

(1991) 07 CAL CK 0040

Calcutta High Court

Case No: Civil Order No. 3193 of 1987

Ananda Mohan Sham

APPELLANT

Vs

Sashadhar Pal

RESPONDENT

Date of Decision: July 3, 1991

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 10, Order 26 Rule 18, Order 26 Rule 9

Citation: (1993) 2 ILR (Cal) 281

Hon'ble Judges: Abani Mohan Sinha, J

Bench: Single Bench

Advocate: Sushil Biswas and Shyamal Sur, for the Appellant; Bidyut Kumar Banerjee and Shila Sarkar, for the Respondent

Final Decision: Dismissed

Judgement

Abani Mohan Sinha, J.

This revisional application is directed against the judgment and order passed by the learned Munsif, Fourth Court at Burdwan in Title Suit No. 237 of 1981.

2. The suit was brought by the Plaintiffs for declaration of their rights of the pathway and permanent injunction against the Defendants, the present revisionists. Earlier, there was a suit being Title Suit No. 49 of 1954 of the same Court, at the instance of the self-same Plaintiff which was ultimately compromised in terms of a solenama which formed part of the decree declaring the Plaintiffs' right of pathway in the disputed land. It is alleged that the Defendants, who are the revisionists in the present proceeding, have been trying to obstruct the Plaintiffs' use of the pathway by raising obstruction or construction on such land. In that suit, the Plaintiffs filed an application for appointment of a Commissioner for local investigation for ascertaining the proper location of the disputed pathway. The Court allowed the petition of the Plaintiffs and by an order dated January 10, 1980, directed the

Commissioner to go to the locale for local investigation after due service of notice touching certain points specified by it.

3. The revisionists who are Defendants in the suit also filed an application for "investigation by the same Commissioner on certain points. The Commissioner issued notices to the parties in terms of the directions of the Court and, after conducting investigation, submitted the reports of investigation on the points raised by the Plaintiffs as well as by the Defendants. The Defendants preferred objections against the Commissioner's report. Ultimately, the Court took up the matter on May 14, 1987. It appears from Order No. 140 passed on such date that the Commissioner was examined and the Plaintiff declined to cross-examine the Commissioner. The Court, on hearing the submissions of the parties and on perusal of the record, accepted the report. Being aggrieved by such order the Defendants have come up in revision.

4. Mr. Sushil Biswas, the learned Advocate, duly assisted by Mr. Shyamal Sur, has submitted before this Court with reference to the provisions of Order 26, Rules 9, 10 and 18 of the CPC that, in the instant case, the procedure for issuance of commission under Order 26, Rule 9 was not followed and that the Court did not issue any direction to the parties to the suit to appear before the Commissioner or, so to say precisely, issue notice upon the parties to appear before the Commissioner through their agents or pleaders and, as such, the order is vitiated and should be deemed to have been passed without any jurisdiction.

5. Mr. Banerjee, learned Advocate for the opposite party, duly assisted by Miss Shila Sarkar, has submitted that this is not the scheme of the Rules under Order 26. He has further submitted that the impugned order clearly reflects that the parties, namely the Plaintiffs as well as the Defendants, did not place any objection against the Commissioner's report although the Commissioner was examined by the Court as to his investigation and his report. The learned Court, in these facts and circumstances, clearly recorded that the Plaintiffs declined to cross-examine the Commissioner and that the report should be accepted. The acceptance was recorded on perusal of the record and on consideration of submission of both the parties. So, according to Mr. Banerjee, it would not lie on the part of the defendants to agitate over the same question again or to raise their objection as to the acceptance of Commissioner's report. It must be taken that the Defendants waived their objections.

6. Mr. Biswas, on the other hand, urges that there cannot be any waiver on point of law and the order suffers from exercise of erroneous jurisdiction and that such point could be raised at any time.

7. I have not been supplied with the written objections which the Defendants filed in the Court below. There is nothing to apprise this Court if such objection was raised at all or if the revisionists gave up their objections before the Court. So, it must be

presumed that the Court passed a proper order in its regular course of business. There is nothing on record Or in the application for revision to suggest that the Court did not allow the Defendants to raise their objections or resisted them from raising their objections. So, this point as advanced by Mr. Biswas cannot be accepted.

8. So far as issuance of direction or notice by the Court in terms of Rule 18 of Order 26 of the Code of Civil Procedure, it may be said that the Court below at the time of allowing the petition for commission recorded that the Commissioner should go to the locale for conducting investigation after due service of notice. In my view, the provisions contained in Rule 18 is not mandatory, but directory. The Court may itself issue directions or authorise the Commissioner who has been appointed by it to issue notice of commission on the parties. The Commissioner being an officer of the Court can exercise the delegated authority of issuing notice for the purpose of facilitating the work of commission and for giving the parties an opportunity of participating in the work of commission. I am supported by a Single Bench decision of our High Court in [Jaiswal Coal Co. Vs. Fatehganj Co-operative Marketing Society Ltd.](#), where similar question was raised in connection with an Original Side proceeding. It was held by the learned Judge on a reference to a number of decisions of different High Courts that the Commissioner or Special Officer can act on the directions of the Court as recorded in the minutes and, accordingly, issuance of notice by the Commissioner in terms of the direction would not vitiate the work of commission and the notice by the Commissioner would not be bad. What the Rule requires is that notice to the parties should be given of the work of the commission and the parties should be given opportunity of participating in the work of commission after the receipt of such notice. Similar is the view held by the Allahabad High Court in the case of Suraj Pal v. Meera AIR 1973 AH. 148. If notice is given by the Commissioner, it may be taken that there was substantial compliance of the provisions of Rule 18 of Order 26 of the Code of Civil Procedure.

9. Mr. Biswas has also drawn my attention to some defects in the work of the commission. I am afraid that such matter cannot be reopened at this stage. Besides, the report of the Commissioner is only a piece of evidence which the parties can utilise at the time of trial of the suit in support of the respective contentions raised in the issues framed in the suit; and such report, it is well-settled, cannot be sacrosanct. It can be tried and tested like any other piece of evidence and rebuttal of evidence can be given by the parties against such evidence.

10. That being the case, I do not find that the revisionists will suffer any irreparable injury or will not have any remedy at the time of trial. In my view, there is no jurisdictional error in the impugned order. Accordingly, the application stands rejected on contest. I make no order as to costs. All interim orders are vacated.

11. Let the order be communicated to the Court below expeditiously.

12. Let xerox copies of this order be delivered to the learned Advocates for the parties on their usual undertakings to apply for and obtain urgent certified copy.