

(1996) 01 OHC CK 0006

In the Orissa High Court

Case No : Original Jurn. Case No. 5087 of 1995

Smt. Laltoomani Mohanty

APPELLANT

Vs

First Additional District Judge, Cuttack and Others

RESPONDENT

Date of Decision : 22-01-1996

Acts Referred:

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

Citation : AIR 1996 Ori 141 : (1996) 1 OLR 342

Hon'ble Judges : D.P. Mohapatra, Acting C.J.; R.K. Patra, J

Bench : Division Bench

Advocate : D.P. Mahanty and P.K. Mohanty, for the Appellant; S.K. Das, for the Respondent

Judgement

R.K. Patra, J.—This is a petition filed under Article 227 of the Constitution seeking quashing of the judgment and order dated 21-1-1995 (Annexure-2) by which the learned is Additional District Judge, Cuttack in Civil Revision No. 68 of 1994 has set aside the order of the trial Court accepting the report of the survey knowing Commissioner.

2. Facts leading to filing of this writ petition briefly are as follows ; compound wall of the petitioner in plot Nos. 2008 and 2012 of hal khataNos. 719 and 677 (corresponding to part plot Nos. 79 and 80 of Sabik khata No. 54) located at Bakha-rabad in Cuttack. It is the allegation of the petitioner that the said opposite parties 2 and 3 constructed the latrine by encroaching upon the compound wall of the petitioner. On 22-11-1990 the petitioner filed a petition praying for appointment of a Civil Court Commissioner to visit the disputed spot and answer on the points indicated in the petition. The opposite parties 2 and 3 filed their objection contending, inter alia, that the petition was not maintainable. The learned Munsif after hearing both the sides, by order dated 8-1-1991 appointed a Civil Court Commissioner by observing as follows:

".....From the pleadings of the parties it appears that the controversy is not only for the existence of the boundary wall but also regarding the encroachment.

Both parties have claimed the boundary wall to be erected on their land. The defendants have averred that such construction are since about 50 years back. Therefore, in the circumstances of the case and to determine the real controversy I find it necessary that a Civil Court Commissioner should be deputed for investigation....."

The Civil Court Commissioner who has been referred to as the survey knowing Commissioner submitted his report after making local investigation, The opposite parties 2 and 3 filed objection on the grounds, inter alia, that the Commissioner had not measured the disputed land, he had not prepared the local investigation map and case map, chain triangulation method adopted by him was not applicable at the spot and he had not taken any fixed point for measurement. After hearing both the sides, the learned Munsif by his order dated 4-4-1994 at Annexure-1 accepted the report of the Commissioner. The opposite parties 2 and 3 being aggrieved by the order accepting the report of the survey knowing Commissioner filed Civil Revision No. 68 of 1994 which came to be disposed of by the 1st Additional District Judge, Cuttack, by the impugned judgment and order dated 21-1-1995 at Annexure-2 which, as already indicated, is the subject-matter of challenge-in his writ petition.

3. The learned Additional District Judge in the impugned decision has observed "that the trial Court by passing a "strained order" accepted the report of the survey knowing Commissioner. By giving specific reasons in paragraph 5 of the impugned decision, the learned Additional District Judge has set aside the order accepting the Commissioner's report and directed the trial Court, if necessary, to depute another survey knowing Commissioner. We need not repeat those reasons because of the order we are going to pass in the matter.

4. We may, however, note briefly the contentions raised by the counsel for the petitioner and opposite parties 2 and 3. Shri Mohanty for the petitioner contended that the report of the survey knowing Commissioner being a piece of evidence, aggrieved party can rebut it by adducing other evidence and as such, there is no question of rejecting such report. He also submitted that the learned Additional District Judge exceeded his jurisdiction in setting aside the order of the trial Court in exercise of revisional power u/s 115, C.P.C. The learned Counsel appearing for opposite parties 2 and 3 relying on a decision of the learned single Judge of this Court in Surajmal Khandalwalla and Others Vs. Krushna Chandra Das and Others, submitted that the learned Additional District Judge rightly set aside the order of the trial Court accepting the Commissioner's report and in view of sub-rule (3) of Rule 10 of Order 26, C.P.C., the option given to the trial Court to depute another survey knowing Commissioner, if necessary, cannot be faulted with,

5. It is now well settled that the report of a survey knowing Commissioner is nothing more than evidence in a case. It is one of the items of evidence amongst other evidence adduced or to be adduced by the parties in the suit. The evidentiary value of the report would be judged by the court while evaluating the

entire evidence on record. The legal position as to the report of a survey knowing Commissioner has been succinctly indicated by one of us (D. P. Mohapatra, J.) in *Sambhunath Sahu v. Upendra Palei* (1984) 97 CLT 278 : (AIR 1985 NOC 30) as follows:

"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."

6. In view of the aforesaid, while modifying the operative part of the order of the learned Additional District Judge we state that the report of the survey knowing Commissioner which is already on record is available to be considered as a piece of evidence along with other evidence to be adduced in course of trial of the suit. It is open to the opposite parties 2 and 3 to take out any other survey knowing Commissioner for the purpose if they consider it necessary. If any other report of survey knowing Commissioner is made available at the instance of the opposite parties 2 and 3, the same may be considered in accordance with law.

7. With the aforesaid observations, the writ petition is disposed of. No costs.

D.P. Mohapatra, A.C.J.

8. I agree.