

(2016) 08 MAN CK 0003

In the Manipur High Court

Case No : CRP (C.R.P. Article 227) No. 5 of 2016

Shri Kangjam Jayanta Singh

APPELLANT

Vs

Lisham Anilkumar Singh

RESPONDENT

Date of Decision : 26-08-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10

Citation : (2017) AIR(Manipur) 10 : (2017) 1 CivCC 738

Hon'ble Judges : Mr. S. Serto, J.

Bench : Single Bench

Final Decision : Disposed Off

Judgement

Mr. S. Serto, J. - This is a petition filed under Article 227 of the Constitution of India praying for :

(i) setting aside the impugned order dated 04.01.2016 of the learned Civil Judge (Sr. Divn.), Imphal East passed in Judicial Misc. Case No. 279 of 2015 (Ref.: Judicial Misc. Case No. 229 of 2014 & Original Suit No. 5 of 2014),

(ii) praying for an order of superintendence directing the Learned Civil Judge to comply with the provision of Article 141 of the Constitution of India by exercising its jurisdiction in passing Judicial orders,

(iii) and praying for any appropriate order or direction which this Court may deem fit and appropriate in the facts and circumstances of the case to meet the ends of justice.

2. The petitioner in this case filed an Original Suit in the Court of Learned Civil Judge(Sr. Divn.), Imphal East, praying for an injunction to restrain the defendants (respondents in this case) from interfering with the construction of compound wall between his land and the land of the defendants/respondents and also to restrain the defendants/respondents from entering and disturbing his peaceful possession and enjoyment of his Pattaland being No. 55(Old)/166

(New), measuring 0.22 acres, under C.S. Dag No. 240 of village No. 29, at Top Naoriya, Sub-Division Porompat, Imphal East District. The respondents/defendants also filed a written statement coupled with counter claim.

3. While the case was under trial, the petitioner/plaintiff filed a misc. application praying for appointment of a Commissioner for conducting local investigation over the disputed land under Order 26, Rule 9 . The same was registered as Judicial Misc. Case No. 229 of 2014. While this misc. case was pending, the respondents/defendants also filed another application praying for the same. The application of the respondents/defendants was registered as Judicial Misc. Case No. 288 of 2014. The Learned Civil Judge, (Sr. Divn.) disposed both the petitions by a common order passed on 15.11.2014 by which the learned Judge appointed a Commissioner and laid down the terms of reference. The terms of reference laid down are as follows :

- (1) The actual map and field measurement of C.S. Dag No. 240 and 241;
- (2) To ascertain the straight boundary line between C.S. Dag No. 240 and 241 as per the Map;
- (3) To ascertain whether any area of the Plaintiff's land bearing C.S. Dag No. 240 has been encroached by southern neighbour Defendant No. 1 to 4 and if so, the area and dimension;
- (4) To ascertain the entire length of the C.S. Dag No. 241 which directly adjoins the southern side approach road;
- (5) To ascertain whether there is any probability of an approached road which seemed to have been used by the Defendants in any period of time located between the north eastern side of the defendant No. 1 to 3 and eastern side of the plaintiff's homestead land, opening/leading to the main road i.e. Lisham Road.
- (6) Any other fact relating to the dispute which needs to be ascertained by the Local Commissioner."

Thereafter, the Commissioner appointed by the said order inspected the disputed land and submitted his report.

4. After the report was submitted, both the petitioner/plaintiff and the respondents/defendants submitted an application each praying for permission to cross-examine the Commissioner. The application of the petitioner which was registered as Judicial Misc. Case No. 86 of 2015 was disposed on 12.06.2015, allowing the prayer to cross-examine the Commissioner. Accordingly, the petitioner cross-examined the Commissioner on 30.06.2015 and on 17.10.2015. While the same was still going on, the petitioner filed another application on 16.11.2015 under Order 26, Rule 10 (3) read with Section 151 of CPC 1908 praying for setting aside the report of the local Commissioner on the grounds briefly stated as follows :

- (i) That, the entire terms of reference laid down by the learned Civil Judge have not been answered by the Commissioner in his report;
- (ii) That, the map of the disputed land has been recorded contrary to official Vendyte Map dimension;
- (iii) That, the Commissioner has not submitted the photograph taken at the site deliberately which shows his biasness;
- (iv) That, the Commissioner gave wrong finding in the Terms of Reference No. 1 which is against the official Vendyte Map filed by both the parties;
- (v) That, no finding has been given in respect of the Terms of Reference No. 2 and terms of Reference No. 4.

After hearing the parties in this Judl. Misc. Case stated above, the learned Civil Judge passed the impugned order, the relevant portion of which states as follows :

"The Commissioner is to ascertain the following points as terms of reference :

- i. The actual map and field measurement of C.S.Dag No. 240 and 241;
- ii. To ascertain the straight boundary line between C.S. Dag No. 240 and 241 as per the map;
- iii. To ascertain whether any area of plaintiff's land bearing C.S. Dag No. 240 has been encroached by southern neighbor defendant No. 1 to 4 and if so, the area and dimension;
- iv. To ascertain the entire length of C.S. Dag No. 241 which directly adjoins the southern side approach road;
- v. To ascertain whether there is any probability of an approached road which seemed to have been used by the defendants in any point of time located between the north eastern side of the homestead land of the defendant No. 1 to 3 and eastern side of the plaintiff's homestead land, opening/leading to the main road i.e. Lisham road;

3. On the basis of the above terms of reference, the Id. Advocate Commissioner had conducted commission and had submitted a written report before the court on 11.05.2015. After that the petitioners also have filed an application under Order 26, Rule 10 (2) r/w section 151 CPC praying for permission to examine the Commissioner personally in open Court touching upon matters referred to him. The same application has been registered as J.M. Case No. 86 of 2015 and the matter was heard on 12.06.2015 and the petitioners were allowed to cross-examine the Commissioner. The Advocate Commissioner was examined by the Court and the Id. Counsel of the petitioners on 30.06.2015 & 07.10.2015 and not yet completed. At this stage, the petitioners filed the present application for setting aside the commission report so stated above by giving various reasons.

The O.Ps. 1 to 4 also have filed application under Order 26, Rule 10 (2) read with section 151 CPC praying for allowing them to examine the Commissioner. This matter is highly objected by the petitioner and still pending before the court for disposal.

4. It is pertinent to mention here that the proceeding of the Original Suit has been kept abeyance by passing orders dated 14.01.2015 as follows :

"Plaintiff by Id. Counsel present Id., Counsel for the defendants 1 to 5 is also present. Put up after the disposed of J.M. Case No. 229 of 2014."

4. It is true that the commission report and depositions to be evidence in suit under Order 26, Rule 10 (2) CPC and the at the same time, the Court has ample power to take the commission report as part of the record or not after considering the nature of the commission and also after examination of the commissioner. By the by, the scope of Order 26, Rule 9 CPC by may be considered. The Court cannot prevent a party from adducing the best evidence, if such evidence can be gathered with the help of the Commissioner. Refusal of the request of the party to appoint a Commissioner under Order 26, Rule 9 CPC to make a local investigation in an appropriate case amounts to failure to exercise of jurisdiction vested in it. Since the court has ample power to accept the commission report as part of the record and also to be evidence in the suit and at the same time the court also cannot accept the report of the Commissioner and also can issue commission afresh.

In Harihor Misra v. Narhari Setti, Sitaramaiah reported in AIR 1966 Orissa 121, it is observed that "Rule 10 Order 26 does not make the report of the Commissioner as concluding the question of valuation. On the contrary, the rule gives clear indication that the report of the Commissioner is only of the pieces of evidence amongst other evidence to be led by the parties for determination of the issues on valuation of the suit. When the parties file no objection to the Commissioner's report, the Court rightly accepts the report. Its acceptance by itself does not, however, mean that parties are precluded from challenging the evidence of the Commissioner and the witnesses examined by him or by giving any other evidence to countermand the effect of the Commissioner's report" (underlined is mine).

Again in Laltoomani Mohanty v. First Addl. District Judge, Cuttack reported in AIR 1967 Orissa 41 at page 142, it is also observed that the evidentiary value of the report would be judged by the Court while evaluating the entire evidence on record.

5. As above, the Commission report contains elaborate in various aspects arising out of the commission conducted by him. As discussed above, the report of the commissioner is a pieces of evidence and the evidentiary value of the report would be judged by the court while evaluating the entire evidence on record. In other words, the commission report, even if taken as a pieces of evidence or form part of the record, can not rely upon conclusively. Hence, in my view,

whether the present commission report shall form part of the record or not to be accepted due to want of proper investigation, is to be decided in future after closure of the oral evidences of both the parties in the main suit simply because there are other issues to be proved by the parties as per their pleadings such as including whether the defendants have egress and ingress of an approach road as alleged in the written statement as well as whether the defendants encroached some portion of the land into the land of the plaintiff/petitioner. Only when these issues are proved by the parties, the pieces of evidence found in the commission report, shall help the parties while deciding the real controversies between the parties.

In the result, the prayer made by the petitioner and the O.Ps. shall be kept in abeyance till both the parties led their oral evidences in the trial and the same shall be re-opened at the time of final hearing of the suit for the reasons given above.

Put up this matter after closure of oral evidences of both the parties in the main suit J.M. Case No. 229 of 14 & 161 of 2015 shall re-open with the present J.M. Case.

Announced in the Open Court."

5. The petitioner not being satisfied with the above order of the learned Civil Judge(Sr. Divn.) has come to this High Court for setting aside the same on the grounds given here below :

(i) That, the learned Civil Judge, Senior Division, Imphal East, has erred in law and facts in passing the impugned order dated 04.01.2016, keeping in abeyance the application filed by the petitioner to set aside the report of the Commissioner dated 11.05.2015 in arbitrary manner and with material irregularity.

(ii) That, the learned Civil Judge committed grave procedural error in passing the said error.

(iii) That, the learned Civil Judge erred in law by not disposing the application of the petitioner seeking for setting aside the report of the Commissioner despite the fact that the Commissioner has failed to record his findings on the 6 (six) terms of reference laid down by the Court.

(iv) That, the learned Civil Judge has failed to ensure compliance of the order passed by his predecessor, who laid down 6 (six) terms of reference for the Commissioner to investigate and give his findings.

(v) That, the learned Civil Judge committed error in passing the impugned order as he failed to appoint second Commissioner to investigate on the terms of reference framed or laid down by the Court, even though the Commissioner himself has admitted in his cross examination that he has not answered to all the terms of reference.

(vi) That, the learned Civil Judge violated the principle of natural justice by not

giving heed to the plea of the petitioner that the Commissioner's report has not given answer to all the terms of reference.

(vii) That, the learned Civil Judge failed to exercise his jurisdiction to appoint second Commissioner to carry out in full the order passed in Judicial Misc. Case No. 229 of 2014 by which the Commissioner was appointed to investigate on 6 (six) terms of reference.

(viii) That, the learned Civil Judge (Sr. Divn.) failed to exercise his jurisdiction by not deciding on the objections raised by the petitioner that the report of the Commissioner is deficient or defective.

(ix) That, in cases where boundary dispute is the subject matter in issue, a commission is usually issued to ascertain the factual position on the ground as per the claims of the parties in dispute. Likewise in the Original Suit before the learned Civil Judge also, a commission was issued for that purpose. Therefore, the learned Civil Judge by not ensuring the factual finding by the Commissioner has failed to exercise his jurisdiction and also defeated the purpose for which the commission was issued.

(x) That, the learned Civil Judge, (Sr. Divn.) failed to exercise his jurisdiction under Sub-Rule 3 of Rule 10 Order 26 of the CPC by not considering whether the report of the Commissioner is satisfactory or not and as to whether there is necessity to issue a fresh commission or not.

6. Heard the learned counsel for the petitioner and also heard the learned counsel for the respondents.

At the very outset, it is submitted by the learned counsel for the petitioner that before the learned Civil Judge, it was submitted by both the petitioner and respondents that the Commissioner's report is not complete as it has not answered all the terms of reference laid down by the learned Civil Judge (Sr. Divn.) for the investigation of the Commissioner. Therefore, the petitioner prayed before the Id Civil Judge (Sr. Divn.) in the Judicial Misc. Case No. 279 of 2015 to consider the report and set it aside so that a new Commissioner can be appointed to investigate on the terms of reference laid down by the Court. The learned counsel drew my attention to para No. 3 of the application of the respondents filed before the learned Civil Judge which was registered as Judl. Misc. Case No. 261 of 2015 (annexed to the writ petition as Annexure, P/18) to show that the respondents indeed submitted as stated by him. In para No.3 of the said application, it is stated as follows :

"That, report of a local investigation conducted on 8-2-2015 has been filed by the local commissioner before this Hon'ble Court. On perusing the said report furnished to the Defendants, it has been discovered that the report filed was an incomplete regarding points/terms of reference, complete report of local investigation conducted at field has not been disclosed."

(The said petition was filed by the respondents/defendants to allow them to cross-

examine the Commissioner).

The learned counsel submitted further that since both the parties have found the Commissioner's report not complete, the learned Civil Judge ought to have considered the same and reject it and issue a fresh commission for doing the needful. But the learned Civil Judge failed to exercise his jurisdiction by not disposing the application submitted by the petitioner praying for rejecting the Commissioner's report, therefore, this Court under Article 227 has the power and jurisdiction to set aside the impugned order and direct the learned Civil Judge to exercise his jurisdiction and dispose the application filed by the petitioner which was registered as Judicial Misc. Case No.279 of 2015. The learned counsel also submitted that the learned Civil Judge is empowered under Order 26, Rule 10 (3) of CPC to appoint another Commissioner to investigate on the terms of reference laid down by the Court in case he find the Commissioner's report wanting and not acceptable but instead kept the matter pending by his order which is impugned here in this case. Therefore, the learned Civil Judge has failed to exercise his jurisdiction conferred by the Code, as such, this High Court, for the ends of justice may exercise the power under Art 227 of the Constitution of India and set aside the impugned order and direct the learned Civil Judge to appoint a new Commissioner to investigate afresh on the terms of reference laid down by the court. In support of his contention, learned counsel cited the judgment of Hon"ble Supreme Court as reported in (2015) 5 SCC 423. The relevant para no. 24 cited by the learned counsel is given here below :

"24. The difference between Articles 226 and 227 of the Constitution was well brought out in *Umaji Keshao Meshram v. Radhikari*. Proceedings under Article 226 are in exercise of the original jurisdiction of the High Court while proceedings under Article 227 of the Constitution are not original but only supervisory. Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915 excepting that the power of superintendence has been extended by this article to tribunals as well. Though the power is akin to that of an ordinary court of appeal, yet the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunals within the bonds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction."

7. On the other hand, the learned counsel appearing for the respondents submitted that the learned Civil Judge has not passed any conclusive order as he had kept the disposal of the Judl. Misc. Case in abeyance, therefore the revision would not lie against the impugned order.

In support of his submission, learned counsel cited the judgment of Andhra

Pradesh High Court passed in Golikota Reddy v. Goli Raja Gopala Reddy and Others in Civil Revn. Petn. No. 1602 of 2000. The relevant portion of the judgment is at para No. 4 which reads as follows :

"4. I have heard the learned counsel for the parties at length. I agree with the learned counsel for the respondent that passing an order in the context in which it had been passed and by which the earlier order has been kept in abeyance does not decide any issue between the parties and hence it would not amount to a case decided, therefore, the revision was not competent. The Executing Court has merely postponed the consideration of the issue so that it hears both the parties and decides the matter."

8. A commission is issued by Civil Courts under Order 26, Rule 9 of CPC as and when Courts deems local investigation is necessary for the purpose of elucidating any matter in dispute. Under Order 26, Rule 10 (1) of the same Code, the Commissioner so appointed, after conducting such local inspection is to reduce the evidence collected by him in writing and submit his report which also shall be in writing along with the same to the Court. In Sub-Rule 2 of Rule 10 Order 26 of the same Code, it is provided that such report and evidence submitted by the Commissioner shall form part of the evidence in the suit but if the parties in the suit desires to cross examine the Commissioner they may do so with the permission of the Court in the open Court touching any of the matter referred to him or mentioned in his report or as to the manner in which he has made the investigation. In Sub-Rule 3 of Rule 10 of the same Order and Code, the Court who appointed the Commissioner is given the power to direct further inquiry if for any reason the Court is not satisfied with the proceeding of the Commissioner.

9. From the provisions of the law stated above, it is amply clear that on submission of the report along with evidence collected by the Commissioner, the Court who issued the commission must first form an opinion whether it is satisfied or not with the proceeding of the Commissioner. Only if the Court is satisfied with the proceeding of the Commissioner the evidence and the report submitted by the Commissioner will be accepted as a part of the record of the case in which the commission was issued. Therefore, the Court who issued such commission should first examine whether the report is complete or not and not wanting in anyway and also give a chance to the parties to submit their objections to the report if any and also give them a chance to cross examine the Commissioner if they need to and thereafter arrived at a conclusion whether it is satisfied with the proceeding of the commission or not. In case the Court is satisfied and accepted the report of the Commissioner then only the same will form part of the record. Evaluation of the evidential value of the report or evidence collected and submitted by the Commissioner will however be done by the Court only at the later stage along with the other evidence or evidences submitted by the parties.

In this case, as it appears from the submission of the learned counsel for the petitioner and the application of the respondents as quoted above, the parties in

the case have stated before the learned Civil Judge that the Commissioner has not answered all the terms of reference. Therefore, the learned Civil Judge would have to first examine the Commissioner's report in the light of the submissions of the parties and give his conclusion as to whether the Commissioner has conducted the investigation on all the terms of reference laid down by the Court and gave his answer on all of them or not. And in case he finds that the Commissioner had given answer on all the terms of reference in his report, and he is satisfied with the same, he has to pass appropriate order to that effect. On the other hand, in case the report is found not to have answered some of the terms of reference then also appropriate order should have to be passed so that the very purpose for which the commission was issued is not defeated. In that event, issuance of a fresh commission or issuing of further order for further investigation by the same Commissioner would also have to be considered. Therefore, the learned Civil Judge in exercise of the power given under the provision of law stated above should have to first examine whether the objection raised by the parties is based on facts and decide accordingly instead of keeping the issue in abeyance. As such, his view that whether the present Commission report shall form part of the record or not in view of the objection of the petitioners that it is not complete has to be decided in future after closure of the oral evidence of both parties is wrong and can not be sustained.

10. Further, though the view of the learned Civil Judge that evidential value of the Commissioner's report shall be evaluated along with other evidences at the conclusion of the record of evidence is right but as provided under the law stated above he has to first decide whether the report of the Commissioner is to be accepted or not as part of the record. Accepting of the report as part of the record and evaluation of its evidential value are two different things. First the report has to be accepted only then its evidential value can be examined. Though the later can be done at the time of final hearing the former has to be done at the early and appropriate stage of the proceeding of the case. Therefore, the learned civil Judge will have to first examine the report in the light of the objections or submissions of the parties that it has not answered some of the terms of reference, and other relevant factors and decide as to whether the same is to be accepted as part of the record or not. For that the Judicial Misc. Case No. 279 of 2015 has to be heard and disposed. The learned Civil Judge having not done so, has failed to exercise the jurisdiction given to decide on such matter at the right time.

11. In view of the reasons given above, the impugned order can not be sustained as such, it is set aside and the learned Civil Judge is directed to hear the matter and dispose the same at the earliest. However, since it is admitted that cross examination of the Commissioner on the prayer of the petitioner is in the midway, let the same be continued and when it is concluded let the Judicial Misc. Case No. 279 of 2015 be taken up and dispose according to law. Regarding the concern of the learned Civil Judge expressed in the order regarding the non-examination of witnesses, it is made clear that the examination of the witnesses

which are not related to the commission issued may go ahead so that the proceeding of the Original Suit is not unnecessarily delayed.

With this, the petition is disposed.