

(2015) 02 OHC CK 0056

In the Orissa High Court

Case No : Writ Petition (C) No. 11412 of 2008

Bijayial Mohanta and Others

APPELLANT

Vs

Khiramani Mohanta and Others

RESPONDENT

Date of Decision : 25-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9
Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (2015) 1 OLR 718

Hon'ble Judges : D. Dash, J

Bench : Single Bench

Advocate : N.M. Praharaj, J.P. Das, M.C. Behera and A.B. Parida, for the Appellant; Ananga Kumar Otta, Suryakanta Dash and Biswa Prakash Dhal, Advocates for the Respondent

Final Decision : Dismissed

Judgement

D. Dash, J.—This writ application has been filed challenging an order dated 4.8.2008 passed by the learned Civil Judge (Sr. Divn.), Karanjia in T.S. No. 21/2000 rejecting the petition filed by the petitioners/defendant Nos. 1(a) and (b) for deputation of a civil Court commissioner under the provision of Order 26, Rule 9 of the Code of Civil Procedure.

2. Opp. party No. 1 as the plaintiff filed the above noted suit for declaration of title, recovery of possession and permanent injunction in respect of the suit land appertaining to Plot No. 96/344 as per the record of the current settlement published in the year 1982-83 standing in the name of Suryamani Patnaik and his brothers. It is stated that the said land was purchased from one Bhikari Charan Behera by registered sale deed dated 5.6.1963. In the year 1987, wife of Suryamani Patnaik, the defendant No. 2 on her behalf and on behalf of minor daughters, defendant Nos. 3 and 4 sold land measuring Ac.0.019 decimal to the plaintiff. When defendant Nos. 1(a) and (b) claiming to have purchased the suit land created disturbance in the possession of the plaintiff, a proceeding under

Section 145 Cr.P.C. was initiated in which the possession of the defendant Nos. 1(a) and (b) has been declared. So, the suit has come to be filed claiming the above reliefs.

Defendant Nos. 1(a) and (b) claim that the suit land appertains to Sabik Plot No. 78 measuring Ac.0.36 decimal under Sabik Khata No. 106 and that said plot have been converted to six plots in current settlement being assigned with the different areas. According to their case, Plot No. 96/344 measuring Ac.0.04 decimal is an imaginary plot. They purchased the southern most portion of Sabik Plot No. 78 and location of Plot No. 96/344, according to them is a mistake and that is the purchased land of the plaintiff. So, they assert that the plaintiff has no right, title and interest over the suit land as described and claimed.

3. On an application filed by the plaintiff under Order 26, Rule 9 of the Code, Civil Court commissioner was appointed and he has given his report.

4. It may be stated here that the earlier report of the civil Court commissioner being received necessary objection to it was invited and these defendants had filed their objection. After examination of the Civil Court commissioner on 13.2.2008 and after hearing the parties, the Court by order dated 21.2.2008 accepted the report of the Commissioner and the suit got posted for hearing. The present move by the defendants for deputation of another Civil Court commissioner has arisen after the closure of the evidence by the parties when the suit was posted for argument. The defendants pointed out certain errors and anomalies in the earlier report by further stating that the said report was made after measurement by the civil Court commissioner behind their back. The Court below in view of above, has taken a view that the very purpose of filing the petition is to linger the litigation and the factum of acceptance of the earlier report of the civil Court commissioner having gone unchallenged, has been adversely viewed for favouring the further prayer of the defendants in that regard.

5. Heard the learned counsel for the parties.

Perused the petition filed by defendant Nos. 1(a) and (b) for deputation of the civil Court commissioner, the objection and also the order which has been called in question in the present writ application.

6. The provision of Order 26, Rule 9 of the Code confers a discretion on the Court. But the discretion, as it is well known, has to be exercised in a judicious and sound manner. What is necessary to note in the provision is the expression "deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute...." Therefore, where the Court considers a local investigation to be requisite and proper, ordinarily it should not decline to exercise the jurisdiction. However, it may decline to exercise said jurisdiction if the motion is made at a belated stage, or if the motion is mala fide or other circumstances justify refusal. A party has a choice and a right to examine a survey-knowing person after getting the identification or measurement privately

done by him. For examining such witness it does not seek any privilege or indulgence. Where the controversy between the parties is the area of the land or identification or location of an object or the land, local investigation is necessary, essential, requisite or proper, it will not be a sound exercise of discretion without anything more to decline to appoint a Commissioner. *Mahendranath Parida Vs. Purnananda Parida and Others*, AIR 1988 Ori 248 : (1987) 64 CLT 722 .

7. The object is not to collect evidence which can be taken in Court but to obtain evidence which from its peculiar nature can only be had on the spot. It is to elucidate a point which becomes doubtful on the evidence taken before the Court. Such investigation assists the Court.

8. Coming to the case in hand, on an application by the plaintiff, civil Court commissioner had already been deputed by the Court in exercise of the discretion under Order 29 Rule 9 of the Code. The report being objected to by the defendants, commissioner has been examined. Thereafter, the Court has accepted the report.

The settled position of law is that even when Commissioner's report is accepted after consideration the same has no better sanctity than any other evidence. Such evidence can be rebutted by the party. The Court can also consider the value of such report at the time of appreciating the evidence and in case it is not satisfied with the report, the Court may discard the same. It is also settled the law that the commissioner's report though accepted is not binding on the Court. It's neither final nor conclusive. Party can countermand the effect of the Commissioner's report and the formal acceptance of the same does not preclude the challenge at the trial. It's like any other evidence in the suit, for being considered along with other evidence on record.

9. At this juncture, it is felt the need to refer to few decisions of this Court which throw much light on the subject and which appears to have not at all been kept in mind while dealing with the petition by the Court below in specifically assigning the just and proper reasons for arriving at the conclusion in the matter and the order thus is not seen to have been passed being alive to the settled position of law.

In case of *Kunja Bihari Mohanty v. Kishore Chandra Jagadev Ray*: 73 (1992) CLT 187, the Division Bench of this Court has held on discussing of several decisions and the position of law that simply because a Commissioner's report is rejected, the Court is bound to go for appointment of a fresh commissioner and get a fresh report in every case. It would be fully within its jurisdiction after rejecting the Commissioner's report to decide the dispute on the residue evidence if it is so possible. But where the nature of dispute is such and the Court after rejecting the Commissioner's report is not in a position to decide the dispute on the residue evidence, then in such a case it will have to appoint a fresh commissioner for obtaining a fresh report.

In case of *Kangali Ch. Sahu and Others Vs. Duryodhan Sahu and Others*, (2001)

1 OLR 657 ; the trial Court after initial acceptance of the report, at the time of rendering judgment refused to place any reliance upon it and accordingly dismissed the plaintiff's suit on failure to prove that the disputed land was part of their other homestead land. So in that case this Court finding the main question to be the identity of the land held that it would be proper for deputation of a fresh Commissioner at the plaintiff's cost.

So, once the civil Court commissioner's report having been received and accepted, the Court may exercise the discretionary power in that matter, in case, it feels while appreciating the evidence in order to determine the real controversy between the parties that it was not so possible, the evidence being deficient and unsatisfactory leading to difficulty in so finding and that it is not so possible without assistance of the civil Court commissioner.

10. On going through the contents of the petition filed by the defendant Nos. 1(a) and (b) under Order 26, Rule 9 of the Code, it reveals the move for further deputation of civil Court commissioner that basically it's a challenge to the earlier report of the civil Court commissioner conched with the words little differently in attempting to give it a different colour and flavour. The propose is to negate its effect. These defendants have never disputed in the written statement regarding the total area under Hal Plot No. 96 and 96/344. Therefore, now the contention to measure the plot to find out the area along with area of Plot No. 96/344 when those have already been measured and reported appears to be only for the purpose of further collecting rebuttal evidence through deputation of civil Court commissioner again. The move is also at a belated stage after closure of the evidence from both sides when the suit was posted for argument. The reasons given in the order as such are not acceptable when it is found that the Court below has not gone to discuss the facts and circumstances properly in testing those in the light of the settled position of law. Be that as it may, the contention of the defendant Nos. 1(a) and (b) for the purpose of deputation of civil Court commissioner, that is the grounds projected for the purpose and the stage at which it has been moved when tested in the touch stone of the settled position of law holding the field, this Court finds no such error of law apparent on the face of the ultimate result of the order impugned so as to interfere with it.

11. In the result, the writ application stands dismissed.

Cost assessed at Rs. 2000/- (Rupees two thousand only) be paid by the petitioners to the opp. party No. 1.

12. Considering the fact that the suit is of the year 2000, this Court directs the trial Court to dispose of the same within a period of three months with effect from 20.3.2015 when the parties are directed to appear in the Court below to receive further instructions.