
(1986) 05 OHC CK 0015
In the Orissa High Court
Case No : Civil Revision No. 461 of 1983

Chaitan Das

APPELLANT

Vs

Smt. Purnabasi Pattnayak and Others

RESPONDENT

Date of Decision : 13-05-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 18, 115

Citation : AIR 1988 Ori 52 : (1987) 63 CLT 680 : (1986) 2 OLR 69

Hon'ble Judges : K.P. Mohapatra, J

Bench : Single Bench

Advocate : Shyam Mohapatra, for the Appellant; S. Misra, No. 2, for the Respondent

Final Decision : Allowed

Judgement

K.P. Mohapatra, J.—This revision is directed against the order passed by the learned Munsif, Anandapur, accepting the report of the survey knowing commissioner.

2. Opposite party No. 1 is the plaintiff and the petitioner is defendant No. 1 in Title Suit No. 49 of 1981-1 of the court of Munsif, Anandapur. The suit is for declaration of title and confirmation of possession in respect of the schedule "Ka" property of the plaint, existence of right of easement over the schedule "Kha" property thereof and for other reliefs. The petitioner is the main contestant of the suit. On 18-2-1982 opposite party No. 1 filed a petition for appointment of a pleader commissioner for local investigation. In his counter dated 26-2-1982 the petitioner submitted that a survey knowing commissioner should be deputed for local investigation. After hearing both parties, the learned Munsif, by order dated 23-3-1982 directed appointment of a survey knowing commissioner for local investigation under the provisions of Order 26, Rule 9 of the Civil P.C. ("Code" for short). Accordingly, a survey knowing commissioner was appointed and after local investigation, the commissioner (examined in court as C.W. 1) submitted his report (Ext. III) and map (Ext. IV) on 4-7-1982. The petitioner filed objection

to the report and map and inter alia stated therein that in his absence and being influenced by opposite party No. 1, the commissioner had submitted his report in support of the latter. Therefore, the report and map should be rejected. The survey knowing commissioner (C.W. 1) was examined in court. He stated that he visited the suit property for making local investigation on 4-7-1982. Both the parties were served with notices. The petitioner refused to accept the notice. The learned Munsif, after consideration of the evidence, accepted the report of the commissioner by the impugned order.

3. Mr. Shyam Mohapatra, learned counsel appearing for the petitioner, urged that as a matter of fact the commissioner neither offered nor served notice on the petitioner before proceeding to the suit property for the purpose of local investigation. Therefore, for violation of the principle of natural justice inherent in Order 26, Rule 18 of the Code, which is mandatory in nature, the report of the commissioner is liable for rejection.

Mr. S. Misra-2, learned counsel appearing for opposite party No. 1, on the other hand, contended that the petitioner had due notice. Even if he had no notice, he would not in any way be prejudiced in his defence of the suit because of acceptance of the report of the commissioner as he may have opportunity of taking out a survey knowing commissioner of his choice for local investigation and examine him during the trial of the suit. Further, the order of acceptance of the report of the survey knowing commissioner being not a ease decided, a revision is not maintainable in terms of Section 115 of the Code.

The contentions made by the learned counsel require careful examination.

4. Rule 9 of Order 26 empowers a court to depute a civil court commissioner for local investigation in a suit if he deems it requisite or proper for the purpose of elucidating any matter in dispute. Rule 18(1) of Order 26, which is relevant for the purpose of discussion is quoted below for easy reference :--

"Where a commission is issued under this Order, the court shall direct that the parties to the suit shall appear before the commissioner in person or by their agents or pleaders."

This rule has been interpreted in several decisions of different High Courts. In (Modalvalasam) Latchan Naidu and Another Vs. Rama Krishna Ranga Rao Bahadur Bobbili Samasthanam, , Cornish, J. held that Rule 38 is mandatory, and is intended to ensure that the parties have notice of the appointment of the commissioner and that they must attend his investigation. In S KUPPUSWAMI Vs. COMMISSIONER OF Income Tax, MADRAS. OCTOBER 20, 1953., , Ramaswami, J. held that Rule 18 of Order 26 enjoins upon the court at the time the commission is issued to direct that the parties to the suit shall appear before the commissioner in person or by their agents or pleaders. In Mahant Narayana Dossjee Varu Vs. The Board of Trustees, the Tirumalai Tirupati Devasthanamas, Tirupathi, , The Tirumalai Tirupati Devasthanamas, K. Subba Rao, C.J. speaking for the court held that the information gathered by the commissioner behind the

back of the parties is not evidence in the case. In *Labanya Debi and Others Vs. Govinda Malik and Others*, J. held that according to Rule 18 of Order 26, all the parties must be given individually an opportunity to make representation of their respective cases by issuing notices to them. In *Pedda Seetharamappa and Others Vs. Pedda Appaiah*, Manohar Pershad, J. held that it is mandatory by reason of Order 26, Rule 18 on the court after issue of the commission to direct the parties to appear before the commissioner. He went to the extent of observing that notice issued by the commissioner is not sufficient compliance with Rule 18 and where local investigation is made behind the back of the defendant, no reliance can be placed on the report given by the commissioner. In (Takhat) *Sri Harimandirji Saheb Vs. Land Acquisition Officer and Others*, Anant Singh, J. went to the extent of holding that where the court has not directed the parties to appear before the commissioner, any notice by the commissioner himself to the defendant would not validate the appointment of the commissioner. The order of the court appointing a commissioner without notice to the defendant is obviously without jurisdiction. In *Maroli Achuthan Vs. Kunhipathumma*, a Division Bench held that the presence of parties is imperative under Order 26, Rule 18. Hence there must be a direction by the court of which notice has to be given to the parties or, at least the commissioner should issue notice to the parties calling upon them to appear for investigation. In *Jamil Ahmed Taban and Others Vs. Khair-Ul-Nisa and Others*, a Division Bench observed that in case of non-compliance of mandatory provisions of Rule 18 of Order 26, the appointment of the local commissioner is without jurisdiction and the report resulting from his inspection cannot be read as evidence. In *Suraj Pal and Others Vs. Smt. Meera alias Merhia and Others*, an identical view was taken and it was held that even if the court does not give notice to the parties in terms of Rule 18 of Order 26, if the commissioner issues notice to them, it would be deemed to be sufficient compliance. In view of the principle enunciated in these decisions, law is well settled that Rule 18 of Order 26 is mandatory. It is the duty of the court to direct that the parties to the suit shall appear before the survey knowing commissioner in person or by their agents or pleaders at the time of local investigation. In the absence of notice by the court, notice issued by the commissioner to the parties shall be deemed to be sufficient compliance. If no notice is served on any of the parties to the suit to appear before the survey knowing commissioner at the time of local investigation, the result of such local investigation, namely, the report and the map, cannot be accepted as evidence.

5. It is now to consider if in the present case there was compliance of Rule 18 of Order 26. Manifestly, the court did not direct the parties to the suit to appear before the survey knowing commissioner on the date of local investigation. The notice given by the survey knowing commissioner is Ext. II. He has written the names of all the parties to the suit therein. But it appears from it that notice was served only on opposite party No. 1. There is no mention in Ext. II that notice was served on the petitioner, nor is there any endorsement to the effect that he had refused to accept the notice. As a matter of fact, when the survey knowing

commissioner was appointed at the instance of the petitioner, there was no reason why he should have kept himself away despite service of notice on him. In view of this clinching piece of evidence, the development made by the commissioner (C.W. 1) while giving evidence in court that he offered the notice, but the petitioner refused to accept the same cannot be accepted as true. I am, therefore, convinced that the survey knowing commissioner did not serve notice on the petitioner before proceeding to the suit property for the purpose of making local investigation and so his report and map prepared behind his back cannot be accepted as evidence.

6. Mr. Section Misra-2 cited a decision reported in Ramgulam Choudhary and Others Vs. Nawin Choudhary and Others, , in which it was held that an order confirming or setting aside a pleader commissioner's report and ordering fresh investigation may not be a "case decided" within the meaning of the expression "case decided" in Section 115 of the Code. It is to be pointed out that the case related to allowing the plaintiff to adduce further evidence after defendant No. 1 has closed his case. In that context, the learned single Judge had examined as to whether it was a case decided and while doing so by way of obiter, he gave some illustrations of purely interlocutory orders which are not covered by the expression "case decided" within the meaning of Section 115. This obiter dictum cannot be accepted as a precedent in this case. On the other hand, if the impugned order is allowed to stand, there shall be violation of the principle of natural justice apart from non-compliance of the provisions of Order 26, Rule 18 and so there shall be gross miscarriage of justice calling for interference in exercise of powers u/s 115 of the Code, as has been decided in Doshei Dei and Others Vs. Rama Routa and Others, . In this view of the matter, the contention of Mr. S. Misra-2 that no prejudice will be caused to the petitioner for acceptance of the report of The commissioner is thoroughly untenable.

7. For the reasons stated above, the impugned order passed by the learned Munsif cannot be supported according to law, which is vacated. The report and map of the survey knowing commissioner are set aside. The learned Munsif shall be free to re-issue the commission, either to the same commissioner or to any other commissioner, after hearing the parties, who are directed to appear before the learned Munsif on 16-5-1986 for directions. The civil revision is accordingly allowed. Parties shall bear their own costs.

The L.C.R. be sent back at once.