

(1964) 03 CAL CK 0035
In the Calcutta High Court
Case No : A.F.A.D. No. 333 of 1958

Bibhuti Bhushan Bank and Another

APPELLANT

Vs

Sadhan Chandra Sheet and Others

RESPONDENT

Date of Decision : 10-03-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10, Order 26 Rule 10(2), Order 26 Rule 9, 100, 100(1)
Evidence Act, 1872 — Section 101

Citation : AIR 1965 Cal 199 : 68 CWN 1043

Hon'ble Judges : C.N. Laik, J

Bench : Single Bench

Advocate : Apurba Dhan Mukherjee and Murari Mohan Mukherjee, for the Appellant; Pramatha Nath Mitra and Ramesh Chandra Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Laik, J.—A tamarind tree, the small plot of land on which it stands and the alleged mis-appropriation of 15 seers of tamarind led to the institution of the suit for declaration of title, injunction and for damages, total value being laid at only Rs. 20/- put of which this Second Appeal arises. The plaintiffs being unsuccessful in both the Courts below, fought the battle royal for two days in this Court through their learned Advocate Mr. A. D. Mukherjee, defended by Mr. P. N. Mitra, the learned Advocate for the respondent.

2. The plaintiffs claim that the land and the tree appertain to their Bastu plot (No. 6930). The defendants on the other hand, claim that they appertain to their tank and its banks (Plot No. 6929), being on the west of the plaintiffs' plot, having no gap between the two. Plaintiffs rest their title on two Kobalas dated May 16 and June 4, both of the year 1891. Defendants rest their title on an unregistered Patta of 1282 B.S. (1875) followed by a Kobala of the year 1929. Besides the said and other documentary evidence, oral evidence was adduced by

both the parties.

3. At the plaintiffs' instance, a Pleader-Commissioner was appointed for local investigation. He submitted a report, which being found defective, was rejected by the Trial Court. To the credit of the Commissioner he lost even the original Case Map, A second Commissioner was appointed. To the second report again, (as criticism is usually the Commissioner's lot) both sides filed objections, The Court of appeal below without relying on the Commissioner's report found that the plaintiffs, by their Kobalas have not purchased the disputed land on which the tree stands and further found that the tree referred to in the defendant's Patta and the Kobala was the tree in dispute and the same was within the defendants' tank and its banks. The conclusion arrived at by the Commissioner that the tree is within the ambit of the land demised by the Patta is accepted by the learned Subordinate Judge in appeal, because the same appeared to him to be correct, in view of other evidences on the record.

4. Before the Court of appeal below a grievance was made on behalf of the plaintiffs-appellants that the Appellate Court ought to have examined the Commissioner before rejecting his report and that a remand was justified. The learned Subordinate Judge, however, adhered to the view that other evidences on the record are sufficient for the disposal of the case and the prayer of remand? was not acceded to. The terms of the judgment delivered by him in my view are certainly calculate ed to suggest that he had applied his mind to the other evidences in the case and had come to an independent conclusion. The result was that the disputed land and the tree were thrown into the defendants' plot. The, learned Subordinate Judge was possibly disposed to think that any further working on the case was likely to be nothing but infructuous expenditure of time and a protraction-of the dispute. But in spite of above, it now appears that it has not tended (in this case at least) to stop the litigation. More so, when the learned Advocate in support of the appeal, attempted to call up the case as a regular appeal and when I was taken to the other evidences on the record.

5. Mr. Mukherjee maintained firstly that the Subordinate Judge's disregard of the Report of the Commissioner and the failure to order for a fresh enquiry constituted a substantial error or defect in procedure within the meaning of Clause (c) of Section 100 of the Code of Civil Procedure. Mr. Mitra, the learned Advocate of the respondent on the other hand, called in his aid and relied on certain decisions and specially of their Lordships of the Judicial Committee of the Privy Council as corrective of an undue skepticism in such matters.

6. In my judgment, on construing Order 26, Rules 9 and 10 read with Section 100(c) of the Code of Civil Procedure, 1908, there is no warrant for absolute proposition of law that disregard of the Commissioner's report, made after local investigation, under the provisions of Order 26, Rules 9 and 10 of the Code of Civil Procedure, constitutes an error or defect in the procedure within the meaning of Clause (c) of Section 100 of the Code; or that such disregard affects "the merits of the case" within the said Section 100 as to justify interference in a

Second Appeal. If there is no defect in the conduct of a case, if the decision does not involve any principle of law and if the only error, which if it is committed, consists in the Court's drawing a wrong conclusion from evidence, that would not, in my opinion, constitute a substantial error or defect in the procedure. The acceptance or rejection of the Commissioner's report is entirely within the Court's competence. It has full discretion in the matter but the said discretion is to be exercised properly and not capriciously. If the Court rejects a Commissioner's report after proper exercise of discretion, it is not obligatory or compulsory on the Court to order for another investigation.

As the problem, in spite of the strenuous arguments, remained in short, to ascertain the boundary, the appellant in order to set aside the decision of the Court of appeal below, should come forward to show clearly where it is wrong and what other course is right and that merely lack of precision in the materials in boundary cases of this type does not in my view relieve the Court of the duty of settling a line upon the evidence before it.

7. Turning now to the reported decisions, Mr. Mukherjee in support of his first contention, as to the error or defect in procedure, placed before me a Bench decision of this Court (Sanderson C.J, and Ashutosh Mookerjee, J.) in the case of *Tirthabasi v. Bepin* AIR 1917 Cal 573 : 23 Cal LJ 600 where the learned Chief Justice, speaking for the Court, held that the Subordinate Judge ought to have directed a second enquiry and should not have proceeded to have decided the case "upon what was left". It was also held that that was not the proper way to deal with the matter and the course taken by the Subordinate Judge in trying to come to a conclusion upon "part only of the evidence", after rejecting the Commissioner's report, was a substantial error or defect in the procedure. Mr. Mukherjee, therefore, demanded for an order to remit the instant case (as was done in the said reported decision) to the Munsif with my opinion that he should direct a third enquiry. Mr. Mitra on the other hand placed a decision of the Judicial Committee of the Privy Council in the case of *Lukhi Narain v. Jodu Nath* 21 Ind App 39: ILR 21 Cal 504 (PC) where it was held that disregard of the Commissioner's report was not a substantial error or defect in procedure within the meaning of Section 584 of the CPC 1882. (Clause (c) of Section 584 in both the Codes of Civil Procedure 1877 and 1882 should be remembered as being almost similar to Clause (c) of Section 100 of the present Code.

8. It is unfortunate that the attention of their Lordships of the High Court deciding *Tirtha Basi's* case AIR 1917 Cal 573 : 23 Cal LJ 600-(supra) was not drawn to the said decision of the Judicial Committee. Moreover, the particular circumstances in *Tirtha Basi's* case AIR 1917 Cal 573: 23 Cal LJ 600 were (1) that the Commissioner's investigation was considered as "most valuable"; (2) that it was not very clear whether there were other evidences in the case except the report or that other evidences were sufficient to dispose of the case; (3) that the Commissioner's report was not supported by either party in the said case; (4) that the trial Court accepted the report and fifthly and lastly, the title as to

the ownership of the land being a very material part of the case, was misunderstood, which led to the wrong decision by the learned Subordinate Judge, in the said reported decision.

9. Without noticing again Tirtha Basi's case AIR 1917 Cal 573 : 23 Cal LJ 600 (supra), another Bench decision of this Court (Fletcher and Panton, JJ.) held in the case of Jadavendra, Nandan v. Gajendra Narain AIR 1919 Cal 946 : 28 Cal LJ 203, that where an appellate Court) refused to accept the report of the Commissioner it was not bound to order a fresh enquiry: the matter was held to be within the discretion of the Court.

10. A complaint was made before Richardson and Walmsley JJ. in the case of Hon^{ble} Sir Maharaja Manindra Chandra Nandi Bahadur Vs. Kumar Sarabindu Ray and Others,), that if the District Judge was dissatisfied with the map and report of the Amin he should have directed a fresh investigation. Their Lordships answered by holding in the first place that it was not Compulsory to direct a fresh investigation and as their Lordships of the Judicial Committee of the Privy Council in the case of Jagadindra v. Secy. of State, 30 Ind App 44 : ILR 30 Cal 291:7 Cal WN 193 (PC) held that while it was no doubt open to the District Judge in the case of Satcowri v. Secy. of State ILR 22 Cal 252, to take the course of sending the case back for further enquiry, he committed no error in point of law in deciding as he did on the evidences as it stood before him. Whether he was right or wrong in the decision to which he came, is not a question into which, one can enter in a second appeal. I may further mention that it is again unfortunate that the attention of the Court, to the decision in Tirtha Basi's case AIR 1917 Cal 573 : 23 Cal LJ 600 (supra) was not drawn, though both the learned Advocates of great eminence (Sir Rash Behari Ghosh and Babu Dwaraka Nath Chuckerburty) appeared on either side in this case (Manindra Nandy) as well as in the case of Tirtha Basi.

11. The decision of a Division Bench of the Patna High Court in case of Rambilakh Singh and Another Vs. The Chairman of Dinapur Nizamat Municipality, (2) relied on by Mr. Mitra, where it was held that a mere fact that the report is based upon an inconclusive material or upon an inspection indifferently performed does not impose an imperative duty upon Court to order a fresh inspection. Tirtha Basi's case AIR 1917 Cal 573: 23 Cal LJ 600 (supra) according to the said decision does not lay down the general principle that in a case where the Commissioner's report is not accepted, there must be a second enquiry but each case must be considered upon its own particular facts. Monohar Lal J., however, sitting singly held subsequently (of course negatively), in the case of Mt. Bibi Fatma Sogra Vs. S. Saider Hussain and Others, that the decision in the case of Tirtha Basi was inaccurate because the learned Judge preferred to follow the "accurate view" of the Division Bench, decision of his own Court (Patna) in the case of Rambilakh Singh and Another Vs. The Chairman of Dinapur Nizamat Municipality, . The learned Judge did not however give any reason for his said opinion. With respect I cannot persuade myself to agree . with the views of Monohar Lal J. The first

contention therefore of Mr. Mukherjee, neither being supported on the construction of the statute nor by the authorities, fails.

12. On the next point viz., that whether a report of the Commissioner can be rejected by a Court without examining him and giving him an opportunity to explain, the law seems to be reasonably clear that the Court has discretion to examine or not to examine the Commissioner and also to disallow the examination if there is no real ground for examining him. Under Sub-rule 2 of Rule 10 of Order 26 of the Code of Civil Procedure, which can be substantially compared with the last portion of the provisions of Section 180 of the CPC of 1859 and Section 393 of the Code of 1882, the Commissioner's Report is (a) only a piece of evidence on the points, (b) to which the commission refers and (c) the same is to form part of the record. It might be mentioned that under the Code of 1859 a commission had to be issued in the first instance, to an officer of the Court and only when there was no such officer, to any other suitable person. There is no such preference under the present Code.

13. In my judgment the report of the Commissioner is in no way binding on the Court. The parties or the Court may examine the Commissioner touching any of the matters referred to him or mentioning in his report but the Court does not abdicate its function to decide a fact in issue solely on the report of the Commissioner and in advance of or irrespective of any other relevant evidence bearing on the question. It is not precluded from examining the Commissioner at a later stage either suo motu or at the instance of any of the parties to the suit. A party to the suit is entitled to have the report, for what it is worth considered by the Court, before it reaches its conclusion. The Court on the other hand would be entitled to accept the facts stated by the Commissioner in his report and yet to disagree with his conclusion. Similarly the conclusion of the Commissioner might be agreed to by the Court without accepting the findings or reasons in the report. In other words, though the Court has full power and discretion to arrive at its own conclusions even at variance with the report, it would not be in my view altogether a bad practice to allow the Commissioner to explain his report and then to reject it, if necessary, in toto. The expression "may examine the Commissioner" in Sub-rule 2 of Rule 10 of Order 26 of the Code emphasises the Court's discretion and power.

14. Turning again to the precedents on the point, the Bench decision of this Court in the case of Sitaram Vs. Rama Prosad Ram and others is not an authority for the general proposition of law that examination of the Commissioner is necessary. It was a case for adjustment of accounts and the matter was referred to the Commissioner, He took evidence and ultimately submitted a report in favour of the plaintiffs. Defendants thereupon applied for the examination of the Commissioner. The trial Court rejected it on the ground that the defendants were not entitled to examine him as a witness. The District Judge in appeal made it a matter for an adverse comment against the plaintiffs that the Commissioner was not examined but overlooked the application of the defendants and its refusal by

the Court. In these circumstances, this Court held that an opportunity should have been afforded to the parties to clear up matters by the examination of the Commissioner which "may prove useful", and the order of rejection of the Commissioner's report was set aside. Mr. Mukherjee cannot call in aid the principle in the said case to the facts of the case in hand. Here, there was no application by either party for examination of the Commissioner and eventually there could not have been any refusal by the Courts below for such examination, which were the basis for the said reported decision.

15. In the Bench decision of *Jadavendra* AIR 1919 Cal 946 : 28 Cal LJ 203 (supra) no ear was lent to the complaint of the defendant-appellant that he wished to examine the Commissioner and that he was not allowed to do so. Rather, it was held that the Court "obviously has a discretion in a matter of this nature as to whether he should permit or refuse a party to examine the Commissioner" as there must be some real ground for such examination.

16. The decision of P. N. Mookerjee J. in *Gayanath v. Rampada* ILR (1953) Cal 234 is not an authority on the point. It lays down that the report, of the Commissioner submitted u/s 8(c) of the Court Fees Act is admissible as evidence in the suit without the examination of the Commissioner under Order 26, Rule 10(2) of the Code of Civil Procedure.

17. Lastly, the ordinary rule regarding the onus incumbent on the plaintiff, as sought to be argued by Mr. Mitra, has really no application to cases of this type. In my opinion a precise boundary with scientific accuracy is hardly to be expected in every case, substantial justice being all that is necessary for practical purposes. It is the duty of either party to aid the Court in ascertaining the true boundary. Were any other rule recognised, the result might be that some boundaries would remain incapable of judicial settlement for all times. I have not been put in possession of any better method of laying down the correct test in such cases.

18. No other point was urged.

19. For all these reasons it seems to me that the learned Subordinate Judge has applied sound principles of adjudication to the facts of the case. I am prepared to uphold the Subordinate Judge all the more confidently, because it was not put forward on behalf of the appellants that the injustice in this case is apparent. I have also been unable to discover any other evidence on the record or any circumstance which could bar the respondent from obtaining a decree of dismissal of the suit but as his learned Advocate had not as much to say in support of the judgment as the learned Advocate for the appellant, no order for costs is passed in his favour in this appeal.

20. The appeal is therefore dismissed without any order as to costs.