

(1992) 07 GAU CK 0016
In the Gauhati High Court
Case No : Civil Revision No. 44 of 1987

Silchar Municipal Board

APPELLANT

Vs

Eastern Tea Estates Pvt. Ltd. and Sri Mahitosh Purkayastha,
Ex-Chairman, Silchar Municipal Board

RESPONDENT

Date of Decision : 03-07-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10, Order 26 Rule 10(2), Order 26 Rule 9

Citation : (1993) 2 GLR 445

Hon'ble Judges : U.L. Bhat, C.J

Bench : Single Bench

Advocate : K.K. Dey and R.K. Jaitly, for the Appellant; A.R. Paul Mazumdar, for the Respondent

Judgement

U.L. Bhat, C.J.—Revision Petitioner is the Defendant in a suit for declaration of title and permanent prohibitory injunction. It is aggrieved by the order passed by the court rejecting objections filed by it against the Commissioner's report.

2. Defendant-revision Petitioner is the Silchar Municipal Board. A notice was issued to the Plaintiff-Respondent stating that it had encroached into municipal land while constructing its northern compound wall. Thereupon Plaintiff filed the suit and ultimately obtained an interim order of injunction. The suit was filed in 1962. A Commission was appointed in the first instance in 1966. The Commissioner returned the warrant unexecuted. Another Commission was issued by the court and that also became infructuous. A fresh Commission was issued in 1968. In 1973, the Commissioner's report was rejected and, a fresh Commission was issued. In 1978 the court passed an order rejecting the report and issued a fresh Commission. The Commission appeared to have misplaced the record. A fresh order was issued in 1984. The Commissioner returned the order unexecuted and yet another Commissioner was appointed who submitted a report on 23.1.83. The court adjourned the case to 2.2.85 for objections to the report and then again to 23.2.85, on which date the court passed an order

rejecting the Commissioner's report and appointed a new Commissioner who filed the report in 1986. The case was posted to 16.9.86, 10.11.86 and finally to 26.11.86 for objections. On that day, Plaintiff's counsel was present. Defendant's Counsel was not present. The court heard the Plaintiff's Counsel and passed order accepting the report of the Commissioner and directed that it will form part of the evidence as per provisions in Order 26 Rule 10(2), CPC on the ground that the Commissioner had issued notice to the parties informing them of the date of proposed survey and he caused the survey to be made in conformity with the direction issued by the court and the case was adjourned to 9.12.86 for hearing. After this order was passed, on the same day, Defendant filed objections praying that the report may be rejected and the Commissioner be summoned for cross-examination. The Court considered the objections on the same date and ordered that there was no scope to be dissatisfied with the proceeding adopted by the Amin Commissioner in causing survey and accordingly rejected the objections. However the Court noted that Defendants are at liberty to cross-examine the Commissioner during the bearing, if they so desired. This order is now challenged.

3. It is contended by the learned Counsel for the revision Petitioner that objections to the report had been filed before the earlier order was passed. I cannot accept this contention in view of the specific endorsement made on the petition that it was received after the order was passed.

4. According to the learned Counsel for the revision Petitioner, the court having taken up the objections later on the same date was not justified in rejecting the objections by merely observing that "I find no scope to be dissatisfied with the proceeding adopted by the Amin Commissioner in causing survey." Learned Counsel contended that the court's duty is to go into the objections carefully to come to a conclusion. According to the learned Counsel, for the Respondent there is no merit in the objections.

5. Rule 9 Order 26, CPC empowers the court to appoint a Commission to make local investigation where it deems such investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market value of any property or the amount of any mesne profits or damages or annual net profits. The procedure to be adopted by the Commissioner in this behalf is governed by Rule 10. The Commissioner is obliged to hold such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court. The report of the Commissioner and evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the court may examine the Commissioner 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. Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further enquiry to be made as it shall think fit.

6. The object of the local investigation is not so much to collect evidence which can be taken in court but to obtain evidence which from its very peculiar nature can only be had on the spot. The Court has a discretion to issue Commission for local investigation or not; it is not bound to order it in all cases. It is the duty of the Commissioner to make local inspection after due notice to the parties and observe various matters directed to be reported upon by the court and make a faithful report. The report shall form part of the records.

This only means that it shall form part of the record in the same way as pleadings, affidavits etc. form part of the record. In other words, it is to be treated as evidence even without the examination of the Commissioner though either party or both parties are entitled to examine the Commissioner. Parties are entitled to prefer objections to the report and where such objections are raised the court is bound to hear the objections. If the court is dissatisfied with the proceeding of the Commissioner, further enquiry as thought fit can be ordered. For the purpose of satisfying the court that further enquiry should be ordered parties are entitled to adduce evidence and seek to examine or cross-examine the Commissioner.

7. More than 50 years ago the Judicial Committee of the Privy Council held in AIR 1940 3 (Privy Council) that:

Interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.

This of course does not mean that the report irrespective of its merits or qualify is to be accepted by the Court. In fact, in the reported case the court did not chose to act upon the report. It is for the court in every case to examine the report carefully, the objections preferred by the parties and the evidence on record before coming to a conclusion that the report is of such quality as could be acted upon.

8. The question which however arises for consideration is whether at the preliminary stage the court has to apply its mind on the acceptance of the report and to pass an order. Commissioner's report of course does not conclude the matter in issue. It is only one piece of evidence which ultimately has to be considered along with other evidence in the case before the Court can come to a conclusion over the disputed issue. It is for the court ultimately to rely or refrain from relying upon Commissioner's report for the purpose of granting a decree to the Plaintiff or to dismiss the suit. But the law does not oblige the court to pass a formal order accepting report at a preliminary or intermediary stage, as done in the case. Such an order of acceptance passed in the light of failure of the parties to file objections or on consideration of objections" filed by the parties is

not contemplated in the scheme of Rule 10 Order 26, Code of Civil Procedure. It is open to a party to point out defects irregularities and shortcomings in the work done by the Commissioner, the procedure adopted by the Commissioner, the observation's made by him and the inferences, if any, drawn by him and request the court to direct the Commissioner to make a further enquiry. If the mistakes and errors in the report are mistakes or errors so fundamental as to take away the value of the report, if the report is vitiated by bias, it may be open to the parties to request the court to appoint a fresh Commission. In one case the court decides that further enquiry is called for and in the other case the court decides that a fresh Commission is to be appointed, but in no case is the court called upon to pass a formal order "accepting the report" or directing the "report to be part of the record". Every report is part of the record by virtue of the mandate of Rule 10. A report does not become a part of the record by order of the court it becomes part of the record by virtue of the provisions of Rule 10. Even where the court is not satisfied that a further report is called for or that a fresh Commission should be appointed, it is still open to the court not to rely on the report at the conclusion of the trial having reference to the totality of the evidence adduced before it in the trial. It is wholly inappropriate for the court at the preliminary stage to reject objections as without merit. This is because the court may be persuaded to take a different view after evidence is adduced at the trial of the suit. The court is not precluded from considering the report and the objections in the light of evidence adduced at the trial. At the preliminary stage what the court is called upon to consider is whether a fresh enquiry is called for and not to consider whether the objections are to be accepted or rejected or whether report is to be accepted or rejected. Before deciding whether further enquiry is to be ordered, court should give an opportunity to the parties to examine the Commissioner. See *Ashutosh and Another Vs. R.C. Dey and Others*,

9. In the light of the above principles, the impugned order is unsustainable. The Defendant was not diligent in filing the objections in time and it has to be put on terms. The parties will do well to cooperate with the court in disposal of the suit since the suit is possibly one of the oldest in the State.

10. In the result, the impugned order is set aside. If the Defendant desires to adduce evidence in support of the objections, the lower court may give him a short but reasonable opportunity to do so. If however the Defendant desires to adduce evidence only at the trial, the lower court may take up the suit immediately for trial. The revision petition is thus allowed, but in the circumstances, I direct the revision Petitioner to pay Respondent's cost in the revision petition. The suit will be called in the lower court on 3.8.92. Records shall be sent back forthwith.