

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.200 of 1983

(Against the order and final decree dated 03.08.1982 passed by 1st Subordinate Judge, Chapra in partition suit No.127 of 1975).

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Bipin Bihari Upadhyaya

.... .. Defendant No.6-Appellant

Versus

Shambhu Sharan Upadhyaya & Ors.

.... .. Plaintiffs-Respondents

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Appearance :

For the Appellant/s : Mr. K.N.Choubey, Sr. Advocate

For the Respondent No.1 : Mr. Shankar Kumar, Advocate

For the Respondent No.5: Mr. Surendra Kishore Thakur, Advocate
Mrs. Madhuri, Advocate

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date:17-03-2015

1. The defendant No.6 has filed this First Appeal against the final decree dated 03.08.1982 passed by the learned Sub Judge I, Chapra in partition suit No.127 of 1975 whereby the court below rejected the objection to the Pleader Commissioner's report filed by the defendant No.6-appellant.

2. It appears that the plaintiff-respondent No.1 filed the partition suit claiming 1/6th share in the suit property. According to the plaintiff, Rameshwar Upadhyay had three sons namely Ram Kailash Upadhyay, Ram Bilash Upadhyay and Bhagwati Sharan



Upadhyay. Ram Kailash Upadhyay had two sons i.e. plaintiff, Awdhesh Bihari Sharan Upadhyay and the defendant No.6, Bipin Bihari Upadhyay. Defendant Nos.1 to 5 represent the branch of Ram Bilash Upadhyay and Bhagwati Sharan Upadhyay. The suit was decreed and plaintiff's share to the extent of $1/6^{\text{th}}$ was declared. It was also held that the defendant No.6 has got $1/6^{\text{th}}$ share and the remaining $2/3^{\text{rd}}$ share belonged to the other two branches i.e. defendant Nos.1 to 5. It is admitted that no appeal was filed against the preliminary decree. The Pleader Commissioner was appointed for preparation of final decree. The Pleader Commissioner submitted the report and thereafter the defendant No.6 had filed the objection to the Pleader Commissioner's report. By the impugned order and final decree, the objection of the defendant No.6 has been rejected. Against the order and final decree, the defendant No.6 has filed the present First Appeal.

3. The learned senior counsel, Mr. K.N.Choubey appearing on behalf of the appellant submitted that the learned court below has disposed of the objection of the appellant in most perfunctory way. In fact, the Pleader Commissioner had not visited the suit land and has given the valuation of the suit plots without measurement and without examining the nature of the suit land. The learned counsel further submitted that no notice was served on the appellant and, therefore, he did not participate in the proceeding



before the Pleader Commissioner but the learned court below wrongly held that the appellant took part in the proceeding. The learned counsel further submitted that while dividing the bamboo clumps, the Pleader Commissioner divided the same without counting the bamboo clumps and, therefore, also the Pleader Commissioner's report is liable to be set aside. Further, the appellant had constructed house on plot Nos.1871 of 1872 but the Pleader Commissioner without visiting the said plots, mentioned in the report, that both the plots are agricultural land, on this score alone, the Pleader Commissioner's report is liable to be set aside. According to the learned counsel, by the High Court, a Pleader Commissioner was appointed while hearing the stay matter and the Pleader Commissioner appointed by the High Court gave a report to the effect that there is construction of house containing two rooms and household articles are also there. However, while allotting the share, the said house constructed by the defendant No.6-appellant was not given in the share of the appellant, therefore also, the Pleader Commissioner's report is liable to be set aside.

4. During the course of the argument, the appellant expressed his grievance mostly with regard to these two plots i.e. 1871 and 1872. The learned counsel submitted that since the appellant is in possession of the same and is mentally attached with the same, the Pleader Commissioner should have allotted the house in



toto in favour of the appellant following the principle that convenience of the parties should be respected while allotting the lands. Here, the appellant is in animus possidendi of the land with the structure and if that part is given to the plaintiff, he is ready to adjust his brother, plaintiff in the share of the appellant in other land. So far the share of defendant Nos.1 to 5 is concerned, the same was not challenged. The learned counsel further submitted that while allotting the share in the ancestral house, the Pleader Commissioner has only given two rooms without giving any passage to go to the same, therefore also, the Pleader Commissioner's report is liable to be set aside. Further, the learned counsel submitted that the agricultural lands which are mortgaged and in possession of mortgagee, have been allotted in the share of the appellant.

5. On the other hand, the learned counsel appearing on behalf of the plaintiff-respondent No.1 submitted that he will persuade the plaintiff to have an amicable settlement with regard to these two plots 1871 and 1872. On this assurance given by the plaintiff-respondent No.1, the appeal was adjourned giving opportunity to the plaintiff and defendant No.6 to work out and resolve their dispute. However, on 02.03.2015, when the appeal is taken up for further hearing, the learned counsel appearing on behalf of the appellant submitted that he has got no instruction regarding as



to what happened with respect to the dispute relating to these two plots. On the contrary, the learned counsel appearing on behalf of plaintiff-respondent No.1 submitted that there was talk between both the parties and the plaintiff expressed his desire that he is ready to give his share in both these plots to the defendant No.6-appellant and defendant No.6-appellant may accommodate the plaintiff in his share in agricultural land. The learned counsel for the plaintiff-respondent further submitted that he even expressed his desire that the entire takhta allotted in favour of the plaintiff may be given to defendant No.6-appellant and the takhta allotted to defendant No.6-appellant may be given to the plaintiff-respondent. Before this Court also, the learned counsel agreed that this may be done even by the High Court. However, as stated above, the learned counsel appearing on behalf of the appellant submitted that he has got no such instruction and, therefore, the appeal may be disposed of on merit.

6. The learned counsel for the plaintiff-respondent submitted that the structure which was constructed by the defendant No.6 on these two plots had fallen down long ago and was not in habitable condition. Both the plots i.e. plot Nos.1871 and 1872 measure more than 3 bighas and in small portion, the structure was made and in remaining portion, crops are being grown which was found by the Pleader Commissioner in his report. Since nobody was



residing at that time when the Pleader Commissioner visited, the Pleader Commissioner has not pointed out about the structure which was very very old and inhabitable condition. The same report has been given by the Pleader Commissioner appointed by the High Court. Therefore, now, on this ground that the appellant is in animus possidendi, the due share of the plaintiff cannot be deducted from the said land. Moreover, the plaintiff is ready to give his share provided the appellant is ready to adjust the plaintiff in any other place out of his share but the appellant is not ready and he is trying to delay the matter.

7. The learned counsel further submitted that the Pleader Commissioner has assigned reasons for each and every objection that was raised by the appellant which are valid reasons based on facts, therefore, this Court sitting in first appellate jurisdiction should not interfere lightly unless a question of law is raised. The learned counsel in support of his contention relied upon a decision of this Court in the case of **Jugeshwar Singh & Anr. v. Rijhan Singh & Ors., A.I.R. 1938 Patna 104**. The learned counsel further submitted that the defendant No.6 was always participating in the proceeding before the Pleader Commissioner. He was in possession of two rooms in the ancestral house whereas the plaintiff was in possession of only one room. The defendant No.6 expressed



his intention that both the rooms which are in his possession must be allotted in his takhta and, therefore, the Pleader Commissioner considering the convenience allotted him both the rooms and the plaintiff was adjusted at another place. So far the bamboo clumps are concerned, the learned counsel submitted that with consent of the parties, the Pleader Commissioner divided the same without counting and it was not possible to count the bamboo in the clumps. Therefore, on this ground also, the Pleader Commissioner's report cannot be set aside. The learned counsel further submitted that all these grounds which are being argued by the learned counsel for the appellant have not been raised in memo of appeal but is being argued at the time of hearing.

8. The learned counsel appearing on behalf of the defendant No.5-respondent submitted that so far his share is concerned, the defendant No.6 has not disputed the same. The dispute is between two brothers i.e. two branches of Ram Kailash Upadhyay. The learned counsel also submitted that he has got instruction that the plaintiff-respondent had talked with the appellant and had expressed his desire to exchange his takhta with defendant No.6 or to give his share allotted in both the plots in 1871 and 1872 provided the appellant adjust the plaintiff in any other agricultural land but today intentionally the defendant No.6 is avoiding the same.

9. In view of the above contentions of the parties, the points arise for consideration in this First Appeal is as to “whether the Pleader Commissioner’s report and/or the final decree is liable to be set aside on the ground of objection raised by the defendant No.6-appellant” and “whether the impugned order and final decree is sustainable in the eye of law?”

10. From perusal of the memo of appeal, it appears that only three grounds have been raised. Firstly, the order passed by the court below is perfunctory and in capricious manner. Secondly, that the Commissioner has not looked into convenience of the parties while making allotment and has undervalued the share of the lands of the plaintiff and defendant Nos.1 to 5 and gave valuable lands. Thirdly, the proper share of the plaintiff has not been given. Except this, no ground has been raised. However, at the time of hearing of this First Appeal, all those points which were raised by the appellant and considered by the trial court are raised before this Court.

11. So far the first point regarding non-service of notice by Pleader Commissioner is concerned, from perusal of the report of the Pleader Commissioner, it appears that the Pleader Commissioner clearly mentioned that notices were served upon the lawyers of the parties and also on the parties. He has also mentioned that in presence of both the parties on each date, field work was done



by him. It further appears that on each and every date of the proceeding, both the parties were present. It further appears that the defendant No.6-appellant at the time of division of the ancestral residential house insisted before the Pleader Commissioner that he must get his two rooms in which he was residing with his family. The Pleader Commissioner found that the plaintiff was residing in one room in the northern west which is insufficient for his family members. However, considering the convenience of the parties, the Pleader Commissioner allotted two rooms in the middle in the western portion of the house to the defendant No.6. It further appears that the defendant No.6 at the time of division of Dallan insisted that he is not prepared to take the western portion of the Dallan as it is very old construction and, therefore, one room in the Dallan was given to the plaintiff. Now, in view of this report of the Pleader Commissioner, it appears that the defendant No.6 was very much present before the Pleader Commissioner. It is not the statement of the defendant No.6-appellant on affidavit that these statements made by the Pleader Commissioner in his report are false or that he never insisted for the same as mentioned by the Pleader Commissioner or that he was not present. It may be mentioned here that the Pleader Commissioner was appointed by the Court in presence of both the parties. Notices were even given by the Pleader Commissioner to the parties. The



proceeding continued by the Pleader Commissioner. No objection was ever raised either before the Pleader Commissioner or before the Court by the appellant to the effect that he had no knowledge, therefore, he could not participate. Only after filing the report by the Pleader Commissioner, in the objection, this question has been raised by the appellant. In view of the above, I find no force in the submission that defendant No.6 was not noticed. It is not the case that he had no knowledge about the proceeding or that he did not participate. Moreover, if he had knowledge but he did not participate then on this ground also, the report cannot be set aside. In other words, after notice, if a party intentionally did not take part in the proceeding, the Pleader Commissioner will not await him or that the proceeding before the Pleader Commissioner cannot be withheld.

12. So far bamboo clumps are concerned, the Pleader Commissioner has mentioned that it is not possible to count the same but in the report, it appears that the Pleader Commissioner valued the same and mentioned that both the parties have agreed that they will be satisfied with whatever bamboos they get in their share. The Pleader Commissioner also found that the defendant No.6 is benefited with one mango tree in his share according to division. Therefore, so far this objection that without counting the bamboo clumps, division has been made has also got no force.



13. So far the objection that all the lands, which are mortgaged lands, have been allotted in the share of the defendant No.6-appellant is concerned, it may be mentioned here that this is only general allegation. There is no specific allegation or mention that which plot was mortgaged by which party and that plot has been allotted in the takhta of the defendant No.6. Therefore, merely on the basis of this general allegation, the Pleader Commissioner's report cannot be set aside.

14. So far the objection regarding plot Nos.1871 and 1872 is concerned, the learned counsel for the appellant submitted that the Pleader Commissioner has mentioned that Bhadhi crops were found whereas in fact, a house was constructed by the defendant-appellant. On the contrary, the respondents submitted that the alleged house was in such a condition that it could not have been mentioned as a house and in fact, there was Bhadhi crops on the date of visit of the Pleader Commissioner. Therefore, the Pleader Commissioner recorded what was found by him. From perusal of the report of the Pleader Commissioner, it appears that the Pleader Commissioner has mentioned that both the plots are very big plots and are contiguous to each other and on these plots, Rabbi and Wheat are grown and likewise, Bhadhi crop is also grown. It appears that the Pleader Commissioner has mentioned that he inspected these lands with the



help of the parties. Except these plots, he also inspected various other plots. Admittedly, nobody was residing in the said house because as has been stated above, the defendant No.6 was residing with his family in two rooms of the ancestral house. Now, if a hut was constructed which was not in habitable condition and the Pleader Commissioner did not mention the same while valuing the property, can it be said that the Pleader Commissioner did not visit the land. In my opinion, there cannot be any such presumption because the Pleader Commissioner inspected the lands for the purpose of valuing the lands. It is not denied that Wheat crops or Bhadhi crops were grown in the said lands. It is submitted by the respondents that today also, the crops are standing. Moreover, both the plots measure more than 3 bighas and only in small portion, if any hut was constructed, on the basis of that the valuation of the land will never be increased nor there can be any presumption that the Pleader Commissioner has done table work only without visiting the spot. So far allotment of this constructed portion is concerned, it may be mentioned here that still today, no one is residing there. Therefore, there is no question of convenience of the parties arises.

15. So far the submission of the learned counsel for the appellant that the appellant has got mental attachment with the constructed portion is concerned, in my opinion, the mental

attachment cannot be a ground of giving more share to a party. The appellant has got 1/6th share only and his brother-plaintiff has got 1/6th share. The land has been divided in such a way that the constructed portion which was in dilapidated condition has fallen in part in the share of the plaintiff also.

16. As stated above, the plaintiff expressed his desire to give his share on these two lands to the appellant and also the plaintiff-respondent expressed his desire if so like, the defendant No.6-appellant may exchange the entire takhta of the plaintiff but the learned counsel for the appellant only stated that he has got no such instruction. This speaks about the intention of the defendant-appellant. In my opinion, therefore, while doing partition, the mental attachment cannot be made a ground for division of the property. If it will be made a ground, then everybody will say that I have got a mental attachment of a particular property. Here, in the present case, it is not the case of the defendant-appellant that in the portion i.e. 1/6th share allotted in his favour in both the plots, no construction can be made for residential purpose. In view of the above, I find no force on this objection also.

17. So far the Pleader Commissioner's report submitted before the High Court is concerned, it may be mentioned here that the Pleader Commissioner also reported that it was an old

construction and is not in habitable condition. No one was found residing there i.e. it is abandoned.

18. The learned counsel appearing on behalf of the appellant relied upon a decision of the Supreme Court in the case of **Madhukar and others v. Sangram and others, A.I.R. 2001 Supreme Court 2171** and submitted that this Court being the first appellate court should deal with all the points that was taken in the objection. In addition to this decision, the learned counsel relied upon the another decision of the Supreme Court in the case of **State Bank of India & Anr. v. M/S Emmsons International Ltd. & Anr., A.I.R. 2011 Supreme Court 2906**. So far these decisions are concerned, it is well settled principles of law and there is no dispute about that. Here, in the present case, the points raised by the appellant are vague one and not borne from the record. For example, according to the appellant, no notice was served but from the report, it is clear that he was participating, the bamboo clumps were not properly divided whereas from the report, it appears that both agreed to the division of bamboo clumps in the manner divided etc. etc. as I have stated above. Now, therefore, it cannot be said that the order passed by the court below is perfunctory in nature. It may be mentioned here that the order passed by the court below itself speaks that the court below applied his mind. Therefore, merely because an adjective

“perfunctory” mentioned in the memo of appeal or submitted at the time of argument, the order cannot be held to be perfunctory. In the present facts and circumstances of the case, the decisions relied upon by the appellant are not applicable at all.

19. It will not be out of place to mention here that firstly, at the spot, the Pleader Commissioner who was appointed by the Court applied his mind considering the various objections of the parties and divided the properties considering the convenience of the parties. Now, against the said report, objection was filed and thereafter by the trial court, the objection was considered one by one. Therefore, the report of the Pleader Commissioner was tested by the trial court and thereafter, this appeal has been filed by the appellant and is praying for deciding the veracity or otherwise of the report of the Pleader Commissioner. In view of the above, now it becomes clear that at the first opportunity, he challenged the report before the trial court and then in second opportunity, he is challenging the report before this Court. No doubt, it is a First Appeal but a Division Bench of this Court in the case of **Jugeshwar Singh & Anr. v. Rijhan Singh & Ors., A.I.R. 1938 Patna 104** has held that “a First Appeal to the High Court from a final decree in a partition suit is really in the nature of a second appeal in which questions of law and principle can be considered. The High Court should only interfere when it is shown

that the Lower Court in its decision has gone wrong on some question of principle in making the final allotment and in drawing up the decree.”

20. In the present case, as stated above, except the defendant No.6, who is own brother of plaintiff, is disputing the allotment and rest of the parties including the plaintiff and defendant Nos.1 to 5 did not raise any objection. They are satisfied. However, the appellant was given opportunity to settle his grievance with the plaintiff by sitting together and the appeal was adjourned but in spite of the fact that the plaintiff agreed to resolve the claim of the appellant, the defendant-appellant did not agree. It is not the case of the defendant-appellant that he has got strained relationship with his brother or brother's descendants. No reason has been assigned by the appellant as to why he did not agree the proposal made by the plaintiff-respondent either to exchange the takhta or adjust the plaintiff in agricultural land in lieu of the share of the plaintiff in plot Nos.1871 and 1872. The appellant, therefore, is desirous of getting the final decree set aside on one or the other grounds which are not tenable as discussed above.

21. In view of my above discussion, I find no merit in this First Appeal. Accordingly, this First Appeal is dismissed with cost of Rs.10,000/- to be paid by the defendant-appellant to the

plaintiffs-respondents within two months from today failing which the
plaintiffs-respondents shall be at liberty to realize the same from the
appellant through the process of the Court.

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(Mungeshwar Sahoo, J)