

(2011) 08 CAL CK 0037

Calcutta High Court

Case No: S.A. No. 217 of 2004

Sukhnath Mudi

APPELLANT

Vs

Satish Chandra Mahata and
Others

RESPONDENT

Date of Decision: Aug. 30, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100

Hon'ble Judges: Tarun Kumar Gupta, J

Bench: Single Bench

Advocate: Biswaranjan Bhakat, for the Appellant; Rabindra Nath Mahato, Jayeeta Chakraborty and Prasanta Behari Mahato, for the Respondent

Final Decision: Dismissed

Judgement

Tarun Kumar Gupta, J.

The Defendant is the Appellant against the judgment of reversal.

2. The Plaintiffs/Respondents filed a suit alleging that 1.02 acres of land in plot No. 1/110 with other lands originally belonged to Bijoy Krishna Pal who sold the same to his sons namely Nanda Dulal Pal and Chitta Ranjan Pal through a registered kobala dated 23rd September, 1974. While Nanda Dulal Pal and Chitta Ranjan Pal possessed the same in ejmal, they sold .31 acres with incomplete construction thereupon to the Plaintiffs by two kobalas both dated 20th of April, 1994. The Defendant No. 1 forcibly trespassed and constructed a "Challa" in a portion of said purchased land being suit land as described in Schedule B of the plaint. Hence was the suit for recovery of khas possession by evicting Defendant No. 1 there from.

3. Appellant/Defendant No. 1 contested the suit by filing a written statement denying material allegations and contending inter alia that since 1st of March, 1972 this Defendant and Ors. started to possess different portions of entire 1.02 acres of land in suit plot No. 1/110 and that those possessors including Defendant No. 1 have

acquired title in their respective portion of land by way of adverse possession and that the Plaintiffs had neither title nor possession in any portion of suit plot.

4. Learned Trial Court came to the findings of fact on the basis of evidence on record as well as admission of contesting Defendant No. 1 that Plaintiffs purchased .31 decimals of land in suit plot No. 1/110 by two kobalas both dated 20th April, 1994 and that Plaintiffs were also in possession of said purchased land. In the case in hand, the Investigation Commissioner was appointed at the prayer of both the Plaintiffs and Defendant No. 1 and submitted a report dated 17th of January, 1998 enclosing a sketch map depicting Plaintiffs purchased land as well as suit land. It appears from the judgment of learned Trial Court that though he took note of the admission of contested Defendant No. 1 that Plaintiffs purchased .31 decimals of land through their kobalas and was also in possession of the same but dismissed the suit for recovery of possession on the following grounds:

(1) Defendant No. 1 challenged the location of the suit land described in Schedule B of the plaint and showed its location in a map prepared in trussing paper annexed with W.S. showing the possession of all 17 persons including Defendant in the suit plot.

(2) No. sketch map was annexed with Plaintiff's purchased kobalas dated 20th April, 1994. In absence of a sketch map in kobalas location of the suit property as shown in Schedule B map could not be identified as part of Plaintiff's purchased property.

(3) Though learned Commissioner was appointed for local investigation on the points mentioned in the application of Defendant No. 1 as well as in the application of the Plaintiffs but learned Commissioner submitted his report only entertaining two points mentioned in the petition of the Plaintiffs.

(4) Learned Commissioner failed to relay the entire suit plot No. 1/110 according to R.S. map and to note the names and addresses of the possessors with specified bounded lands in their possession.

(5) Learned Commissioner failed to identify the kobala land, suit land and land in possession of the Defendant.

(6) As learned Advocate Commissioner held local investigation only touching the points made out in Plaintiff's petition totally ignoring the points mentioned in Defendant's petition, he was not impartial and his report cannot be relied on that ground.

(7) It was not established that the suit land alleged to be encroached by Defendant No. 1 was within the purchased lands of the Plaintiffs.

5. Learned Lower Appellate Court, however, put reliance on Commissioner's report in perspective of other evidence on record and decreed the suit after setting aside the judgment of learned Trial Court.

6. At the time of admission of this second appeal the following substantial question of law was framed.

Whether the learned Court of Appeal below was right in overlooking that the Defendant had filed an application for local investigation praying for repayment of the entire suit property without which identify of the property could not be established and in accepting the report of the commissioner in the absence of repayment of the entire plot without which the suit property could not be identified.

7. Mr. Biswaranjan Bhakat, learned advocate for the Appellant, has submitted that learned Lower Appellate Court did not state as to why he accepted Commissioner's report disregarding learned Trial Court's observations when learned Commissioner did not cover all the points of the writ and was found to be partisan. In this connection he has submitted that though the report of learned Commissioner was accepted during trial but it was not binding on the Trial Court at the time of final decision of the suit. In support of his aforesaid contention he referred the case law of [Sankar Kumar and Another Vs. Mohanlal Sharma,](#)

8. Mr. Rabindranath Mahato, learned advocate for the Respondents, on the other hand, has submitted that above referred case law has No. application in this case as Commissioner's report was accepted without any objection. He has further submitted that learned Trial Court did not give any scientific reason for not accepting the Commissioner's report. According to Mr. Mahato, learned Trial Court unnecessarily and without any basis branded learned Commissioner as partisan. In this connection he has referred the case [Roy and Co. and Another Vs. Sm. Nani Bala Dey and Others,](#)

9. Learned Trial Court came to findings of fact on the basis of evidence on record coupled with admission of contesting Defendant No. 1 that Plaintiffs purchased .31 decimals of land through two kobalas and was in possession of the same. Said findings of fact were also confirmed by learned Lower Appellate Court. The only point in issue before learned Courts below was whether the land alleged to be encroached by Defendant No. 1 namely "B" schedule land was within the purchased properties of the Plaintiffs. If the answer of said question was in the affirmative then certainly Plaintiffs were entitled to get a decree for recovery of possession.

10. It appears from the judgment impugned that at the time of delivering writ to the learned Advocate Commissioner some documents were enclosed but the petition of the contesting Defendant No. 1 praying for local investigation was not included therein. As such, learned Commissioner had No. scope for giving his findings relating to the points taken by contesting Defendant No. 1 in his petition. As such, it cannot be said that learned Commissioner did not comply the directions as given in the writ or that he was partisan or not neutral. It further appears that the commission work was held in presence of both parties. It further appears from the case record that learned Commissioner submitted his report on 13th of February,

1998 and that dates were fixed on 6th of March, 1998, then 27th of April, 1998 and then 1st of June, 1998 for filing objection, if any, against Commissioner's report and for hearing. It appears that contesting Defendant No. 1 did not file any objection on any of these dates and ultimately the report of learned Commissioner was accepted by Court on 1st of June, 1998 being unchallenged by either side.

11. As such, it appears that the very basis of rejection of the report of the learned Advocate Commissioner by learned Trial Court was wrong, and it was rightly pointed out by learned Lower Appellate Court.

12. In Sankar Kumar's case (ibid) as referred by advocate for the Appellant learned Trial Court while accepting Commissioner's report had observed that the effect of the report shall be considered along with other evidence on record and that at the time of final hearing learned Trial Court rejected the report of the Commissioner on the basis of other evidence on record. But the facts of the present case are quite different. There is no observation of learned Trial Court that the report of learned Commissioner was not in conformity with other evidence on record for which no reliance can be placed on the report of learned Commissioner. Learned Commissioner's report was totally rejected on the ground that he was partial for not giving reports on the points mentioned in the petition of Defendant No. 1 though in reality it came out that said petition of Defendant No. 1 was not even enclosed with the writ which was handed over to learned Commissioner. As such, aforesaid case law of Orissa High Court has no application in the facts and circumstances of the present case.

13. In M/s. Roy and Company's case (ibid) this High Court has categorically observed that the Commissioner's report could not be rejected except on clearly defined and sufficient grounds and that the Court should not act as an expert and overlook the Commissioner's report whose integrity and carefulness are not questioned. In said case law it was further observed that when in spite of several chances given to the Defendant to assail the Commissioner's report, no objection was filed, the objection against the Commissioner's report could not be allowed to be raised at appellate stage when the honesty of the pleader commissioner was not challenged. Aforesaid case law of this High Court is squarely applicable in the facts and circumstances of the present case. Here in spite of giving several opportunities no objection was filed against the report of pleader commissioner. The commission work was held in presence of both parties. Neither at the time of holding commission work nor later after filing of Commissioner's report there was any allegation by Defendant No. 1 that pleader commissioner was not neutral. In view of the above, learned Lower Appellate Court was quite justified in criticizing the findings of learned Trial Court regarding non-acceptance of Commissioner's report.

14. Learned Lower Appellate Court was also justified in observing that though there was no sketch map attached to written statement but learned Trial Court observed presence of such sketch map which went to show that learned Trial Court was not at

all scrutinizing enough.

15. It came out from the report of local investigation (Ext.3) that at the time of commission work through repayment he noted two points namely to determine and locate the lands purchased by the Plaintiffs by kobalas dated 28th of April, 1994 and to draw a map showing the location of the suit land. It further appears from the map annexed to said report that the suit land "kobala" was depicted in yellow color wash with orange stripe to show that the same was within the purchased lands of the Plaintiffs. It is true that learned pleader commissioner failed to relay the entire suit plot No. 1/110 according to R.S. map and to note the names and addresses of the possessors with specified bounded lands in their possession as claimed in the petition of local investigation filed by Defendant No. 1, but those points were not relevant for deciding the dispute of the suit. I have already stated that point in issue was whether the alleged encroached "B" schedule land was within the purchased lands of the Plaintiffs or not. The report of Commissioner together with map annexed thereto clearly established that "B" schedule encroached land was within the purchased lands of the Plaintiffs. This report of the Commissioner, I have already stated, was based on survey held in presence of both sides and remained unchallenged. As such, repayment of the entire suit plot or the noting of possession of other possessors were not at all required for determining the real point in issue of said suit and No. injustice was held for not answering those points of the Defendant No. 1's petition. It further came out from the well reasoned judgment of learned Lower Appellate Court that the suit land as described in schedule of the plaint tallied with lands as described in Plaintiffs' purchased deeds in perspective of Pleader Commissioner's report. Accordingly, learned Lower Appellate Court rightly held that the observations of learned Trial Court that the boundary as described in the plaint did not tally with the boundary of the deed had No. basis.

16. From the above discussions it is clear, and crystal clear that the impugned judgment dated 29th March, 2003 of learned Lower Appellate Court passed in Title Appeal No. 18 of 2002 reversing the judgment dated 7th January, 2002 of learned Trial Court passed in Title Suit No. 91 of 1994 was based on evidence on record and was also well reasoned justifying No. interference by this Court in Second Appeal u/s 100 of the Code of Civil Procedure.

17. As a result, the appeal stands dismissed on contest.

18. However, I pass no order as to costs.

19. Let the Lower Court records along with a copy of this judgment be forwarded to the Lower Court urgently.

20. Urgent Xerox certified copy of this judgment is supplied to learned Counsel/counsels of the parties, if applied for.