

(2017) 04 MP CK 0117
MADHYA PRADESH HIGH COURT
Case No: 21750 of 2015

REEMA KATARE

APPELLANT

Vs

STATE OF M P

RESPONDENT

Date of Decision: April 3, 2017

Acts Referred:

- Constitution of India, Article 227 - Power of superintendence over all courts by the High Court
- Code of Civil Procedure, 1908, Section 151 - Saving of Inherent powers o

Hon'ble Judges: Vandana Kasrekar

Bench: Division Bench

Advocate: Girish Shrivastava, Sanjay Agrawal, R.P. Khare

Judgement

1. The petitioners have filed the present petition, under Article 227 of the Constitution of India, challenging the order dated 30.11.2015 passed by 3rd Additional District Judge, Jabalpur in Miscellaneous Judicial Case No. 06/2008.
2. The original plaintiff Subhash Bhasin filed a civil suit for partition and separate possession of the suit property bearing House No. 1 and 1A, Adarsh Nagar, Gwarighat Road, Jabalpur.
3. The trial Court passed a preliminary decree declaring that the original plaintiff Subhash Bhasin and his brothers and sisters having equal share in respect of the suit property. The petitioner preferred a First Appeal No. 253/2003 before this Court which is pending. This Court vide order dated 21.07.2008 has passed an interim order directing the Executing Court not to pass any final order, judgement or decree without leave of this Court.

4. Respondents No. 1 to 3, thereafter, filed a execution case before the Executing Court for execution of a preliminary decree. The Executing Court appointed the Commissioner for partition of the disputed property in terms of preliminary decree passed by the trial Court. The learned Commissioner submitted his report before the Executing Court on 25.10.2013 proposing the partition and as per the Commissioner report in which part No. 1 was proposed to be given to the decree-holders. Part No. 2 was proposed to be given to respondent No. 4, part No. 3 to respondent No. 5, part No. 4 to respondent No. 6 and part No. 5 was given to the petitioners/judgement debtors. The petitioners raised an objection to the Commissioner's report dated 25.10.2013 stating that the partition which is made by the Commissioner is not correct, as part No. 1 of the suit property which was proposed to be given to respondent Nos. 1 to 3/decreeholders is in possession of the petitioners/judgement debtors and they are living there and has put huge amount on the maintenance of the portion, therefore, part No. 1 should have been given to the petitioners instead of part No. 5.

5. On 02.09.2014 the case was fixed for reply and argument on the objections raised by the petitioners, but as respondents No. 1 to 3/decreed holders have not filed their reply, the case was fixed for orders on objection on 01.10.2014. However, due to inadvertence, the counsel for the petitioners noted the date 17.11.2014 instead of 01.10.2014, therefore, on 01.10.2014 as no body appeared on behalf of the petitioners, the learned Executing Court, therefore, rejected the objections of the petitioners for want of prosecution and fixed the case for further hearing on 17.11.2014. On 17.11.2014 when the counsel for the petitioners appeared in the case, at that time they have come to know that the objections has been dismissed vide order dated 01.10.2014. He, therefore, submitted an application for setting aside the ex-parte order dated 01.10.2014 along with an affidavit of the counsel.

6. Respondent Nos. 1 to 3 oppose the application and denying the contents of the application.

7. Learned Court below has allowed the application filed by the petitioners for setting aside the order dated 01.10.2014. However, contended that since the objections to the Commissioner's report had already been rejected on 01.10.2014, therefore, no consideration can be given to the objections and fixed the case for evidence. The petitioners, therefore, filed an application under Section 151 of the Civil Procedure Code for recalling the order dated 10.07.2015 on the ground that as the learned Court allowed the application dated 17.11.2014, but have not set aside the order of rejection of the objections though in the application it was specifically prayed by the petitioners. Learned Court below vide order dated 30.11.2015 has dismissed the said application. Being aggrieved by that order, the petitioner has filed the present petition.

8. Learned counsel appearing on behalf of the petitioners argues that the Court below has grossly erred in dismissing the application submitted by the petitioners for recalling the order dated 10.07.2015. He submits that the order dated 01.10.2014 which is passed by the trial Court thereby rejecting the objections submitted by the petitioners was due to the want of prosecution. He further argues that once the order regarding the dismissal of case for want of prosecution was set aside by the trial Court vide order dated 10.07.2015, then the trial Court should have allowed the prayer of the petitioners to hear him on objections to the Commissioner's report also. He further submits that in the application dated 17.11.2014, the petitioners have made a specific prayer that the order dated 01.10.2014 be set aside and the matter be listed for arguments on objections to the commissioner's report, however, the said prayer was not considered by the trial Court.

9. The respondents No. 1 to 6 have filed their reply and in the reply, the respondents had stated that the number of opportunities have been granted to the petitioners for arguing on the report submitted by the Commissioner. However, the petitioners have failed to avail the opportunity, therefore, the trial Court has rejected the prayer of the petitioners for hearing the objections submitted by the petitioners on the commissioner's report. He further supports the order passed by the trial Court.

10. I have heard learned counsel for the parties and perused the record as well as the order passed by the trial Court. From perusal of the record it reveals that the original plaintiff Subhash Bhasin filed a civil suit for partition and separate possession of the suit property. The trial Court has passed a preliminary decree. Against the said decree the petitioners have preferred a first appeal before this Court in which an interim stay order was passed directing the trial Court to proceed with the final decree of partition, but no final order shall be passed without leave of this Court. Thereafter, Commissioner was appointed for executing the decree passed by the trial Court. Initially one N.K. Patel, Advocate was appointed as Commissioner and he submitted his report on 03.01.2011. The petitioners have raised an objection against the said report. The learned trial Court, therefore, rejected the report of the Commissioner and directed to re-examine the spot. The Commissioner there again submitted his report on 25.10.2013. The petitioners again filed an objection against the said report. The trial Court directed the petitioners on 02.09.2014 to argue on the objections of the Commissioner report. The petitioners have, therefore, filed their objections on 11.09.2014. The respondents filed their reply and oppose the objections of the petitioners. The case was fixed on 01.10.2014 for hearing on Commissioner's report. The counsel for the petitioners did not appear on 01.10.2014, therefore, the trial Court on 01.10.2014 rejected the objections of the petitioners on commissioner's report and proceed to record the evidence. The petitioners, thereafter, filed an application for setting aside the order dated 01.10.2014 supported by the affidavit of the Advocate.

11. Respondent Nos. 1 to 6 have filed their reply and stated that on 01.10.2014, the learned trial Court accepted the Commissioner report, therefore, the application for setting aside the order dated 01.10.2014 is baseless.

12. The trial Court vide order dated 10.07.2015 has rejected the application of the petitioners. The petitioners have, therefore, filed an application on 26.10.2015 under Section 151 of the C.P.C for review of the order dated 10.07.2015. The learned trial Court vide order dated 30.11.2015 rejected the application of the petitioners. Against the said order, the petitioners have filed the present petition.

13. From perusal of the order dated 01.10.2014, it reveals that the trial Court has rejected the objections as well as the application for objections in non prosecution. The said order is read as under:-

"VERNACULAR MATTER OMITTED"

Thereafter, the petitioners have filed an application for setting aside the said order and the trial Court has rejected the said application on 10.07.2015. While rejecting the said application, the trial Court has observed that the objections submitted by the petitioners have already been rejected vide order dated 01.10.2014, therefore, the said cannot be considered again. However, permitted the petitioners to participate in the proceedings. Being aggrieved by that order the petitioners have preferred an application under Section 151 of the C.P.C. for recalling the order dated 01.10.2014. However, the trial Court has dismissed the said application on the ground that the application is not maintainable under Section 151 of the C.P.C and further held that there is no error apparent on the face of the record.

14. Thus, from perusal of the order sheets, it reveals that the objections submitted by the petitioners against the Commissioner's report were not considered on merits by the trial Court at any stage of the proceedings and the same has been dismissed for want of prosecution. Therefore, the trial Court should have given an opportunity of hearing to the petitioners against the objections submitted by them on the Commissioner's report.

15. In view of the aforesaid, the writ petition is allowed. The impugned orders dated 01.10.2014, 10.07.2015 and 30.11.2015 are hereby set aside and the trial Court is directed to hear and pass an appropriate orders on the objections submitted by the petitioners on Commissioner's report.

16. Consequently, the interim order dated

17. 12.2015 passed by this Court stands vacated.