

(1989) 11 OHC CK 0002

In the Orissa High Court

Case No : Civil Revision No. 289 of 1989

Smt. Kamala Sethi and Others

APPELLANT

Vs

Nila Sethi and Others

RESPONDENT

Date of Decision : 24-11-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10, Order 26 Rule 10(3), Order 26 Rule 9

Citation : (1990) 1 OLR 201

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : R.N. Panigrahi, D.P. Mohapatra and D. Panigrahi, for the Appellant; Sk. Rahenoma and Sk. Enamor Rahenoma, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mohapatra, J.—In this Civil Revision, Plaintiff assailed the order of the trial Court accepting, the report of the survey knowing Commissioner appointed under Order 26, Rule 9, CPC and consequently, refusing to appoint another Commissioner.

2. Plaintiffs claimed in the suit that they have their thatched house over Plot Nos. 40 and 42 where beyond one feet of the northern wall of their house they have put a fence on the boundary. Defendants who are adjacent owners of Plot No. 39 to the North having put pillars within 6 from the fence in the Plaintiffs' boundary, they apprehend that water from the thatch of the proposed house of the Defendant would fall on their land. Accordingly, suit was filed for demarcation of the land of the Plaintiffs in the east and north and for restraining the Defendants not to construct within 2 feet from the boundary of the Plaintiffs.

3. Defendants in their written statement while not disputing to be adjacent owners as described in the plaint, contested the other assertions of the Plaintiffs.

4. On the application of the Plaintiffs, trial Court deemed a local investigation

requisite and proper and appointed a survey knowing Commissioner for preparing a map of Plot Nos. 39, 40 and 42 showing houses, haris and trees on them belonging to the parties, to report on which plot, water from the thatch of the Defendants house on the north and west corner of Plot No. 39 falls, distance between the houses of the Defendants indicating doors and possession of the fence, if any, on plot Nos. 39, 40 and 42.

5. Survey knowing Commissioner visited the spot and submitted a report. On objection of Defendants trial Court being dissatisfied with the report, directed to make local investigation again. Second report of the Commissioner after local investigation was also in favour of the Plaintiffs. No objection having been filed by the Defendants within time stipulated, report was accepted by the trial Court on 14-11-1986. Later, Defendants applied for recalling the order of acceptance of the order and filed objection to the report. Trial Court recalled the order and considering the objection of the Defendant directed the Commissioner to submit a fresh report. Commissioner visited the spot again and submitted the report which was to favour of the Defendants. Plaintiffs filed objection and prayed for deputing another Commissioner. Trial Court not having accepted the objection of the Plaintiffs to be valid and refusing to appoint another survey knowing Commissioner, the order is assailed by the Plaintiffs in this Civil Revision.

6. As has been held in Debendranath Nandi Vs. Natha Bhuiyan, :

...The object of local investigation is to obtain evidence which from its peculiar nature can best be had from the spot itself Such evidence enables the Court to properly and correctly understand and assess the evidence on record already recorded. It clarifies or explains any point which is left doubtful on the evidence on record....

In the present case trial Court held that issue of a commission to a survey knowing Commissioner is requisite and proper. Both parties did not assail the appointment of a survey knowing Commissioner. Accordingly, the validity of appointment of a Commissioner is not required to be considered in this Civil Revision.

7. Mr. R.N. Panigrahi, learned Counsel for the Petitioners submitted that on objection by the Defendants, Commissioner was directed to submit a fresh report answering all points referred and he was not to go to the spot again. Since Plaintiffs were given notice and they participated in the investigation, I am not inclined to accept the submission of Mr. Panigrahi merely because the report went against the Plaintiffs.

8. There can be no doubt that on submission of a report by a survey knowing Commissioner, each party is to get opportunity to object to the same. This has been decided by this Court in two decisions; In the decision reported in 47 (1979) CLT 303 Nagendranath Roy v. Ramaprasad Panda it was observed:

...From the provision of Rule 10 it is evident that after the Commissioner's

report is received a party should be given an opportunity to contest that report, for if the Commissioner's report is accepted without objection and the Court is not dissatisfied with the proceedings of the Commissioner, it cannot depute another Commissioner for local inspection, which can be spelled out from Sub-rule (3) of Rule 10 of Order 26, Code of Civil Procedure....

To the same effect is the decision reported in *Surajmal Khandalwalla and Others Vs. Krushna Chandra Das and Others*, where it has been observed:

The general practice in the Civil Courts in the State is that after submission of the report, map and field book of a survey knowing Commissioner, the parties are directed to submit their objections, if no objections are filed, an order is passed accepting the report, if any or both the parties file objections and desire to examine the survey knowing Commissioner, he is summoned and is examined and cross-examined in Court. Thereafter, arguments of both parties are heard on the points of objection and after due application of mind an order is passed either accepting the report or rejecting it.

9. Where objection to the report of the survey knowing Commissioner is sustained and Court records dissatisfaction with the proceeding of the Commissioner, it may direct further enquiry as provided in Order 26 Rule 10(3), Code of Civil Procedure. In *Surajmal Khandalwalla and Others Vs. Krushna Chandra Das and Others*, , it has been observed:

...If the objections prevail, the survey knowing Commissioner is redirected to hold local investigation in the light of the observations made by the Court or a new survey knowing Commissioner is appointed for local investigation and after he submits his report, map and field-book the same process is repeated.

10. Where report of the Commissioner is accepted after consideration of the objection, it becomes a piece of evidence as provided in Order 26, Rule 10, I.P.C. However, the same has no better sanctity than any other evidence. Such evidence can be rebutted by the party against whom it goes, by cross-examining the person who has submitted the report or by examining the witnesses and proving documents to nullify the effect of the report or to place materials from the report itself, to prove that the same cannot be relied upon. *S.C. Kantaru Sahu and Others Vs. Dharma Sahu and Another*,

11. Even where a report is accepted to become a piece of evidence, Court can consider the value of such report at the stage of assessing evidence and in case it is not satisfied with the report, it has to appoint another Commissioner. *S.c. 1970 (1) C.W.R. 244 Akadesi Harichandan v. Khetramohan Misra* and *1973 (I) C.W.R. 197 Dutika Bewa v. Nakul Chandra Barik*.

12. In the aforesaid background, when the party aggrieved by acceptance of the report which has become a piece of evidence, prays for issuing commission by appointing another person, Court is to consider whether such prayer is to be accepted.

In ILR 1965 Cut. 412 A. Satyanarayana Naidu and Anr. v. Sarbeswar Das a Commissioner's report was accepted since no objection was filed latter the objection to the report was filed and another application was filed for appointment of a second Commissioner for measuring the suit land at his cost. It was observed:

...Thus, it is open to the Defendant to take a commissioner privately, but the report to be furnished by him and the evidence given would not come within the purview of Order 26, Rule 10. When the commission is issued through the Court, both parties are given notice and must take part in the proceedings. If they do not take part in the proceedings, they do it at their own risk. When, however, Defendant asks for the services of a commissioner under the control of the Court as he does now, the commission is not deputed by the Court and the Plaintiffs suffer no risk by not taking part in such proceedings.... It the Defendant could measure the land privately with the help of an expert, there is no reason why the services of a commissioner would be refused when he is willing to pay the costs. The Court could make it clear that the report of such a commissioner and the evidence taken by him would not be treated as evidence under Order 26, Rule 10. Whether the Court would accede to such request would depend upon the facts and circumstances of each case and is discretionary with the Court....

13. In Sambhunath Sahu Vs. Upendra Palai and Others, in a similar situation as in this case, it was held:

It is well settled that the Commissioner's report is only one of the pieces of evidence amongst other evidence to be led by the parties in the suit. It is in no way binding on the Court. The Court has full power to arrive at its own conclusion even at variance of the report on consideration of the entire evidence on record. The evidentiary value of the report will depend on its nature and other circumstances in the case. It is open to the Petitioner to get the disputed land measured by a duly qualified person of his choice and examine him to countermand the effect of the Commissioner's report. It is also open to the Petitioner to countermand the effect of the Commissioner's report by giving other evidence. Therefore, it cannot be said that the Petitioner is seriously prejudiced by acceptance of the Commissioner's report.

14. Report of the Commissioner being only a piece of evidence as provided under Order 26, Rule 10, Code of Civil Procedure. a Court while issuing a writ to a person is to see that it does not improperly assist a party for collection of evidence when such party is capable of adducing such evidence himself. S.C. 1986 (II) OLR 622 (supra). In the aforesaid decision, relying upon Debendranath Nandi Vs. Natha Bhuiyan, it was observed:

...When the report would be necessary to appreciate the evidence on record, a commission can be issued in proper case. Therefore, normally writ is to be issued to Commissioner for local investigation to appreciate the evidence already recorded. There may be departures from the normal rule for issue of commission

also. For illustrations, where evidence is necessary to know the depth of water in a particular season a commissioner can be deputed even though evidence has not been recorded. Where it is to be found as to on which plot the disputed land lies, a writ can be issued to any person to rely the same even though no evidence is recorded if the Court finds that the parties themselves cannot produce evidence to that effect....

To the same effect is the decision reported in Mahendranath Parida Vs. Purnananda Parida and Others, where it has been observed:

No doubt, the provision confers a discretion on the Court. But the discretion, as it is well known, has to be exercised in a judicious and sound manner but not whimsically and capriciously. 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 jurisdiction. It may decline jurisdiction if the motion is made at a belated stage or if the motion is mala fide or in other circumstances justifying 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. Very often decision of a case turns on the identification or determination of the area and evidence in relation thereto from its peculiar nature can only be had on the spot.

In such cases local investigation and measurement are essential. Evidence in respect thereof can be laid by engaging a person qualified to conduct the investigation and measurement privately. But there are some difficulties. While doing the survey, the person has to take measurements from various points. In course of such investigation it may be necessary for him to enter upon the land and premises of the other party and he may be resisted by the later, whereas neither of the parties can resist the commissioner appointed by the Court from carrying out the writ.

So it is held that where local investigation is considered necessary, essential, the Court should not ordinarily refuse to appoint a commissioner for the purpose of elucidating any matter in dispute between the parties.

15. Keeping the aforesaid principles in mind. I am satisfied that acceptance of the report of the Commissioner does not prejudice the Petitioner. He can appoint a person privately to measure the land and adduce rebuttal evidence at trial. In case, Petitioner is obstructed from getting the land measured privately he may take the assistance of the Court for such measurement. However, the report given by the survey knowing person, shall not be a piece of evidence under

Order 26, Rule 10, CODE OF CIVIL PROCEDURE. as has been held in ILR 1966 Cut. 412 (supra). In case, Petitioner does not adduce any rebuttal evidence and the Court at the time of trial is not satisfied with the report, it shall have to appoint another Commissioner since it has already held that for proper adjudication, a Commissioner is required to be deputed. If, however, rebuttal evidence is given and the Court is in a position to decide the dispute in respect of which a Commissioner was deputed, no further Commissioner need be deputed even though the report of the survey knowing Commissioner which is a piece of evidence under Order 26, Rule 10, Code of Civil Procedure. is not accepted by the Court.

16. In view of the discussion as made above, I am satisfied that this is not a fit case where I should interfere with the impugned order in revision.

17. In the result, the Civil Revision is dismissed. No costs.

Revision dismissed.