

PETITIONER:
TUSHAR KANTI BOSE & ORS.

Vs.

RESPONDENT:
SAVITRI DEVI AND ORS.

DATE OF JUDGMENT: 25/07/1996

BENCH:
G.B. PATTANAIAK (J)
BENCH:
G.B. PATTANAIAK (J)
RAMASWAMY, K.

CITATION:
JT 1996 (7) 480 1996 SCALE (5)574

ACT:

HEADNOTE:

JUDGMENT:
THE 25TH DAY OF JULY, 1996

Present :
Hon'ble Mr.Justice K.Ramaswamy
Hon'ble Mr.Justice G.B.Pattanaik
Jayant Das, Sr.Adv., G.S.Chatterjee and Ms.Aruna Banerjee,
Advs., with him for the appellants.
P.P.Rao, Sr. Adv. S.Banerjee, Sumant Bharadwaj and Mrs.
M.R.Bharadwaj, Advs. with him for the Respondents.

J U D G M E N T

The following Judgment of the Court was delivered:
Tushar Kanti Bose & Ors.

V.
Savitri Devi and Ors.

J U D G M E N T

G.B. Pattanaik, J.
Leave granted.

This appeal is directed against the judgment dated 25th September, 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 9th May, 1998 passed in Matter No. 64 of 1950.

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 the Premises No. 22/1C, Monoharpukur Road, Calcutta from Ballygunge Estate Pvt. Limited in course of a liquidation proceeding pursuant to a court sale dated 2nd May, 1974 and the sale deed in question had been executed on 16th August, 1974. After possession of the same. The respondents are the owners of the Premises No. 22/1D which they had purchased also from Ballygunge Estate Pvt. Limited as early as on 13th January, 1953. The appellants application before the Liquidator on 23rd August, 1977 seeking level 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 after considering the several orders, passed by the Civil Judge in civil suits between the parties as well as the reports of the Engineer, 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 dispossess 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 Sri Anajn 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 20th May, 1988 the Division Bench passed an order of status quo as on that date. On 12th November, 1991 the Division Bench in the aforesaid appeal passed an order appointing Shri Suhrid Roychowdhury 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 Roychowdhury, the Special Officer appointed one Shri Bhupendra Mohan Saha as the Surveyor by consent of parties for the purpose of demarcation of Plot Nos. 3 and 4. After demarcation was done through the assistance of the Surveyor Shri Bhupendra Mohan Saha, the Special Officer Suhrid Kumar Roychowdhury submitted his report on 20th April, 1992. The Division Bench by order dated 1st July, 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 1st September, 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 Sri Anajn Chakraborty who had been appointed by the Learned Single Judge to handover possession of the property to Bhattacharjees, the respondents herein and it is this order which is under challenge in this appeal.

Mr. Das the learned senior counsel appearing for the appellants contended that the Special 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 said Surveyor having been appointed on consent of the parties, the Division Bench committed gross error in not considering the foresaid report and disposing of the matter on the basis of report submitted earlier by Sri Anajn 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 1st September, 1992, 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, Sri Anajn 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, 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 for 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 proceedings the appellants having been found encroached upon a portion of respondents property, the court was fully justified in passing the order impugned herein.

Having heard the learned counsel for the parties and after going through the record of the case without expressing an 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 12th November, 1991 and it was directed that he shall demarcate the two plots by taking assistance of a Surveyor. It is also undisputed that 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 28th April, 1992. An objection filed to the said report by the respondents stood dismissed on 1st September, 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 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 of the matter we set aside the judgment of the Division Bench dated 25th September, 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 senior most Judge of the High Court the Presiding Judge and dispose of the appeal in accordance with law after considering the report of the Special Officer Shri

Bhupendra Mohan Saha, Surveyor, if any. In view parties the High Court is requested to dispose of not the appeal at the earliest. This appeal is allowed but in the circumstances there will be no order as costs.

JUDIS