the aforesaid appeal passed an order appointing Shri Suhrid Roychoudhury as the Special Officer and directed that the Special Officer shall take forthwith possession of the disputed rooms. After taking possession of the rooms

he shall allow the parties to occupy the rooms subject to the undertaking of such parties that they will not claim equity to occupy the disputed rooms until further orders. The Special Officer was also directed to appoint a surveyor who shall demarcate Plot No. 3 belonging to the appellants and Plot No. 4 belonging to the respondents on the basis of conveyance, original plans, original documents, scheme and other papers. Both parties were directed to make over conveyance and other documents on which they rely. The Special Officer was directed to complete demarcation within 3 weeks from the date of order and submit a report to the Court. Pursuant to the aforesaid order of the Division Bench Shri Suhrid Raychoudhury, the Special Officer appointed one Shri Bhupendra Mohan Saha as the Surveyor by consent of the parties for the purpose of demarcation of Plots Nos. 3 and 4. After demarcation was done through the assistance of the Surveyor Shri Bhupendra Mohan Saha, the Special Officer Suhrid Kumar Roychoudhury submitted his report on 20-4-1992. The Division Bench by order dated 1-7-1992 granted leave to the respondents to file an application taking exception to the report of the Special Officer within two weeks. The respondents filed their objections. When the matter was called on 1-9-1992 none appeared for the applicants, and therefore, application was dismissed. Finally, the matter was listed before another Division Bench who by the impugned order dismissed the appeal and directed the Special Officer Shri Anjan Chakraborty who had been appointed by the learned Single Judge to hand over possession of the property to the Bhattacharjees, the respondents herein and it is this order which is under challenge in this appeal.

4. Mr Das, the learned Senior Counsel appearing for the appellants, contended that the Special Officer Shri Suhrid Kumar Roychoudhury having been appointed by the Division Bench and having submitted a report on the basis of the survey which he had conducted with the help of Surveyor Shri Bhupendra Mohan Saha and the said Surveyor having been appointed on consent of the parties, the Division Bench committed gross error in not considering the aforesaid report and disposing of the matter on the basis of the report submitted earlier by Shri Anjan Chakraborty who had been appointed as a Special Officer by the learned Single Judge. Mr Das further contended that an objection to the report of the Special Officer, Shri Suhrid Kumar Roychoudhury having been filed and the same having been rejected by order dated 1-9-1992, the Division Bench should have given effect to the said report and therefore the Bench was not right in ignoring the same and directing implementation of the earlier order of the learned Single Judge. Mr Das lastly contended that in view of the order of the Division Bench appointing Shri Suhrid Kumar Roychoudhury as a Special Officer, Shri Anjan Chakraborty's earlier appointment as a special officer is not valid and therefore the Division Bench should not give effect to the order of the learned Single Judge. Mr P.P. Rao, the learned Senior Counsel appearing for the respondents, on the other hand contended that in view of several pending litigations between the parties both for declaration of title as well as for possession, it was not open for the appellant on the basis of an order of demarcation to get their title established and in that view of the matter the Division Bench was wholly justified in dismissing the appeal. Mr Rao further contended that during the pendency of the proceeding the appellants having been found encroaching upon a portion of the respondents' property, the Court was fully justified in passing the order impugned herein.

5. Having heard the learned counsel for the parties and after going through the record of the case without expressing any opinion on the merits of the rival contention we are of the considered opinion that the impugned order of the Division Bench cannot be sustained on the sole ground of non-consideration of the relevant material. It is undisputed that Shri Suhrid Kumar Roychoudhury was appointed as a Special Officer by the Division Bench on 12-11-1991 and it was directed that he shall demarcate the two plots by taking assistance of a surveyor. It is also undisputed that the said Shri Suhrid Kumar Roychoudhury appointed Shri Bhupendra Mohan Saha as the Surveyor on the consent of parties and ultimately on the basis of the survey done the Special Officer had submitted

his report on 28-4-1992. An objection filed to the said report by the respondents stood dismissed on 1-9-1992. The aforesaid report of the Special Officer as well as the survey done by Shri Bhupendra Mohan Saha constitute an important item of evidence which could not have been ignored by the Division Bench while disposing of the appeal. Then again so far as the appeal is concerned it is Shri Suhrid Kumar Roychoudhury who had been appointed by the Division Bench and the said order of appointment had not been reversed by the subsequent bench and therefore any direction can be given only to the said Special Officer. Non-consideration of the aforesaid vital piece of evidence vitiates the ultimate conclusion. In this view of the matter we set aside the judgment of the Division Bench dated 25-9-1995 passed in Appeal No. 340 of 1988 and remit the appeal to the High Court with the request to the Hon'ble Chief Justice to constitute a Division Bench with the Chief Justice as Presiding Judge or seniormost Judge of the High Court as the Presiding Judge and dispose of the appeal in accordance with law after considering the report of the Special Officer Shri Suhrid Kumar Roychoudhury as well as the report of Shri Bhupendra Mohan Saha, Surveyor, if any. In view of the nature of the dispute between the parties the High Court is requested to dispose of the appeal at the earliest. This appeal is allowed but in the circumstances there will be no order as to costs.