

(2007) 04 PAT CK 0137

In the Patna High Court

Case No : C.R. No's. 1125 of 2006 and 2099 of 2005

Jagdish Bhagat and Others

APPELLANT

Vs

Sri Baijnath Rai and Others

RESPONDENT

Date of Decision : 30-04-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10, Order 26 Rule 13, Order 26 Rule 14, Order 26 Rule 18, Order 26 Rule 9

Citation : (2007) 3 PLJR 719

Hon'ble Judges : Ramesh Kr. Datta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ramesh Kr. Datta, J.—I.A. No. 2749 of 2006 has been filed in Civil Revision No. 1125 of 2006 for condoning the delay of about 9 months for filing the revision application. It is submitted on behalf of the petitioners that earlier an order dated 28.7.2005 was passed by the learned Subordinate Judge-11, Patna in Title suit No. 295 of 1994, in which it was held that the objection of the plaintiff-petitioners for setting aside the report of the Pleader Commissioner is not fit to be accepted. It is submitted that the petitioners were not correctly advised in the matter and instead of immediately challenging the said order by filing revision application before this Court, the petitioners preferred an application before the court below seeking a review of the order dated 28.7.2005, which was rejected by order dated 7.9.2005 and against the same, the petitioners filed Civil Revision No. 2099 of 2005 before this Court within time.

2. However, after hearing of the said matter at the admission stage itself it came to the knowledge of the counsel that the main order having not been challenged, it will not be appropriate to set aside the order passed in rejecting the review application by the court below.

3. In the said circumstances, belatedly the Civil Revision No. 1125 of 2006 has been filed challenging the earlier order dated 28.7.2005.

4. In view of the aforesaid facts and circumstances, this Court considers that it is a fit case for condonation of delay in filing the Civil Revision No. 1125 of 2006.

5. I.A. No. 2749 of 2006 is, accordingly, allowed.

6. Since both the revision applications arise out of the common issues, hence, with the consent of the parties they have been heard together and are being disposed of by this common order.

7. The short facts relevant to the decision of the present matter are that at the instance of the plaintiff-petitioners, a Pleader Commissioner was appointed by the learned trial court by order dated 17.12.1998. The Pleader Commissioner submitted his report on 15.1.2004 to which the plaintiffs filed their objection on 10.2.2004. Thereafter, the said Advocate Commissioner was examined and his evidence was closed on 10.11.2004. Subsequently, the plaintiffs also closed their evidence on 24.11.2004 and the defendants closed their evidence on 11.1.2005. The objection to the report of the Advocate Commissioner was heard in which the point taken by the other side was that the said objection petition was not maintainable, since the suit was of the year 1994 and evidence of both the parties had also been closed and the matter was pending for argument. It was alleged that the plaintiffs somehow or the other wanted to keep the matter pending. It was further stand of the opposite parties that the evidence of the Advocate Commissioner is over and his report has also been marked as Ext. N. At the time of final hearing, the report of the Advocate Commissioner can be considered by the court. For the said reasons, it was submitted that the objection petition of the plaintiff-petitioners to set aside the report of the Pleader Commissioner is not fit to be accepted and their objection petition should be dismissed for those reasons.

8. On a consideration of the aforesaid arguments of both the sides, the court accepted the submissions made on behalf of the defendant-opposite parties and came to the conclusion that the objection petition of these petitioners for setting aside the report of the Advocate Commissioner is not fit to be accepted and at the time of final hearing of the suit, the report of the Pleader Commissioner can be considered. The objection petition was, accordingly, disposed of giving liberty to the Learned Counsel for the plaintiffs to refer the report of the Pleader Commissioner at the time of final arguments. Against the said order, the petitioners earlier filed an application for review on 16.8.2005 under Order 47 Rule 1 and Sections 114 and 151 of the Code of Civil Procedure. A rejoinder was filed by the defendant- opposite parties to the said review application in which apart from other objections, the stand taken was that by the earlier order dated 28.7.2005, the objection petition of the plaintiffs has been disposed of and it has neither been accepted nor rejected and thus, there was no occasion to review the same and it would be open for the plaintiffs to raise issues at the time of final argument.

9. By the impugned order dated 7.9.2005, the application for review was

rejected on the ground that no new matter has been brought to light for review of the earlier order.

10. Learned Counsel for the petitioners submits that once the court has exercised its discretion and appointed the Survey knowing Pleader Commissioner to submit his report after making local investigation then it is the duty of the court either to confirm the report on being satisfied or to set aside the same if it is dissatisfied. It is submitted that the court cannot postpone the matter for a future date for final argument. It is further submitted by Learned Counsel that once an objection is raised against a report of the Pleader Commissioner, then the court must exercise its discretion and if being satisfied no order is required to be passed but if it is dissatisfied with the report then it has to direct making of further enquiry of the matter and to appoint further Pleader Commissioner as laid down by the full Bench of this Court.

11. In this regard, Learned Counsel for the petitioners relies upon a Full Bench decision of this Court in the case of Asifunisa and Another Vs. Ali Imam in paragraph Nos. 95 and 96 of which it has been held as follows:

"95. It cannot, therefore, in my opinion, be said that in no circumstances, the court will have no right to set aside the report.

In this situation in my opinion, the court has not only has the requisite jurisdiction but also a duty to set aside such a report and direct a local inspection be made by another Pleader Commissioner.

96. Some such instances, which may be considered at this stage are:

(a) Violation of the provisions of Order 26 Rule 18 of the Code (see Mandera Mukherjee Vs. Sachindra Chandra Mukherjee and Others, ; (b) where an inspection is made behind the back of the parties as for example giving notice to the parties to make an inspection on a particular date, but holding inspection on another date; (c) when a clandestine inspection was made at the behest of the one of the parties; (d) where only one of the parties could project his view points and the contentions of the other parties were totally ignored; (e) where the report of the Commissioner is violative of the directions of the court and (f) where it is destructive of the purpose and object for which a commission was issued."

12. In view of the aforesaid decision, it is submitted by Learned Counsel for the petitioners that the objection petition of the petitioners ought to have been considered and the Court below should have either confirmed or set aside the report of the Pleader Commissioner and not left the matter to be considered at the stage of final argument as has been done by the impugned order.

13. Learned Counsel for opposite party Nos. 1 to 6, who have appeared and are the only contesting opposite parties, on the other hand, submits that the impugned order 28.7.2005 is, as a matter of fact, the rejection of the objection petition filed by the plaintiff-petitioners. He further submits that after rejecting

the objection petition, the court below has clearly stated that it will consider the arguments on merits of the report at the time of final argument and judgment. For the said reasons, it is submitted that the court once having exercised its jurisdiction by rejecting the objection petition on behalf of the plaintiff-petitioners it is not open to the petitioners to pursue the matter further for the purpose of appointment of a fresh Pleader Commissioner.

14. Learned Counsel for the opposite parties also refers to the conduct of the petitioners during the course of trial to show that from an early stage, the petitioners for one reason or the other have tried to delay the matter so that the trial is not concluded.

15. On a consideration of the rival submissions of the parties and further on a comparative analysis of the provisions of Order 26 Rules 9 and 10 of the CPC appertaining to commission for local investigation with those of Order 26 Rules 13 and 14 appertaining to Commission to make partition of immovable property, this Court is of the view that these two types of commissions stand clearly on different footings. So far as commission to make partition is concerned, it is incumbent upon the court to either confirm or set aside the report or reports that have been filed by the Pleader Commissioner for carving out separate share of the parties. If the same is confirmed on merit then, as a matter of course, the final decree is prepared in the partition suit in terms of such report of the Pleader Commissioner as confirmed on merit by the court below.

16. So far as the commission for local investigation is concerned, there can be hardly any doubt that the report submitted by such commission can only be treated to be an evidence in the suit and it does not stand on the same footing as a report of the Pleader Commissioner in a partition suit. However, an important right has been conferred upon any of the parties to raise objections to the report of the Pleader Commissioner and also with the permission of the court, to examine the Commissioner personally in open court touching any of the matters referred to him or mentioned in his report, or as to his report or as to the manner in which he has made the investigation. It has further clearly been provided in Order 26 Rule 10 sub rule (3) that where the court is, for any reason, dissatisfied with the proceedings of the Commissioner it may direct further such enquiry to be made as it shall think fit. The said provision has been interpreted by the Full Bench of this Court as conferring a definite authority upon the trial court to either accept the report of the Pleader Commissioner or even to set it aside. It has further been held in the Full Bench decision cited above that once the court rejects the report of the Pleader Commissioner then it has the power to appoint a second Commission and not only that it has such jurisdiction, but it has the duty to set aside such a report and direct a local inspection to be made by another Pleader Commissioner.

17. In the present matter, it is evident that immediately after the report of the Advocate Commissioner was submitted in the court below, objection thereto had been filed by the plaintiff-petitioners.

18. From a consideration of the impugned order dated 28.7.2005, and the impugned order on review dated 7.9.2005, it is evident that neither any opposition to the objection petition had been made nor the same was considered by the court below on the merits. It was said by the defendant-opposite parties in the court below that the objection petition was not maintainable, since any argument with respect to the report of the Pleader Commissioner can be made at the stage of final hearing of the arguments. The court below has also accepted those submissions and on those grounds themselves the application to set aside the report of the Pleader Commissioner has been held as not fit to be accepted, it has not dealt with the objection raised by the plaintiff-petitioners on its own merit and rejected the same. There can be hardly any doubt that the court below should have exercised its jurisdiction by considering the objections of the petitioners on merit and taken further action if, for any reason, it was dissatisfied with the report of the Pleader Commissioner.

19. In my view, once an objection petition to the report of the Pleader Commissioner is filed then it is the duty of the court to consider the same and come to its own conclusion. Although it does not amount to the same thing as confirming or setting aside the report as in the case of the Pleader Commissioner appointed for making partition, but certainly, either party has a right to challenge the report of the Pleader Commissioner not only factually, but also the manner in which the report has been prepared. Once such an objection is raised, it is incumbent upon the court to consider the same on merit and either to accept or reject the same. which has not been done by the court below. To this extent at least, the arguments of the Learned Counsel for the petitioners must be accepted, although no such confirmation or rejection of the report per se is required in a matter under Order 26 Rule 10 as with respect to the Commission to make partition provided under Order 26 Rule 13 and 14 of the Code. For the aforesaid reasons, both the revision applications are allowed, the orders dated 28.7.2005 and 7.9.2005 of the learned Subordinate Judge are set aside and the matter is remanded to the court below to consider the objections raised by the petitioners with respect to the report of the Advocate Commissioner in accordance with law. Since the matter arises out of an old title suit, therefore, the court below is directed to dispose of the objection petition of the plaintiff-petitioners within a period of two months from today.