

(2013) 04 CAL CK 0003

Calcutta High Court

Case No: C.O. No. 433 of 2013

Abhijit Lahiri

APPELLANT

Vs

Ashok Roy

RESPONDENT

Date of Decision: April 2, 2013**Citation:** (2013) 3 CHN 422**Hon'ble Judges:** Harish Tandon, J**Bench:** Single Bench**Advocate:** Bidyut Kr. Banerjee and Shila Sarkar, for the Appellant; Saptangshu Basu and Ananya Das, for the Respondent

Judgement

Harish Tandon, J.

The defendants/petitioners have assailed the order dated January 4, 2013, passed by learned Civil Judge (Junior Division), 2nd Court, Sealdah by which an application for non-acceptance of the Commissioner's report, is rejected by the Trial Court. The point which emerges for consideration in this revisional application relates to the stage at which the objection to the Commissioner's report should be entertained by the Court.

2. Before dealing to determine the aforesaid point, the salient facts of the case are adumbrated below:

3. The plaintiff/opposite party filed Title Suit No. 178 of 2002 in the Court of learned Civil Judge (Junior Division), 2nd Court, Sealdah seeking a decree for declaration that the agreement dated February 25, 1998, is valid and binding upon the defendants/petitioners. Further relief in the form of a decree for permanent injunction is also sought restraining the defendants from creating any obstruction to the right of user of staircase from ground floor to first floor and also in respect of a roof. The suit premises comprises of the ground floor plus three stories building constructed at the premises No. 3C Bipin Mitra Lane, P.S. Ultadanga, Kolkata-700 004 which was originally owned by the plaintiff and one Ranjit Roy, having undivided

equal share which they acquired on the strength of the deed of partition dated April 26, 1996. The plaintiff stated that he was allotted a ground floor and the first floor excepting the existing staircase from ground to third floor and both of them were having undivided half share in respect of the entire premises. The said deed further provides that the plaintiff/opposite party shall construct an independent staircase from the ground to first floor. Subsequent thereto, an agreement was entered into between the plaintiff and the said Ranjit Roy by which the plaintiff/opposite party was permitted to use the existing staircase from ground floor to first floor only. In order to implement and/or effectuates the terms of the said deed of partition, subsequently, the said Ranjit Roy, transferred his share to the defendants/petitioners jointly together with all the incidents and rights appertaining thereto under the said partition deed and the subsequent agreement. The plaintiff/opposite party alleges that the defendants/petitioners are creating obstruction in very egress and ingress from the staircase to the roof and filed the aforesaid suit with the prayer as indicated hereinabove.

4. The defendants/petitioners took a defence in the written statement that the terms and conditions embodied in the said partition deed and the subsequent agreement are binding upon the plaintiff/opposite party and he has no semblance of right to the roof nor has a right to use the staircase beyond the first floor.

5. An application for investigation under Order 26 Rule 9 of the CPC was filed by the plaintiff/opposite party which was eventually allowed and a Engineer Commissioner submitted the report.

6. By filing separate applications, various objections to the report were taken out which has been rejected by the impugned order. From the impugned order, what could be deciphered is that the Trial Court rejected the said application as the report of the Commissioner is an evidence in the suit and is a part of the record. The Trial Court further recorded that Sub-Rule 2 of Order 26 Rule 10 of the Code is mandatory whereas Sub-Rule 3 is directory in nature.

7. Mr. Bidyut Kumar Banerjee, the learned Senior Advocate assailing the said order submits that the Trial Court has proceeded as if the report filed by the commissioner should be accepted as a piece of evidence and be formed the part of the record without entertaining the objection so raised. According to him, if an objection is raised, the Commissioner should be directed for examination and it is only after overruling the objections, the report should be accepted. Lastly, he submits that the course adopted by the Trial Court in permitting the defendants/petitioners to cross-examine the Commissioner at the time of adducing evidence by the parties is against the mandate given under Sub-Rule 3 of Order 26 Rule 10 of the Code. In support of the aforesaid contention, he relies upon a judgment of the Delhi High Court in case of [Harbhajan Singh Vs. Shakuntala Devi Sharma and Another,](#)

8. Per contra, Mr. Saptangshu Basu, the learned Senior Advocate appearing for the plaintiff/opposite party submits that the moment, the report is filed by the Commissioner, it becomes a piece of an evidence and forms the part of the record and there is no illegality in permitting the defendants/petitioners to cross-examine the Commissioner at the stage of trial and not before it.

9. Before proceeding to decide the points as indicated above, it would be profitable to quote the provisions contained under Order 26 Rule 10 of the Code which reads thus:

R. 10. Procedure of Commissioner.-(1) The Commissioner, after 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.

Report and depositions to be evidence in suit-Commissioner may be examined in person.-(2)The report of the Commissioner and the 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 or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court 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.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

10. Sub-Rule 1 of Order 26 Rule 10 of the Code is not relevant for the present purposes, as the entire case hinges on Sub-Rule 2 and Sub-Rule 3 thereof. Power to appoint Commissioner is vested upon the Court under Rule 9 of Order 26 of the Code where the Court deems that the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute. Rule 10 of Order 26 of the Code deals with the procedure and the examination of the Commissioner in person.

11. The Commissioner's report is only an evidence in a case and it does not, in any way, bind the Court so as to treat it conclusive. It is like any other evidence in the suit and does not take away the power of the Court to arrive at the different conclusion if there are sufficient evidence available on the record. The report cannot be a sole basis and the foundation of a final decision in this regard to the other evidence available on the record.

12. There is no specific provision provided under the Court for filing or inviting the objections to the report of the local Commissioner as the plain reading of the language given in Sub-Rule 2 of Order 10 Rule 26 of the Code bestowed the power upon the Court either suo moto or on an application at the instance of the parties to examine the Commissioner in person in open Court touching any matter referred to him or mentioned in his report or as to his report or as to the manner in which he

had made the investigation.

13. The stage at which such objection is to be considered is not indicated in any of the provisions in the Code. The Court, therefore, enjoins certain discretion either to examine the objection, the moment, it is raised or can permit the parties to examine the Commissioner at the trial. Such discretion should be exercised judicially with great caution and circumspection. The acceptance or the rejection of the Commissioner's report is within the competence of the Court which has a discretion either to reject the Commissioner report or to accept. The Court has further discretion to examine or not to examine the Commissioner but it should be exercised legally and not capriciously. The objection, touching the report or the manner, in which the report is made, should be decided by the Court either at the pre-trial stage or thereafter depending upon the attending circumstances and in the facts of each case. It is entirely within the discretion of title Court to invoke the provisions contained under sub-rule 3 of Rule 10 of Order 26 of the Code to direct the further inquiry, if there is sufficient reasons for dissatisfaction with the proceeding of the Commissioner. The Court cannot lay down the strait jacket formula for considering the objection the moment, it is raised and not subsequent thereto.

14. The revisional Court should not upset the discretionary order unless, such discretion appears to have been exercised illegally, irrationally and beyond the legal parameters.

15. The Trial Court has not overruled the objection although, it rejected the application raising objection, but have permitted the parties to cross-examine the Commissioner relating to such objections at the Trial. Such discretion exercises by the Trial Court cannot be said to be unreasonable, irrational and de hors the law.

16. This Court, therefore, does not find any infirmity and/or illegality in the impugned order.

17. The revisional application is therefore dismissed.

18. However, there shall be no order as to costs. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.