

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6702 OF 2009

| PRATIMA MULLICK AND ANOTHER

| Appellant(s) |

Versus

| AARCEE BUILDERS PRIVATE LIMITED AND OTHERS

| Respondent(s) |

O R D E R

Delay in filing the substitution applications is condoned.

The applications for substitution are allowed.

We have heard learned counsel for the parties at length and also heard Ms. Priya Dutta, respondent No.37 who has appeared in person. We have perused the report given by Talbot and Company dated 20th November, 2012 pursuant to our order dated 27th September, 2012. The surveyors have given detailed reasons for the solutions proposed for delineating the share with regard to the claim made by Ms. Priya Dutta, which has ultimately to be shared with the two sisters and other legal representatives under the Will of the maternal uncle. These facts are also noticed by us in the order dated 27th September, 2012. we, therefore, propose to make the aforesaid order as a part of this order. It reads as under :-

"We have heard the learned counsel for the parties at length. We have also heard the learned senior counsel Mr. Bhaskar Gupta, who was requested by us vide order dated 13th September, 2012 to assist the Court as amicus curiae, particularly with reference to the share claimed by Ms. Priya Dutta, Respondent No.37 herein.

Mr. Gutpa has prepared a brief Resume/Note of the entire dispute, consisting of 12 pages which has been placed on record. We wish to immediately place on record our appreciation for the earnest endeavour made by Mr. Gupta, not only to clarify the entire situation but also to assist the parties in arriving at an amicable settlement to the satisfaction of all.

A perusal of the Note indicates that the property at 84, Rakhhal Das Auddy Road, Kolkata has been fully developed. Some of the occupants who vacated the dwelling houses at No.84, Rakhhal Das Auddy Road, Kolkata have been temporarily accommodated awaiting allotments in other properties to be developed. It is also evident from the Note that the plot at No.92 Rakhhal Das Auddy Road and No.27, Chetale Central Road, Kolkata have been merged and sanction has been granted for development of the same in March, 2012. So far as No.115, Rakhhal Das Auddy Road as also Nos. 15A & 15B at Chetale Central Road, Kolkata are concerned, the same are outside the Development Agreement. This only leaves No.84, Rakhhal Das Auddy Road, Kolkata for which no application for development has been made

so far.

Respondent No.37 claims that out of the entire properties, she is entitled to 1.92% inherited from her mother as well as 50% of the 9.58% which she will inherit under the Will left by her maternal uncle who died in July, 2000. Her total share, including the share of her sister under the Will, comes to $(1.92 + 9.58) 11.50\%$. Her individual share would come to $1.92\% + 4.79\% = 6.71\%$

The Developer is prepared to segregate 11.50% of the total share of Respondent No.37 and her sister, from the total area in Plot No. 84, Rakhhal Das Auddy Road, Kolkata. The builder is also prepared to so locate and demarcate the share of Respondent No.37 and her sister so that there is clear access to 84, Rakhhal Das Auddy Road, Kolkata. However, Respondent No.37 claims that she should be given access from Chitale Central Road, Kolkata also.

Added to this, is the problem that the Will in which Respondent No.37 is said to be a beneficiary along with her sister, is pending probate proceedings before the Court of District Judge, Alipore. Therefore, the exact share of Respondent No.37 and her sister, along with other legal heirs of the maternal uncle, shall have to be determined in case the probate is not granted. In such circumstances, the only practical solution at the moment seems to be that the Developer demarcates 11.50% of the area which is claimed by Respondent No.37, which would have to be divided either among the two beneficiaries under the Will or all the legal heirs of the maternal uncle, depending upon the decision rendered by the District Judge in probate proceedings.

For demarcating 11.5% share in an appropriate manner, we deem it appropriate to request M/s. Talbot & Company, 2-A, Tower House, 3rd Floor, Chowringhee Square, Kolkata-700069, to survey and demarcate Plot No. 84, Rakhhal Das Auddy Road, Kolkata, in the manner as indicated above, giving option of access from Rakhhal Das Auddy Road and Chitale Central Road. The Surveyor shall also give a comprehensive report indicating the entire area under the Development Agreement so that the exact 11.5% of the same can be determined. The Architect/Surveyor shall also submit all the necessary sketches and maps along with his report. It is only upon such information is placed before this Court that further appropriate orders can be passed.

Let the report be submitted by the Architect/Surveyor within four week from the date of communication of this order. Copies of the report be given to the parties also. The Architect/Surveyor shall also associate any of the parties who wish to be associated for the purpose of demarcation of the area and preparing the necessary plan of the plot.

The Developer shall bear the costs/fees of the Architect/Surveyor for the aforesaid task.

List this matter after the report of the Architect/Surveyor is received.

The Registry is directed to immediately communicate a copy of this order to the said Architect/Surveyor."

The aforesaid report of the surveyors has been given pursuant to the directions issued vide order dated 27th September, 2012. In the report, the surveyors has mentioned that the total area of all the properties mentioned in the development agreement which are located at 84, Rakhhal Das Addy Road and 27, Chetla Central Road and 78, Rakhhal Das Addy Road together with some other properties is 64 kottahs 11 Chittacks 6 sq.ft i.e. 46,581. Since there are constant interruptions from Ms. Priya Dutta with regard to the submission of the solutions recorded in the report of the surveyors, it would be appropriate to reproduce the entire report with this order:-

"Pursuant to the order of Hon'ble Mr. Justice Surinder Singh Nijjar and Hon'ble Mr. Justice H.L. Gokhale of Supreme Court of India, we have surveyed the demarcated Plot No.84, Rakhhal Das Addy Road, Kolkata in the manner as directed by the Court.

By a Registered Agreement dated 9th December, 1991

between Sukhendu Bikash Addy and others and Aarcee Builders Pvt. Ltd. and Another, M/s. Aarcee Builder was appointed as the developer in respect of the under noted properties :-

No. 27, Chetla Central Road, No. 15A and B, Chetla Road, No. 78, 80(porn.), 84 and 92, Rakhal Das Addy Road and portion of 115, Rakhal Das Addy Road. Excepting Thakur Dalan as No. 84, Rakhal Das Addy Road and portion of 115, Rakhal Das Addy Road.

The developer was appointed to erect and/or construct building consisting of residential flat, office spaces, show rooms, shop rooms, parking spaces, servant's quarters and other spaces of the building.

We have gone through carefully the above mentioned agreement and the site plans of the properties which have been signed by all the parties.

As per the above mentioned agreement, the areas of the different properties are as follows:-

1. 80, (Porn) Rakhal Das Addy Road
Area - 3 Kottahs 14 Chittacks 24 sq.ft.
i.e. 2,814 sq.ft.
2. No. 78, Rakhal Das Addy Road
Area - 4 Kottahs 12 Chittacks 10 sq.ft.
i.e. 3,430 sq.ft.
3. 115,(portion) Rakhal Das Addy Road
Area - 1 Kottah 7 Chittacks 22 sq.ft. i.e.
1,057 sq.ft.
4. 27, Chetla Central Road
Area - 16 Kottahs 14 Chittacks 20 sq.ft.
i.e. 12,170 sq.ft.
5. 84, Rakhal Das Addy Road (excluding Thakur Dalan)

Area as per our measurement is 17 Kottahs 8 Chittacks 13 sq.ft. i.e. 12,613 sq.ft.
6. 92, Rakhal Das Addy Road
Areas - 15 Kottahs 1 Chittack 25 sq.ft.
i.e. 10,870 sq.ft.
7. 15A and 15B, Chetla Road
Areas - 5 Kottahs 0 Chittack 27 sq.ft.
i.e. 3,627 sq.ft.

Xerox copies of the above mentioned site plan signed by the parties are attached herewith.

The total areas of the above is 64 kottahs 11 chittacks 6 sq.ft i.e. 46,581 sq.ft.

The boundaries of the above mentioned properties as per the agreement are mentioned below :-

1. 80, (Porn), Rakhal Das Addy Road
On the North - By common passage
On the East - By Rakhal Das Addy Road
On the South - By No.82, Rakhal Das Addy Road

On the West - By No.78, Rakhal Das Addy Road

2. No. 78, Rakhhal Das Addy Road
On the North - By common passage
On the East - By No.80, Rakhhal Das Addy Road
On the South - By No.82, Rakhhal Das Addy Road
On the West - By No.76, Rakhhal Das Addy Road
3. 115 (Porn.), Rakhhal Das Addy Road
On the North - By No.113, Rakhhal Das Addy Road

On the East - By No.113 and 113A, Rakhhal Das Addy Road

On the South - By portion of No.115, Rakhhal Das Addy Road

On the West - By Rakhhal Das Addy Road
4. 27, Chetla Central Road

On the North - By No. 90A, Rakhhal Das Addy Road

On the East - By No. 92, Rakhhal Das Addy Road

On the South - By Chetla Central Road

On the West - By No. 25, Chetla Central Road
5. 84, Rakhhal Das Addy Road

On the North - By No. 82, Rakhhal Das Addy Road

On the East - By Rakhhal Das Addy Road

On the South - By No. 92, Rakhhal Das Addy Road

On the West - By No. 90A, Rakhhal Das Addy Road and common passage.
6. 92, Rakhhal Dass Addy Road

On the North - By No. 84, Rakhhal Das Addy Road

On the East - By Rakhhal Das Addy Road

On the South - By Chetla Central Road

On the West - By No. 27, Chetla Central Road
7. 15A and 15B, Chetla Road

On the North - by No. 15C, Chetla Road

On the East - By Chetla Road

On the South - Sabji Bagan Lane

On the West - By No. 15C and 15D, Chetla Road

The following areas are not available for development.

- A. As gifted under Court Order by developer where Receiver being confirming party to Amar Gymnasium, 115,(Part), R.D.Road, 1 Kottah 7 Chittacks 22 sq.ft. i.e. 1057 sq.ft.
- B. A strip of land having the area of 1 kottahs 7 chittack 40 sq.ft. i.e. 1075 sq.ft. In 84, Rakhal Das Addy Road was gifted to K.M.C. by a Registered Deed of Gift dated 18.1.2011 was gifted for common passage from 84, R.D. Addy Road (a copy of the said Deed of Gift was supplied to us by the promoter).
- C. Common passage in between No. 84 and No. 86, Rakhal Das Addy Road - 3.74 sq.ft.

The total area unavailable for development is 1057 sq.ft. + 1075 sq.ft. + 374 sq.ft. = 2,506 sq.ft.

Therefore, the area available for development in total area - area unavailable i.e. 46,581 sq.ft. - 2506 sq.ft. = 44,075 sq.ft. i.e. 61 kottahs 3 chittacks 20 sq.ft.

BUILDINGS

On inspection, we find that there are 5 storeyed (G+4) building in the premises, No. 78 and 80 (porn.) Rakhal Das Addy Road which has been recently constructed.

In 115 (Porn.), Rakhal Das Addy Road, there is at present 2 storeyed building.

In 84, Rakhal Das Addy Road, there are old double storeyed building and a single storeyed building. In 92, Rakhal Das Addy Road, there is asbestos shed structure as well as Carrugated iron sheets Roofed structure and in premises No. 27, Chetla Central Road, there is an old 2-storeyed building.

New building is under constructions in Premises No. 15A and 15B, Chetla Road.

No. 84, Rakhal Das Addy Road : As per Supreme Court order, we have thoroughly surveyed No. 84, Rakhal Das Addy Road hereinafter referred to as "property" excluding the Thakur Dalan.

According to our measurement, the property has an area of 17 kottahs 8 chittacks 13 sq.ft. and has got a frontage of about 82'-6" on Rakhal Das Addy Road on the east.

The buildings in premises mentioned earlier are in dilapidated condition.

The building is partly vacant and partly occupied.

As per Order of the Supreme Court, 11.5% of the area available for development i.e. 11.5% of 44,075 sq.ft. i.e. 5069 sq.ft. is to be allotted to Ms. Priya Dutta.

We have prepared a site plan of the premises and as per our measurement, in the said plan, we have shown portion of Ms. Priya Dutta having an area of 5069 sq.ft i.e. 7 kottahs 0 chittacks 29 sq. ft. within red verge.

The said portion has got frontage on Rakhal Das Addy Road on the East and K.M.C passage on the south.

The above mentioned K.M.C. Passage shown within green verge in the plan.

Chetla Central Road is about 123 feet from the portion allotted to Priya Dutta.

Direct access of this plot to Chetla Central Road can be made by crossing the K.M.C. Passage as well as through premises No. 27, Chetla Central Road, where the building plan

has already been sanctioned which has been shown to us by the developer/(sanction dated 12.3.2012). In our opinion, this is not at all practicable and feasible due to its distance from Chetla Central Road as well as for the K.M.C. Passage and through the other premises (i.e. 27, Chetla Central Road) where building plan has already been sanctioned.

In the plan prepared by us the above facts are shown clearly."

A perusal of the aforesaid report clearly indicates that the area falling to the share of Ms. Priya Dutta is 11.5% of 44,075 sq. ft. i.e. 5069 sq.ft. The aforesaid area has been duly demarcated with a clear access from Rakhhal Das Addy Road.

We see no reason not to accept the report of the surveyor. We may also notice that all the co-sharers have accepted the proposed terms of settlement which were presented to this Court by all the parties.

We also accept the offer made on behalf of the developer that the area which has been allotted under surveyor report to Ms. Priya Dutta will be walled up by the Receiver at the expense of the developer.

We, however, make it clear that we have not expressed any opinion on the inter se claims of the parties with regard to the probate proceedings which are pending in the Alipore Court. The possession of the exact shares determined by the probate shall be made over to the parties by the Probate Court.

In view of the above, the terms of settlement are also accepted and shall be made part of the order. The terms of settlement are as under :-

- "1. That by way of compensation for unavoidable delay in construction of flats, the respondent No.1/developer will pay proportionate share of 30% of the total land value fixed under the agreement, i.e. Rs.88,19,130/- to the co-sharers who have not sold/exchanged undivided interest in the properties. Such compensation shall be paid to the co-sharers according to their respective share in the properties on making over their possession in 27, Chetla Central Road and 84, Rakhhal Das Addy Road, Kolkata, as the case may be. It is recorded that the respondent No.1/developer is already in possession of portion of the building at 27, Chetla Central Road and vacant lands at 27, Chetla Central Road and 92, Rakhhal Das Addy Road, Kolkata.
2. That the co-sharers who are in possession of the building at No.84, Rakhhal Das Addy Road, Kolkata shall hand over their possession to the respondent No.1/developer at the time of handing over the flats in proposed buildings to be built on 27, Chetla Central Road and 92, Rakhhal Das Addy Road, Kolkata within three months of completion of construction of new buildings. Meantime the respondent No.1/developer shall be entitled to apply for sanction of plan for the building at 84, Rakhhal Das Addy Road, Kolkata.
3. Co-sharers having less than 1% interest in the properties and do not have physical possession in any of the properties under the development agreement and have not sold their undivided interest shall in addition to compensation of proportionate share of 30% of the land value fixed under the agreement i.e. Rs.88,19,130/- shall in lieu of their entitlement in developed super built up space in the building to be constructed shall be paid value of the same @ Rs.3,000/- per sq.ft.
- 3(a) It is further agreed that any co-sharer desiring to sell his/her undivided interest in the properties under the development agreement shall in addition to compensation of proportionate share of 30% of the land value fixed under the agreement i.e. Rs.88,19,130/- shall in lieu of his/her entitlement in developed super built up space in the building to be constructed shall be paid value of the same @ Rs.3,000/- per sq.ft.
4. Co-sharers having less than 1% interest in the properties and have physical possession in any of the

properties under the development agreement and have not sold their undivided interest may form a group to add up their interest the properties to 1% or more to take developed super built up accommodation in the building to be constructed according to the rate of 345 sq.ft. per 1% interest. Such co-sharers will also be entitled to compensation of 30% of the total land value fixed under the grant i.e. Rs.88,19,130/-.

5. That respondent No.1/developer shall provide one open car parking space for only those co-sharers having 3% or more undivided interest in the properties.

6. 2.58% interest of late Narendra Nath Addy is subject matter of Probate Case No. Act 39-3 of 1984 pending in the Court of 7th Additional District Judge at Alipore. 9.92% interest of late Bipin Behari Addy is also subject matter of Probate Case O.S. No. 3 of 2007 pending in the Court of 10th Additional District Judge at Alipore. The beneficiaries of the said Narendra Nath Addy and Bipin Behari Addy are parties to the said Extra Ordinary Suit No. 32 of 1987 pending in the High Court below. Monthly allowances and sale proceeds of other properties being subject matter of the said Extra Ordinary Suit No. 32 of 1987 are being held the Sri Ramesh Sharma, Receiver appointed in the said Extra Ordinary Suit No. 32 of 1987. Until probate is granted in the said probate case No. Act 39-3 of 1984 and Probate Case No. O.S. No. 3 of 2007 benefits due to the estate of late Narendra Nath Addy and late Bipin Behari Addy by way of allotment of developed/super built up space in new building or value @ Rs.3,000/- per sq.ft. and proportionate share of 30% of the total land value of Rs.88,19,130/- shall be given by respondent No.1/developers and held by the said Ramesh Sharma, Receiver of his successor in office appointed in the said Extra Ordinary Suit No. 32 of 1987 within the time of handing over possession of 84, Rakhal Das Addy Road to respondent No.1/developers.

7. Mr. Ramesh Sharma, receiver appointed in the Extra Ordinary Suit No. 32 of 1987 in which the development agreement has been made under order of the Hon'ble High Court at Calcutta shall execute such document as may be necessary as a confirming party in compliance with the development agreement.

8. The respondent No.1/developer will complete the construction work within three years from the date of receipt of the vacant possession of the building at 27, Chetla Central Road. In default the respondent No.1/developer shall pay to the co-sharers who have not sold their undivided interest compensation @ 15% per annum of the properties share of land value as fixed under the agreement, i.e. at Rs.88,19,130/- for the period of two years on expiry of which the respondent No.1/developer or any co-sharer shall be at liberty to apply to the Trial Court below for further order.

9. The Development Agreement dated 19th December, 1991 executed between the respondent No.1/developer and the Joint Receivers appointed at the relevant time in the said Extra Ordinary Suit No.32 of 1987 and all documents executed thereunder shall stand modified to the extent terms and conditions herein contained otherwise the said development agreement shall remain valid and/or enforceable.

10. The above appeal is disposed of on the above terms."

Before we part with this order, we again express our gratitude to Mr. Bhaskar P. Gupta, learned senior counsel (amicus curiae) for doing a commendable job on our request.

The appeal is disposed of, in the aforesaid terms.

There shall be no order as to costs.

.....J.
(SURINDER SINGH NIJJAR)

.....J.
(M.Y. EQBAL)

New Delhi,
February 26, 2013

ITEM NO.101

COURT NO.9

SECTION XVI

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO(s). 6702 OF 2009

PRATIMA MULLICK & ANR.

Appellant (s)

VERSUS

AARCEE BUILDERS PVT. LTD. & ORS.

Respondent(s)

(With appln(s) for substitution,c/delay in filing substitution appln.,early hearing and office report)

Date: 26/02/2013 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE SURINDER SINGH NIJJAR
HON'BLE MR. JUSTICE M.Y. EQBAL

Mr. Bhaskar P. Gupta, Sr.Adv.(Amicus Curiae)

For Appellant(s)

Mr. Pranab Kumar Mullick, Adv.
Ms. Soma Mullick, Adv.

For Respondent(s)

Mr. Ghanshyam Joshi, Adv.

Respondent-In-Person

For RR 2&36(a)

Mr. Viraj Kadam, Adv.
Mr. Sidharth Shinde, Adv.
Mr. D.M. Nargolkar, Adv.

For RR-1

Mr. Ajay K. Gupta, Sr. Adv.
Mr. Sarad Kumar Singhania, Adv.

For RR 55&56(a)

Mr. Partha Sil, Adv.

UPON hearing counsel the Court made the following
O R D E R

Delay in filing the substitution applications is
condoned.

The applications for substitution are allowed.
The appeal is disposed of in terms of the signed order.
There shall be no order as to costs.

(Sukhbir Paul Kaur)
Court Master

(Indu Bala Kapur)
Court Master

(Signed order is placed on the file)