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Calcutta High Court

Case No: C.O. No. 1754 of 2010

Latif Sk. @ Abdul Latif — APPELLANT

Vs

Yeadul Sk. and Others — RESPONDENT

Date of Decision: Nov. 22, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 10, Order 26 Rule 9, Order 3 Rule 4

Hon'ble Judges: Harish Tandon, J

Bench: Single Bench

Advocate: Abdul Alim, for the Appellant; Kartick Bhattacharya, for the Respondent

Final Decision: Dismissed

Judgement

Harish Tandon, J.
This revisional application is directed against an order No. 199 dated 26.02.2009 by which an application seeking permission to file an objection to the commissioner report and an application for marking the report filed by the commissioner as exhibit is disposed of.

2. The opposite party filed suit for declaration of their title and permanent injunction.

3. On the basis of an application filed by the petitioner for appointment of the commissioner to make local investigation as envisaged under order 26 Rule 9 of the Code of Civil Procedure, the commissioner was appointed. The commissioner hold the investigation and submitted a report to the court. The said report was accepted by the court on 29.08.1997.

4. After the commencement of the trial, the opposite party filed an application for marking the report of the commissioner as exhibit. Simultaneously therewith, the petitioner filed an application for permission to file an objection to the said report. A ground has been taken by the petitioner that the moment the report of the commissioner was filed, he instructed the learned Advocate to file an objection to the said report and it was all along assured

that the same is being filed but the said lawyer did not take any step for filing the objection to the said report.

5. The Trial Court rejected the said application filed by the petitioner on the ground that the commissioner report was already accepted on 29.08.1997 and the said order has not been assailed and/or challenged before the higher forum. However, it is further observed by the Trial Court that if the petitioner is allowed to cross-examine the commissioner the same would amount to recalling or setting aside the said order dated 29.08.1997 by which the commissioner''s report was accepted.

6. Md. Abdul Alim, the learned Advocate appearing for the petitioner submits that the court have committed illegality in rejecting the application filed by the petitioner and marking the said commissioner report as exhibit with objection. He further submits that the commissioner''s report should not be marked as exhibit without tendering the commissioner''s report in evidence by the commissioner himself standing on the witness box and without affording an opportunity to cross-examine the said commissioner.

7. Mr. Kartick Bhattacharyay, the learned Advocate appearing for the opposite parties submits that the commissioner''s report was already accepted and it is merely a marking of a document as exhibit and the same is permissible under Order 26 Rule 10 of the Code of Civil Procedure.

8. Having heard and considered the respective submissions, it emerges that the Trial Court rejected the application of the petitioner on two ground firstly, that the commissioner''s report was accepted on 29.08.1997 and the said order has not been assailed and/or challenged by the parties before higher forum and secondly, if the petitioner is permitted to cross-examine the same would amount to recalling the said order of acceptance of the commissioner''s report.

9. It would be profitable to court Order 26 Rule 10 of the CPC which reads thus:

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 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. On perusal of the said provisions it appears that the report of the commissioner duly signed by him, has to be filed in court and shall be evidence in the suit and do form part of the record. But the court is not denuded of his power to examine the commissioner personally in open court or permitting any of the parties to examine the commissioner personally in open court touching any matters which are mentioned in the report or as to the manner in which the investigation is conducted. Therefore, the report which is filed is a piece of an evidence in the suit and do form the part of the record. Order 3 Rule 4 of the Code provides that there shall be endorsement on every document which has been admitted in evidence in the suit.

11. This court in case of Amena Bibi and others Vs. Sk. Abdul Haque, held that the parties are not precluded from leading evidence to countermand the commissioner''s report accepted by the court. It is settled law that the commissioner''s report is only a piece of evidence and is not conclusive. It is an opinion evidence and placing reliance solely upon the same is not permissible. The court should also consider the other circumstantial and surrounding evidences. Mere marking an exhibit does not mean that the veracity,authenticity and/or the evidentiary value of the report has been proved but the court has to judge the evidentiary value along with the other evidences available on record.

12. I do not find any illegality and/or infirmity in the impugned order.

13. The revisional application is, therefore, dismissed.

14. There shall have no order as to costs.

15. Urgent Photostat certified copy of this order, if applied, be given to the parties on priority basis.