

TUSHAR KANTI BOSE AND ORS.

A

v.

SAVITRI DEVI AND ORS.

JULY 25, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

B

Companies Act, 1956 :

Liquidation proceedings—Properties purchased through Court sale—Application for demarcation—Objections to—Single Judge appointed Special Officer and passed an order of mandatory injunction—Appeal before Division Bench—Division Bench appointing another Special Officer to get properties surveyed and to submit the report—Survey done, report submitted—Objection to report dismissed for default—Later another Division Bench dismissed the appeal without considering the report of Special Officer based on the survey—Held, the report of Special Officer as also the survey done by the Surveyor constitute an important item of evidence which could not have been ignored by Division Bench while disposing of the appeal—Matter remitted to High Court for disposal.

C

D

The appellants purchased a certain property from 'B' a company under liquidation, through a Court sale in liquidation proceedings. They filed, with the leave of the Company Judge, an application before the liquidator for demarcation of the property. An order was passed directing 'B' company to demarcate the property purchased by the appellants. The respondents who had purchased the adjoining premises from the said 'B' company in 1953, filed an application for injunction alleging that the appellants, on the garb of demarcation, were trying to encroach upon their property. The Single Judge of the High Court found that the appellants had made two holes on the wall so as to have access to the portion in occupation of the respondents and had raised a wall and dispossessed the respondents from a portion of the property. The Single Judge directed the appellants to close down the holes, remove the obstacles and restore back the portion of the premises to the respondents, and appointed a special officer to supervise the compliance with the order. The appellant challenged the order in appeal before the Division Bench of the High Court, which passed an order of status quo as on that date, and appointed

E

F

G

H

A another Special Officer to take possession of the rooms in dispute. The Special Officer was also directed to appoint a surveyor to demarcate the respective properties belonging to the parties. The Special Officer got the properties demarcated and submitted his report. The respondents filed their objections which was dismissed in default. Later, the matter came to be listed before another Division Bench, which dismissed the appeal and directed the Special Officer appointed by the Single Judge to hand over possession of the property to the respondents. Aggrieved, the appellants filed the appeal.

C It was contended for the appellants that the Division Bench of the High Court erred in disposing of the matter without considering the report of the Special Officer appointed by the Division Bench and whose report was based on the survey done by the surveyor, particularly when the objections filed by the respondents to the said report had been rejected. For the respondents, it was contended that in view of several pending litigations between the parties for declaration of title and for possession, it was not open for the appellants to have got their title established on the basis of the order of demarcation and, as such, the Division Bench rightly dismissed the appeal.

E Allowing the appeal, this Court

F HELD : 1. The order of the Division Bench cannot be sustained on the sole ground of non-consideration of the relevant material. The Special Officer was appointed by the Division Bench on 12th November, 1991 and it was directed that he would demarcate the two plots by taking assistance of a Surveyor. The Special Officer appointed the Surveyor on the consent of the 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 the surveyor constitute an important item of evidence which could not have been ignored by the Division Bench while disposing of the appeal, Further, so far as the appeal is concerned, it is the Special Officer 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 H aforesaid vital piece of evidence vitiates the ultimate conclusion. [22-B-E]

2. The judgment of the Division Bench is set aside and the appeal is remitted to the High Court with the request to the Chief Justice to constitute a Division Bench with the Chief Justice as Presiding judge or senior most 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 who had been appointed by the Division Bench, as well as the report of the Surveyor, if any. [22-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9494 of 1996.

From the Judgment and Order dated 25.9.95 of the Calcutta High Court in A. No. 340 of 1988.

Jayant Das, G.S. Chatterjee and Ms. Aruna Banerjee for the Appellants.

P.P. Rao, S. Banerjee, Sumant Bharadwaj and Mrs. M.R. Bharadwaj for the Respondents.

The Judgment of the Court was delivered by

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, 1988 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/IC, Monoharpukar Road, Calcutta from Ballygunge Estate Pvt. Limited in course of a liquidation proceedings pursuant to a court sale dated 2nd May, 1974 and the sale deed in question had been executed on 16th August, 1974. After purchasing the property they were also in possession of the same. The respondents are the owners of the Premises No. 22/ID which they had purchased also from Ballygunge Estate Pvt. Limited as early as on 13th January, 1953. The appellants filed an application before the Liquidator on 23rd August, 1977 seeking leave of the Company Judge for demarcation of the property and an order to that

A 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

B 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 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

C 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 or mandatory injunction to close down the holes and remove all

D 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

E Bench passed an order of status quo 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

F 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

G document 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

H demarcation of Plot Nos. 3 and 4. After demarcation was done through the

assistance of the Surveyor Shri Bhupendra Mohan Saha, the Special Officer A
 Suhridd Kumar Roychowdhury submitted his report on 20th the April, 1992.
 The Division Bench by order dated 1st July, 1992 granted leave to the B
 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 hand-over possession
 of the property to Bhattacharjees, the respondents herein and it is this
 order which is under challenge in this appeal. C

Mr. Das the learned senior counsel appearing for the appellants
 contended that the Special Officer Shri Suhridd Kumar Roychowdhury
 having been appointed by the Division Bench and having submitted a D
 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 aforesaid 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 E
 further contended that an objection to the report of the Special Officer,
 Shri Suhridd Kumar Roychowdhury having been filed and the same having
 been rejected by order dated 1st September 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 Suhridd Kumar F
 Roychowdhury as a Special Officer, Sri Anajn Chakraborty's earlier ap-
 pointment 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 G
 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 proceeding the appellants having been found H

A encroached upon a portion of respondents property, the court was fully justified in passing the order impugned herein.

B 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 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 C said Shri Sushrid 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 the appeal is concerned it is Shri Suhrid Kumar Roychoudhury who had been D appointed by the Division Bench and said order of appointment had not been reversed by the subsequent bench and therefore any direction can be E 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 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 F 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 G earliest. This appeal is allowed but in the circumstances there will be no order as to costs.

R.P.

Appeal allowed.