

(2014) 03 CAL CK 0127

In the Calcutta High Court

Case No : C.O. No. 2865 of 2013 and CAN 2321 of 2014

Udit Infrastructure Pvt. Ltd. and Others

APPELLANT

Vs

Sri Bijoy Krishna Paik and Others

RESPONDENT

Date of Decision : 25-03-2014

Acts Referred:

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

Citation : (2014) 3 CHN 708

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Aniruddha Chatterjee and Mr. Surya Prosad Chattopadhyay, for the Appellant; Sukumar Bhattacharya, Srathi Dasgupta and Mr. Dipendra Nath Chunder, for the Respondent

Final Decision : Dismissed

Judgement

Debangsu Basak, J.—This revisional application was directed against two Orders dated May 2, 2012 and July 20, 2013 passed by the 4th Court Civil Judge (Senior Division) at Alipore in Title Suit No. 347 of 2012. By an Order dated September 2, 2013 this Hon'ble Court was pleased to stay the operation of the impugned orders dated May 2, 2012 and July 22, 2013. The interim order of stay was extended on December 23, 2013.

2. The opposite parties made an application for dismissal of the present revisional application and for vacating the Orders dated September 2, 2013 and December 23, 2013. Both the applications were taken up for hearing.

3. By the Order dated May 2, 2012 an application under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 was allowed by the learned Trial Judge. An advocate commissioner was appointed for investigating as to whether there was any encroachment in Plot No. 29 or not.

4. The advocate commissioner conducted such local inspection in presence of the parties and submitted his report to the Trial Court. By the Order dated July 22,

2013 the learned Trial Judge passed an order of injunction on the application for modification of his earlier Order dated January 31, 2012.

5. The petitioners contended that, the learned Judge acted with material irregularity in appointing an advocate commissioner when the prayer was for appointment of a survey passed commissioner. According to the petitioners, the learned Judge acted with material irregularity in relying upon the report of the advocate commissioner. It was contended that, the advocate commissioner acted beyond the plaint case and the writ of commission. The findings returned by the advocate commissioner were perverse. The two plots were not adjacent to each other. The advocate commissioner misconducted the enquiry by not considering the mouza map in which the plots were situated.

6. On behalf of the opposite parties it was contended that, the advocate Commissioner was appointed by the order dated May 2, 2012. The Order dated May 2, 2012 was challenged by way of a revisional application being C.O. No. 2159 of 2012 which resulted in an Order dated August 10, 2012 passed by this Hon"ble Court. The Order dated August 10, 2012 was passed in presence of the opposite parties. No objection was taken at that point of time as to the appointment of an advocate commissioner in place and stead of a survey passed commissioner. The petitioners were not entitled to challenge the appointment of the advocate commissioner by way of the present revisional application. The advocate commissioner submitted his report which was considered by the learned Judge. The petitioners were entitled to lead evidence at the trial of the suit to countermand any finding of the advocate commissioner. Reliance was placed on *Amena Bibi and others Vs. Sk. Abdul Haque*,) in that regard.

7. After considering the respective contentions of the parties and the materials on record, it appeared that the disputes between the parties related to identification of plots. For such purpose an advocate commissioner was appointed by the Order dated May 2, 2012. Such appointment was at the instance of the plaintiffs to the suit who were opposite parties herein. The Order dated May 2, 2012 was challenged by way of a revisional application being C.O. No. 2159 of 2012 by the opposite parties. The said revisional application was disposed of by an Order dated August 10, 2012. By such order this Hon"ble Court noted that an advocate commissioner was appointed in terms of Order XXVI Rule 9 of the Code of Civil Procedure, 1908 to consider the issue with regard to the identity of the suit property. The advocate commissioner was directed to file his report before the Trial Court. Inspection conducted by the advocate commissioner was directed to be carried out upon notice to the parties to the suit. The parties to the suit were directed to cooperate with the advocate commissioner in implementing the order dated August 10, 2012. The Trial Court was directed to pass suitable order keeping in mind the earlier order passed in the proceedings and after considering the report of the advocate commissioner.

8. It was contended on behalf of the petitioners that, the challenge to the Order dated May 2, 2012 in C.O. No. 2159 of 2012 was of limited scope and that such

challenge was at the behest of the opposite parties herein and not by the petitioners. It was contended that, the petitioners were entitled to launch a fresh challenge to the Order dated May 2, 2012 since the points raised by the petitioners herein with regard to the validity and propriety of the Order dated May 2, 2012 were not raised in the earlier revisional application.

9. I am afraid that I am unable to accept such contention. By the Order dated May 2, 2012 the advocate commissioner was appointed. Appointment of the advocate commissioner was not challenged by the petitioners although such appointment was made in their presence. The legality and propriety of the Order dated May 2, 2012 was considered in the earlier civil revisional application which resulted in the Order dated August 10, 2012. Elaborate directions were issued to the advocate commissioner by the Order dated August 10, 2012 passed by this Hon"ble Court. The petitioners could raise all the points they sought to raise in the present application in course of hearing of the earlier revisional application. They chose not to. The petitioners cannot be allowed to reagitate any points with regard to the Order dated May 2, 2012. All points sought to be raised with regard to such order were available to them at the time when the earlier revisional application was heard.

10. The advocate commissioner conducted the inspection in presence of the parties in terms of the order dated August 10, 2012. The advocate commissioner considered the documents produced before him and submitted his report. He gave reasons for coming to the finding as returned in his report. At this stage without further evidence being adduced to countermand the report of the advocate commissioner it could not be said that, the report of the advocate commissioner was perverse. As rightly pointed out on behalf of the opposite parties, the petitioners were entitled to lead evidence at the trial of the suit, if they had any, to countermand the report of the advocate commissioner. This

11. Hon"ble Court in *Amena Bibi* (supra) while considering the plaintiffs' challenge to the validity and propriety of the order passed by the Trial Court accepting the report of the advocate commissioner held that, the party objecting to the Commissioner's report ought to lead best possible evidence at the time of hearing of the suit, to countermand the report even if the same was accepted earlier.

12. The order of appointment of an advocate commissioner made by the Order dated May 2, 2012 attained finality on August 10, 2012. The petitioner cannot be allowed to reopen such issue. So far as the contents of the report of the advocate commissioner was concerned, the petitioner was at liberty to countermand such report at trial by leading evidence.

13. I find no material irregularity in the orders impugned warranting this Hon"ble Court to interfere.

14. In the premises, C.O. No. 2865 of 2013 is dismissed without any order as to costs. The interim orders dated September 2, 2013 and December 23, 2013

passed herein are vacated.

15. In view of the dismissal of the revisional application no order need be passed on CAN 2321 of 2014. CAN 2321 of 2014 is disposed of accordingly. Urgent photostat certified copy of this order, if applied for, be given to the learned Advocate for the parties in compliance of necessary formalities.