

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
And
The Hon'ble Mr. Justice Supratim Bhattacharya**

F.A. No. 484 of 2025

Yashwant Chabria

-Versus-

Charan Kumar Chabria and others

For the appellant	:	Mr. Ashok Banerjee, Sr. Adv., Mr. Asif Hussain, Ms. Shreyasi Nath, ... Advs.
For the respondent no.1	:	Mr. Sabyasachi Chowdhury, Sr. Adv., Mr. Sib Sankar Das, Mr. Naman Chowdhury, Mr. Subhrojyoti Mookherjee, Mr. Ranit Roy, ... Advs.
For the respondent no.2	:	Mr. Ashim Kumar Routh, Mr. Anirban Ray, Mr. Subhayan Barik, ... Advs.
Heard on	:	23.06.2026
Reserved on	:	23.06.2026
Judgment on	:	02.07.2026

Sabyasachi Bhattacharyya, J.:-

1. The defendant no.1 in a partition suit has preferred the instant appeal against the final decree of partition passed therein.
2. Learned senior counsel for the defendant no.1/appellant argues that despite this Hon'ble Court having appointed Joint Partition Commissioners in

connection with a previous first appeal preferred against the preliminary decree under Order XXVI Rules 10 to 13 of the Code of Civil Procedure (for short, "the Code"), the learned Trial Judge, while accepting the Partition Commissioners' report, denied the defendants the opportunity to cross-examine the Commissioners, which vitiates the final decree of partition based on such report.

- 3.** Learned senior counsel places reliance on an order dated September 29, 2023 whereby, post-disposal of the earlier first appeal, a co-ordinate Bench of this Court had discharged one of the Joint Partition Commissioners appointed by this Court on the prayer of the said Commissioner. It is submitted that by dint of such discharge without affording an opportunity to the appellant to cross-examine the Commissioner, the report authored by the Joint Commissioners is itself rendered invalid. Even in the said order, it is submitted, the co-ordinate Bench had permitted the appointment of another Commissioner in place of the outgoing Commissioner. Thus, it is contended that there was no bar for the learned Trial Judge to appoint a different Commissioner and/or to afford the opportunity to cross-examine such newly appointed Commissioner as well as the Commissioner who continued. However, the learned Trial Judge, despite having permitted such cross-examination earlier, with the specific observation that there cannot be a better weapon than cross-examination to discover the truth, subsequently recalled his own order on the basis of the order of this Court passed in a disposed-of appeal. Such recall, it is contended, is amenable to challenge in the present appeal as well and, as such, ought to be set aside.

4. Learned senior counsel next argues that the defendants, including the appellant, filed specific written objection to the Commissioners' report, all the more entitling the defendants to cross-examine the Commissioner. It is highlighted that the report of the Partition Commissioners comprised merely of two different plans, without specifically allocating any portion to either party. The defendants, who are in existing possession of the first floor and the second floor of the suit building, were not allotted the said floors by the impugned final decree. It is argued that such deviation from the existing possession is contrary to the established practice followed in partition suits, where prior possession is taken into consideration while allotting specific portions of the suit property to the parties in the final decree.
5. Secondly, it is argued that the allotment of particular portions by the impugned final decree deviates from the preliminary decree passed in the suit.
6. Learned senior counsel appearing for the appellant points out that the mere reluctance of the Advocate Commissioner, who was apparently a practising advocate of this Court, to face cross-examination could not be a valid reason to deny the opportunity to the appellant to cross-examine him.
7. Thus, it is argued that the impugned judgment and decree are contrary to law and ought to be set aside.
8. Learned counsel for the defendant/respondent no.2 adopts the arguments of the appellant and further contends that no allotment was made by effecting partition *inter se* the defendant nos.1 and 2. It is argued that the Court, while finally decreeing a partition suit, is required to allot shares to all the

parties as far as practicable, which principle was violated by the learned Trial Judge in the impugned judgment and decree.

- 9.** It is further argued by the defendant/respondent no.2 that the suit building is a four-storied one, out of which the ground floor and the top (third) floor have been in occupation of the plaintiff/respondent no.1. On the other hand, the first and second floors were gifted by the defendant/respondent no.3 to the defendant no.1/appellant and defendant no.2/respondent no.2 jointly, along with possession of the said two floors being handed over to defendant nos.1 and 2. Such possession was completely overlooked in making the allocations in the impugned final decree, whereby the entire ground floor and first floor as well as mezzanine floor, along with 50% garage space against cash compensation of Rs.15,17,220/- for the deficit area, was allocated to the plaintiff/respondent no.1 in accordance with Lot-A of the Partition Commissioners' report. On the other hand, Lot-B was allotted to the defendants, including the entire second floor flat, third floor flat and 50% garage space against payment of the said compensation to Lot-A. Thus, the first floor was not allotted to the defendants at all, thereby disturbing their present possession.
- 10.** The learned Trial Judge, it is next argued by the respondent no.2, came to the finding that if the Joint Partition Commissioners' report was not accepted, there would be "complexity", without any explanation regarding such observation.
- 11.** Thus, it is argued that the learned Trial Judge overlooked the specific objections taken in writing by the defendant nos.1 and 2 and deprived them

of the opportunity to cross-examine the Partition Commissioners, thereby vitiating the Commissioners' report and, consequentially, the final decree passed in terms of the same.

- 12.** Learned senior counsel appearing on behalf of the plaintiff/respondent no.1 opposes the submissions of the appellant and respondent no.2 and contends that within the contemplation of Order XXVI Rule 10 of the Code, the Commissioners' report becomes a part of the record and cannot be rejected or overlooked merely due to the lack of any cross-examination. The right to cross-examine the Commissioner, it is argued, is not an absolute right. Learned senior counsel relies on *Misrilal Ramratan and others Mansukhlal and others v. A.S. Shaik Fathimal (dead) by LRs. and others*, reported at *1995 Supp (4) SCC 600*, in support of such proposition.
- 13.** Learned senior counsel for the plaintiff/respondent no. 1 next argues that although the Partition Commissioners may adhere to the existing possession as a matter of custom, the same is not an absolute proposition or principle. In support of the said contention, learned senior counsel cites the judgment of a co-ordinate Bench (of which one of us was a part) in *Hemaran Sanyal v. Hirak Sanyal and Others*, reported at *2024 SCC OnLine Cal 10385*.
- 14.** Learned senior counsel for the plaintiff/respondent no.1 argues further that the Partition Commissioners' report and the plans comprising the same distribute the property in a just and equitable manner in terms of the preliminary decree. Hence, it is submitted that mere lack of opportunity to cross-examine the Partition Commissioners ought not to be a determinant of

the legality of the impugned final judgment and decree of partition. The appeal, it is thus submitted, ought to be dismissed.

15. In order to adjudicate the instant appeal, the following two cardinal issues are required to be decided:

- (i) *Whether the learned Trial Judge was justified in refusing to grant opportunity to the defendants to cross-examine the Partition Commissioners;*
- (ii) *Whether the denial of opportunity to cross-examine the Partition Commissioners to the defendants vitiates the final decree of partition.*

16. The above issues are decided as follows:

- (i) **Whether the learned Trial Judge was justified in refusing to grant opportunity to the defendants to cross-examine the Partition Commissioners**

17. For the sake of convenience, the chronology of events leading to the impugned judgment and decree is set out below:

<u>Date</u>	<u>Event</u>
November 28, 2008	Preliminary decree of partition passed.
... ..	FAT No.63 of 2009 (FA No.410 of 2009) filed by defendant no.3 against the preliminary decree; cross-objection bearing COT No.40 of 2010 also filed by the plaintiff against the said decree.
December 20, 2021	A co-ordinate Bench of this Court directed

	<p>preparation of two plans, one assuming that the defendant no.3/appellant therein had no share in the property, and another, taking into account the fact that he succeeds in the suit and is adjudged to have 50% share in the property. Two practising advocates of this Court were appointed as Joint Commissioners of Partition to prepare a report with a plan for partition of the subject-property, with liberty to appoint valuers, surveyors, chartered engineers and supporting staff in consultation with the parties to implement the order.</p>
<p>September 19, 2022</p>	<p>Another co-ordinate Bench of this Court dismissed the first appeal and the cross objection against the preliminary decree, observing <i>inter alia</i> that whatever the deed of gift executed by defendant no.3 in favour of defendant nos.1 and 2 may say with regard to the possession of the defendant nos.1 and 2/donees in the suit premises is not determinative of their share or allotment that were to be made in the final decree. The co-ordinate Bench also directed the learned Trial Judge to take into consideration the report filed by the Joint Partition Commissioners in the final decree proceeding; however, observing that the acceptance of the said report was left to the discretion of the learned Trial Judge and that the parties shall be heard on the said report</p>

	before acceptance.
May 1, 2025	Special Leave to Appeal (C) No.14487-14488 of 2023, preferred against the judgment of the co-ordinate Bench affirming the preliminary decree, was dismissed.
April 1, 2023	In the final decree proceeding, the learned Trial Judge granted liberty to the defendants to file written objection against the final report.
September 2, 2023	The plaintiff verbally submitted before the Trial Court that there was no need of examination of the learned Advocate Commissioners for acceptance of the Commissioners' report as the Commissioners had only complied with the direction of this Court, to which the opposite parties raised objection. The learned Trial Judge directed the plaintiff to take proper steps for acceptance of the Commissioners' report.
September 16, 2023	The Trial Court observed that the learned Advocate Commissioner was reluctant to enter the witness box to face the cross-examination; however, "it is settled law that there cannot be a better weapon than cross-examination to discover the truth and it is through cross-examination that the veracity of document can be checked". The learned Trial Judge further observed that "the need of the hour wanted to examine the learned Advocate Commissioner before acceptance of the report submitted by him" and accordingly

	directed the Advocate Commissioner to be intimated for being present on the next date fixed for his examination.
October 10, 2023	An application under Section 151 of the Code, for recall of the order dated September 16, 2023, filed by the plaintiff with a put-up petition, was fixed for hearing by shifting back the date from December 15, 2023 to December 7, 2023 in view of the direction of this Court for expeditious disposal, recording that the defendants sought to file written objection against the recall application.
September 29, 2023	A co-ordinate Bench of this Court took up the disposed-of appeal, bearing FA No.410 of 2009, along with COT No.40 of 2010, upon verbal mentioning by one of the Joint Partition Commissioners, seeking his discharge on the ground that, pursuant to the directions of the Trial Court, he had appeared on more than one occasion before the Court in connection with the report and had been directed again to appear in the same connection. The co-ordinate Bench observed that according to the practice followed in this Court, an officer appointed by it is only in rare circumstances directed to be personally present in Court to explain a report and that if any objection to the report of the officer is made, it is taken as an exception to the report in the form of an affidavit, to be dealt with by the parties and

	<p>to be adjudicated by the Court on affidavits. Hence, on the prayer of one of the Advocate Commissioners, he was discharged, holding that the Trial Court was free to appoint any Commissioner in his place and stead, with the rider that the outgoing Commissioner shall not be further summoned to appear in the Trial Court and to adjudicate any objection to the report in the manner indicated above.</p>
January 6, 2024	<p>The Trial Court, taking note of the order of the co-ordinate Bench dated September 29, 2023, recalled its order dated September 16, 2023 to the extent that an opportunity of cross-examining the Advocate Commissioner was given to the defendants.</p>
March 16, 2024	<p>The Trial Court, upon considering the objections raised by defendant nos.1 and 2 to the Partition Commissioners' report, adverted to such objections and accepted the final report dated March 31, 2022 submitted by the Joint Partition Commissioners.</p>
January 13, 2025	<p>CO No.1443 of 2024, filed by the defendant nos.1 and 2 against the order dated March 16, 2024, accepting the Commissioners' report, was taken up for hearing by a learned Single Judge of this Court. It was recorded in the order that the learned Senior Advocate for the defendant nos.1 and 2 submitted that it would be difficult for the defendants to accept any other allotment apart from the</p>

	<p>allotment which comprised of the first floor, by reason of the defendant no.1 occupying the first floor portion. It was also recorded that the learned Advocate (now Senior Advocate) representing the plaintiff submitted that the plaintiff was ready and willing to accept the alternative allotment, that is, either allotment of Lot-A or composite Lots-B and C, in terms of the Commissioners' report. The matter was adjourned to grant opportunity to the defendant nos.1 and 2 to indicate their choices of allotment of either Lot-A or Lots-B and C, which formed a composite allotment.</p>
February 11, 2025	<p>The learned Senior Advocate appearing for the defendant nos.1 and 2/petitioners submitted before the learned Single Judge in connection with CO No.1443 of 2024 that the petitioners would take some more time to deliberate on their choice of allotment in terms of the observation made in the order dated January 13, 2025, upon which the matter was adjourned further.</p>
July 2, 2025	<p>In view of non-appearance of the petitioners at the time of call, CO No.1443 of 2024 was dismissed for default by a learned Single Judge of this Court.</p>
June 13, 2025	<p>The final decree impugned in the present appeal was passed in terms of the Commissioners' report, allotting the Lot-A property, comprised of the entire ground</p>

	<p>floor, the entire first floor flat, mezzanine floor and 50% of the garage space and granting cash compensation of Rs.15,74,220/- as compensation for the deficit area, to the plaintiff/respondent no.1 herein. Lot-B, comprised of the entire second floor and third floor flat, along with 50% of garage space, were allotted to the defendants against payment of the aforesaid amount as compensation to Lot-A.</p>
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- 18.** Certain salient features of the matter are required to be considered. In the initial order appointing the Joint Partition Commissioners dated December 20, 2021, the said Commissioners were directed to prepare two plans, respectively assuming that the defendant no.3 had no share in the property and assuming that he would be adjudged to have 50% share in the property. The Commissioners were directed to prepare a report with a plan for partition, if necessary appointing valuers, surveyors, chartered engineers and supporting staff in consultation with the parties.
- 19.** In the judgment dated September 19, 2022 passed in FA No. 410 of 2009 and COT No. 40 of 2010, the preliminary decree was affirmed by a co-ordinate Bench of this Court, by directing the learned Trial Judge to pass final decree by taking into consideration the Commissioners' report. However, it was kept open to the discretion of the learned Trial Judge as to whether or not to accept such report. Furthermore, the co-ordinate Bench directed that the parties would be heard on the report before acceptance.

- 20.** Hence, the judgment of the First Appellate Court affirming the preliminary decree left it open to the discretion of the learned Trial Judge to accept the report, that too, after hearing the parties.
- 21.** It is also to be taken into account that although it was this Court that had appointed the Joint Partition Commissioners, the appointment was not in respect of a suit pending in the Original Side of this Court, where the practice and customs of this Court would apply, but under Order XXVI Rule 13 of the Code, in respect of a suit before a learned Civil Judge (Senior Division). Thus, the procedure as provided in Rules 13 and 14 of Order XXVI was applicable.
- 22.** Under Rule 14 of Order XXVI of the Code, upon such enquiry as may be necessary, division of the property into as many shares as directed by the order appointing the Commissioners and allotment of such shares to the parties, if authorised by the said order, and awarding owelty money, the Commissioners were to prepare and sign a report allotting the share of each party and distinguishing each share by metes and bounds. Such report/reports were to be annexed to the Commissioners' report and transmitted to the Court. Thereafter, the Court, *after hearing any objections which the parties may have made to the report or reports* was to confirm, vary or set aside the same.
- 23.** Under sub-rule (3) of Rule 14, where the Court confirms or varies the report, the decree is to be passed in accordance with the same; but where the Court sets aside the report/reports, it is to either issue a new commission or make such order or orders as it thinks fit.

- 24.** The expression “after hearing any objections which the parties may make” does not specifically stipulate any right to the parties to examine/cross-examine the Commissioner as such. Under the regime provided by Rules 13 and 14 of Order XXVI, the Court has merely to give a hearing to the parties on their objections to the report, upon which the Court may proceed either to accept the report or vary or set aside the same. Thus, no statutory right is available to the parties in terms to cross-examine the Commissioner.
- 25.** However, the right of hearing contemplated in the said provisions broadly encompasses a right to examine or cross-examine the Partition Commissioners in the event any objection is taken to the report. Even in the order dated September 29, 2023, the co-ordinate Bench of this Court did not shut out the opportunity of cross-examination available to the defendants. Although the Division Bench discharged one of the Partition Commissioners and restrained the Trial Court from calling him further (including for cross-examination), fact remains that the other Joint Commissioner who co-authored the report was still available for cross-examination. Moreover, the Division Bench, in the order dated September 29, 2023, also left it open to the Trial Court to appoint any other Commissioner in place and stead of the outgoing Commissioner. Thus, there was no bar to the Trial Court either to appoint a new Commissioner with a direction to file a fresh report or to permit cross-examination of the still-continuing Joint Commissioner who had also authored the report.
- 26.** Yet, the learned Trial Judge, *vide* order dated January 6, 2024, recalled its earlier order dated September 16, 2023 to the extent that cross-examination

of the Commissioner was permitted, without exploring the alternative avenues as indicated above.

- 27.** It cannot also be lost sight of that the order dated September 29, 2023 was passed by the co-ordinate Bench in an already disposed-of appeal. Hence, it cannot be said that the order precluded the Trial Court from adopting either course of action - to permit cross-examination of the still-continuing Partition Commissioner or to appoint a fresh Commissioner and direct a fresh report to be filed to allocate the shares of the properties of the parties.
- 28.** Hence, this issue is decided in the negative, holding that the learned Trial Judge was not justified in precluding the defendant nos.1 and 2 from cross-examining the Partition Commissioners merely on the basis of the order dated September 29, 2023.

(ii) Whether the denial of opportunity to cross-examine the Partition Commissioners to the defendants vitiates the final decree of partition

- 29.** The crucial question which arises is whether the denial of opportunity to cross-examine the Partition Commissioners vitiates the preliminary decree as a whole.
- 30.** An important link in the chain of events is that the defendants had preferred a revisional application against the order dated March 16, 2024 passed in the suit bearing Title Suit No. 19 of 2005, whereby the Commissioners' report was accepted, ultimately leading to the passing of the preliminary decree on the basis thereof. The said revision, bearing CO 1443 of 2024, was

ultimately dismissed for default vide order dated July 2, 2025 and was never restored. Although the appellant seeks to argue that further continuance with the said revisional application would be futile in view of the final decree having been passed in the meantime, that is, on June 13, 2025, nonetheless, nothing prevented the defendants from appearing before the revisional court and pointing out to the learned Single Judge taking up the revisional application that the same had been rendered infructuous and seeking a disposal of the same/withdrawal of the same with the liberty to the defendants to pursue the challenge taken to the order impugned therein as a ground of the appeal to be preferred against the final decree. Section 105(1) of the Code provides that where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of the appeal preferred against the decree. Thus, since the order dated March 16, 2024, accepting the Partition Commissioners' report, directly affected the decision of the case, the aggrieved parties, that is, the defendant nos. 1 and 2 would otherwise be entitled to set up any error, defect or irregularity in the said order as a ground of objection in the memorandum of the present appeal.

- 31.** However, such opportunity cannot be granted to the appellant now, in view of the appellant having specifically challenged the said order by way of CO No.1443 of 2024, which was dismissed for default, thereby attracting the principle embodied in Order XI Rule 9 of the Code, which is applicable *mutatis mutandis* to all proceedings before a Civil Court. A double remedy cannot be provided to the self-same litigant against the same order, having

chosen to permit a prior challenge thereto to be dismissed for default and thereafter renewing such challenge afresh in the present appeal. Hence, the benefit of Section 105(1) of the Code cannot be extended to the present appellant in view of the dismissal for default of his challenge to the self-same order accepting the Commissioners' report, dated March 16, 2024, by way of the earlier revisional application.

32. That apart, it was recorded in the order dated January 13, 2025 passed in the said revisional application that the defendants/petitioners, through their senior counsel, had submitted before the court that it would be difficult for them to accept any other allotment apart from the allotment which comprised of the first floor, by reason of the defendant no. 1 occupying the first floor portion, to which the plaintiff's counsel expressed the readiness and willingness of the plaintiff to accept either of the alternative allotments, be it Lot A or composite Lots B and C, thus leaving it upon to the defendants to choose the lot which included the first floor. Even in a subsequent order dated February 11, 2025, the revisional court recorded that defendant nos. 1 and 2/petitioners therein required more time to deliberate on their "choice of allotment" in terms of the observation made in the order dated January 13, 2025, thus making it amply clear that the defendant nos. 1 and 2 had, in principle, acceded to the proposal of accepting the allotment including the first floor without raising any demur to the Partition Commissioners' report, on the ground of denial of the right to cross-examine the Commissioners or otherwise. Hence, the defendant nos. 1 and 2 are now barred by the principle of estoppel from re-agitating such issue afresh at this stage.

- 33.** Another aspect of the matter cannot be overlooked. There is a stark distinction between the cross-examination of an ordinary witness in a suit and that of a Partition Commissioner in a partition suit. In case of an ordinary witness, cross-examination is essential to test the veracity of the statements made in the examination-in-chief, the creditworthiness of the witness, as well as to elicit admissions, if any, from the witness. This is based on the principle that it is the deposition itself that goes on record as evidence and ultimately forms a part of the record. If the adversary is deprived of the opportunity to cross-examine a witness, the veracity of the statements made in the examination-in-chief by a witness and the flaws in the same would not be tested, thus, depriving the adversary of a vital right. Based on such principle, it has been held by courts time and again that in the event a witness avoids cross-examination and the adversary is deprived of the right to cross-examine, the evidence of the witness is discarded as a whole, with the only exception that the cross-examination has been substantially concluded on the crucial issues involved and an inconsequential part thereof remains unfinished.
- 34.** However, the paradigm governing a Partition Commissioner's evidence is entirely different. The essence of a Partition Commission is the report authored by the Commissioner. It is such report which forms a part of the record. Thus, the scope of examining a Commissioner is limited to his report and the objections taken thereto, unless, of course, the integrity/credentials of the Commissioner itself is challenged, which has not been done in the instant case.

- 35.** Unlike a Commissioners' Report under Order XXXIX Rule 7 of the Code, where the report is required to be proved by the Commissioner to be taken as evidence, a Partition Commissioners' report automatically forms a part of the record. The only opportunity which is required to be afforded to the party aggrieved by such report, as per the law, is to file an objection and have a hearing on such objection. Hence, as opposed to an ordinary witness, whose deposition is the crux of the evidence, in case of a Partition Commissioner, it is the report and objections thereto which form a part of the record and the right of cross-examination, if any, is report-centric and not Commissioner-centric.
- 36.** Hence, it is not as essential in case of a Partition Commissioner to afford an opportunity to a party aggrieved with his report to cross-examine the Commissioner as in case of an ordinary witness, where the evidence itself is of moment.
- 37.** If Order XXVI Rule 14(2) of the Code is read in such context, we find that the right of having a hearing on its objection given to a party may or may not include the right to cross-examine.
- 38.** In *Misrilal Ramratan (supra)*¹, the Hon'ble Supreme Court categorically held that it is settled law that the report of the Commissioner is part of the record and that therefore, the report cannot be overlooked or rejected on the specious plea of non-examination of the Commissioner as a witness, since it is part of the record of the case. The appellant argues that in the said case,

¹ ***Misrilal Ramratan and others Mansukhlal and others v. A.S. Shaik Fathimal (dead) by LRs. and others, reported at 1995 Supp (4) SCC 600***

no objection was raised to the Commissioner's report. However, the ratio laid down by the Hon'ble Supreme Court was not objection-based but was a general proposition, with or without objection.

- 39.** As such, the lack of opportunity to the defendants to cross-examine the Commissioner does not vitiate the Commissioners' Report and/or the acceptance of the same.
- 40.** The only requirement under Rule 14(2) of Order XXVI of the Code was for the court to give a hearing to the aggrieved parties on their objections to the report, which has been extensively complied with in the present case. In the order dated March 16, 2024, the learned Trial Judge elaborately discussed the different points of objection urged and dealt with each of those vis-à-vis the plans submitted by the Commissioners. Moreover, the earlier orders, whereby opportunity to cross-examine granted to the defendants and thereafter recalled, merged with the order dated March 16, 2024, accepting the Commissioners' report upon giving hearing to the defendants on their objections thereto.
- 41.** The defendants having chosen to have their challenge thereto, being CO No.1443 of 2024, dismissed for default and not applying for restoration of the said revisional application, cannot now be permitted to assail such acceptance in the present appeal.
- 42.** Even otherwise, to satisfy the conscience of this court, we carefully examine the plans submitted by the Commissioners as a part of their report vis-à-vis the objections taken thereto.

- 43.** One of the objections taken is that the defendants' shares were not demarcated *inter se* by metes and bounds. However, in the preliminary decree itself, the learned Trial Judge observed that the plaintiff do get a preliminary decree for partition in respect of his half share in the schedule property and directed the parties to effect amicable partition amongst themselves. Thus, in the preliminary decree itself, which forms the premise of the final decree and the partition to be effected by the Commissioners, there was no direction to separately demarcate the shares of the defendants *inter se*. Even in the order appointing the Commissioners, this court did not direct the demarcation of the defendants' shares *inter se*. Thus, we cannot say that the Commissioners flouted Order XXVI Rule 14(1) of the Code of Civil Procedure, as per which the property is to be divided into as many shares as directed by the order under which the Commission was issued and to allot such shares to the parties, if authorized by the said order. Also, the allotments made were exactly in terms of the shares of the parties declared in the preliminary decree and cannot be faulted on such count.
- 44.** This also takes care of the objection taken by the defendant no.2/respondent no. 2 to the effect that the final decree does not conform to the preliminary decree, which argument has no basis whatsoever.
- 45.** It is also contended by the appellant that the existing possession of the parties was not adhered to while allocating shares to the parties in the Partition Commissioners' report.

- 46.** As held by this court in *Hemarun Sanyal (supra)*², although it is a matter of custom that the Partition Commissioner tries to adhere to the existing possession while allotting shares, the said practice is not an absolute proposition set in stone and possession is only honoured insofar as practicable in the ultimate analysis. A certain amount of *quid pro quo* is implicit in allotment of shares in a final decree of partition, since the wishes of all parties cannot be satisfied by the Partition Commissioner. As long as clearly demarcated and roughly equal areas of property are allotted to each of the parties, none of the parties can insist upon the original possession being retained.
- 47.** If partition is to be effected as per the shares of the parties, the existing possession almost invariably has to be altered in order to conform to the extent of shares of the parties. In the present case, as evident from the Partition Commissioners' Report, if the first and second floors were to be allotted to the defendants, it would much exceed their share in the property. Moreover, we find from the records that ample opportunity was given to the defendants to choose the lot containing the first floor, which was deliberately avoided by them.
- 48.** Even otherwise, from the allocation of shares finally accepted by the learned Trial Judge, we find the same to be perfectly rational and just. Whereas the entire first floor flat and the ground floor, which is much less in extent than the other floors, have been allotted to the plaintiff/respondent no. 1, along

² *Hemarun Sanyal v. Hirak Sanyal and Others*, reported at 2024 SCC OnLine Cal 10385

with 50% share in the garage and owelty money commensurate with the deprivation of the plaintiff, the upper floors, being the second and third floors, which are larger in extent than the ground floor, have been allocated to the defendant nos. 1 and 2 who, by dint of the deed of gift executed by the defendant no. 3, are entitled to 50% share in the property. In respect of getting 50% share in the garage, the defendants have been directed to compensate the deprivation of the appellant by paying owelty money to the extent of such deprivation. Such allotment of shares to the parties is fully commensurate with their respective shares as declared in the preliminary decree and, thus, cannot be faulted.

- 49.** The evaluation of owelty money was also based on valuers' assessment as per the direction of this Court appointing the Partition Commissioners. Hence, there is no infirmity in that regard as well.
- 50.** In fact, as rightly observed by the learned Trial Judge while accepting the Commissioners' Report, any other mode of allotment would be complex and also absurd. If the existing possession was to be retained, the defendants jointly would be getting the first and second floors whereas the plaintiff's allocation would be on the ground floor (which is much less in area than the other floors) and the top (third) floor, thereby separating the two portions of the plaintiff's allocation by two floors, which would then belong to the defendants. In order to have access to the different portions of his share, the plaintiff would then have to traverse the entire first and second floors to move between the top floor and the ground floor on a daily basis. Such an allocation, as opposed to the current allocation, would be absurd, and not

the contrary. Hence, even otherwise, upon careful scrutiny of the impugned judgment and the Commissioners' report which forms the basis thereof, we do not find any error of law and/or fact in the allocation of portions between the parties.

CONCLUSION

- 51.** In view of the above, this Court is of the opinion that there is no scope of interference with the impugned judgment and final decree of partition passed by the learned Trial Judge.
- 52.** Accordingly, FA No.484 of 2025 is dismissed on contest, thereby affirming the impugned judgment and final decree of partition dated June 13, 2025 passed by the learned Civil Judge (Senior Division), First Court at Alipore, District – South 24 Parganas in Title Suit No.19 of 2005.
- 53.** Consequentially, CAN 1 of 2026 stands dismissed as well.
- 54.** There will be no order as to costs.
- 55.** Interim orders, if any, stand vacated.
- 56.** A formal decree be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Supratim Bhattacharya, J.)