

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.21663 of 2013

- =====
1. Naushad Ali.
 2. Irshad Ali.
 3. Parvez Ahmed.

All 1-3 Son of Late Abdul Raheem , Resident of Village- Chala Bakhtiyar, P.S.-Chapia, P.S.- Husainganj, District-Siwan. At present of Siwan Town (Ara machin Adaa No.2), Mohalla- Purani Quila Pokhra, P.S.-Siwan Town, District-Siwan. **Petitioners.**

Versus

1. Mohammad Israil, Son of Late Abdul Hafiz , Resident of Village- Chala Bakhtiyar, P.S.-Chapia, P.S.- Husainganj, District-Siwan.
2. Jamila Khatoon Wife of Dr. Zakir Hussain, Resident of Village- Chala Bakhtiyar, P.S.-Chapa, District-Siwan..
3. Shakila Khatoon, Wife of Allauddin at present Resident of Village- Dharam , P.O.- Dharam Parsa, P.S.-Manja, District-Gopalganj.
4. Sajida Khatoon, wife of Shamim Ahmed , Resident of Village- Jangalia, P.O., P.S. and District-Gopalganj.
5. Shahido Khatoon, Wife of Akhtar Ali, Resident of Village-Bhali.

..... **Respondents.**

=====

Appearance :

For the Petitioner/s : Mr. Ranjeet Kumar, Adv.

For the Respondent/s : Mr. Ranjan Kumar Dubey, Adv.

=====

CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL JUDGMENT

8 03-09-2015

Heard the learned counsel for the petitioners

and learned counsel for the respondent no.1.

Assailing the legal acceptability of the impugned order rejecting the prayer of the judgment-debtor petitioners to cross-examine the pleader commissioner whose report has been objected to by them, the present application

under Article 227 of the Constitution of India has been filed.

Earlier notice was issued to the respondents in admission matter. The notice has been validly served on the respondents as per the office report and the respondent no.1 is presently represented by his learned counsel.

Shorn of unnecessary details, it would be suffice to take into notice that admittedly there has been a preliminary decree in the suit for partition determining the respective shares of the parties in the suit properties described in Schedule- I & II of the plaint with further direction to keep in mind the structures put up by the defendant no.1 in Schedule-II land and give preference in allotting share to him in the said land from the side the structures have been put up by him. The final decree dated 06.01.2011 was passed but the same was, however, set aside in appeal whereby the matter was remitted back to the trial court with direction to issue a fresh writ to the survey knowing pleader commissioner for Takhtabandi of disputed land mentioned in Schedule-II of the plaint, after the finding that the direction in the preliminary decree with regard to allotment of share to the defendant no.1 keeping in view the structures put by him had not been complied. Accordingly, the fresh writ was issued to the survey knowing pleader commissioner who



submitted his report. The petitioner filed objection to the report of the pleader commissioner and further filed petition praying for cross examining the pleader commissioner alongwith a separate petition praying for issuing Dasti summons to the pleader commissioner in order to avoid delay. By the impugned order the learned court below has declined the prayer of the petitioners for opportunity to cross examine the pleader commissioner and for that purpose issuing Dasti summon to the pleader commissioner.

At the outset it would be pertinent to take into notice the preliminary objection raised on behalf of the plaintiff-respondent regarding the maintainability of this application in absence of the heirs of deceased defendant no.2 (Abdul Aziz) as party respondent in this writ application. It has been submitted by Mr. Dubey, the learned counsel appearing for the plaintiff-respondent that this writ application is not maintainable in absence of those persons as parties in this writ application because the order has attained finality so far as those persons are concerned. The learned counsel for the petitioners in reply has submitted that the heirs of the deceased defendant no.2 though are parties in the suit (final decree proceeding) but they have not contested the prayer of the petitioners and therefore this writ application can proceed or even if they are made parties, there is



no need to issue notice to them and the same can be dispensed with at the risk of the petitioners. The learned counsel for the petitioners, however, has made the prayer for impleading those persons as party respondents in this writ application but the said prayer has been opposed by the learned counsel for the respondents on the ground that the plea of defect of party has been raised in the counter affidavit filed much earlier by the respondents in their interlocutory application (I.A.No.1979/2015) filed for vacating the order of stay dated 10.01.2014 with a prior service of copy of the said interlocutory application upon the learned counsel for the petitioners. It has been further submitted that even then no step has been taken by the petitioners to implead those persons as parties and now at this stage when the matter has been placed for orders after hearing the parties, the said prayer cannot be allowed.

After considering the aforesaid submissions, this Court declines the prayer on behalf of the petitioners to implead the heirs of the deceased defendant no.2 (Abdul Aziz) as party respondents at this stage when the matter has been fixed for passing the order after hearing the parties at length. However, this Court has decided to pass the final order in view of the submission made by the learned counsel for the petitioners that

even though those persons are allowed to be impleaded as party respondents in this writ application, there is no need to issue notice to them and the same can be dispensed with at the risk of the petitioners.

The learned counsel for the petitioners has submitted that the learned court below has failed to consider that the petitioners are entitled to examine the pleader commissioner in order to substantiate the objections raised by them to the report of the pleader commissioner. It has been propounded that denying the said opportunity to the petitioners to substantiate his objection to the report would be against the spirit of Order 26 Rule 14(2) C.P.C. which enjoins the court to confirm, vary or set aside the report after hearing the objections raised against the said report. It has also been argued that the denial of said opportunity to the petitioners has resulted in miscarriage of justice.

The learned counsel for the respondent no.1, however, has submitted that the learned court below has passed the impugned order in accordance with the provision of Order 26 Rule 14(2) which only requires the hearing of any objection to the report of the pleader commissioner and does not entitle the party to cross-examine the pleader commissioner or to lead

evidence in support of his objections. It has been posited that the provisions of law in this regard is categorical and there is no room for widening its scope.

For ease of reference the provision as contained in Order 26 Rule 14(2) C.P.C. is quoted hereinbelow:

14. Procedure of Commissioner.-(1)x x x x x
x
x x

(2). The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order)by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3)x
x
x x

The fascicules of the aforesaid provision demonstrate that the report of the pleader commissioner is to be



confirmed, varied or set aside by the court only after hearing any objection made by a party to the said report. It has been contended on behalf of the respondents that there is no express provision in the Civil Procedure Code entitling a party to produce evidence in support of his objections and the only right which the party raising objection has got is the opportunity of hearing on the objection. No doubt the provision as contained in Sub Rule 2 of Rule 14 does not prescribe the detail of the procedure to be followed by the court once after the report has been submitted and an objection (s) has been raised against the same. However, there is also no specific provision excluding the party who has made objection (s) to the report of the Commissioner to seek opportunity to cross examine the said commissioner before making his submissions in support of his objection. This issue came up for consideration in ***Gourhari Das V. Jaharlal Seal, AIR 1957 Calcutta 90*** and their lordships have laid down as follows:

5. “.....*The provisions, as contained in Sub Rule 2 of Rule 14 do not specify in detail the procedure to be followed by the court. The proper procedure, in our view, should be that after the parties had adduced materials*

before the commissioner, so far as the valuation of the property is concerned, the parties should not be allowed to adduce further expert evidence off hand. The commissioner whose report is under consideration if proposed to be examined by either of the parties should be called.

8. “.....After such a supplementary report is received, the parties will be given opportunity to file objections to the commissioner’s report. If any one of the parties prays for the examination of the Commissioner in Court that is to be allowed. As to what further evidence will be allowed to be adduced, if at all , is to be determined by the court below after the Commissioner has been examined, and the learned Judge has formed an opinion as regards the objections raised by the parties.

The similar view has been expressed in ***Dhadi Barik Vs Arjun Barik, AIR 1986 Orissa 203*** wherein after considering the expression ‘after hearing any objections which the parties may make to the report or reports’, it has been held that there is no embargo disabling a party raising objection to the

report of the Commissioner in the final decree proceeding of a suit for partition to adduce evidence to substantiate the same. In this case a bench decision of Lahore High Court in the case of ***Nazir Ahmed Vs Surfraz-ur-Rahman Khan, AIR 1935 Lahore 501*** has also been noticed where it has been laid down as follows:

“.....This implies that the parties are entitled to substantiate their objections but in such cases as a rule of practice the Commissioner should first be examined with reference to the objections, if any, and if it appears from the statement of the Commissioner that there is ground for further enquiry into any matter which is raised in the objections then the parties should be allowed to produce evidence or the Commissioner directed to amend his report accordingly.....

In view of the aforesaid dictums, it is manifest that the right of hearing granted to the party who has raised objections to the report of the Commissioner cannot be construed strictly in the sense of excluding the opportunity to the said party to substantiate his objections at least by cross examining the



pleader commissioner. So far as the right to lead further evidence in support of the objections is concerned, it has to be determined by the court after the examination of the Commissioner and hearing the party on the objections on the report. In case the Court forms the opinion that the objections need further enquiry it may allow the party to adduce such other evidence which shall be relevant for the purpose but in no case shall be the repetition of the evidence adduced during the trial. In this process the Court shall have to be careful in maintaining the balance between the endeavour to finally and completely resolve all the disputes between the parties and to act with utmost expediency to avoid frivolous attempt to elongate proceeding.

For the aforesaid reasons and discussions, this Court holds that the petitioners are entitled for opportunity to cross examine the pleader commissioner before making their submissions in support of their objection.

Accordingly, the writ application is allowed and the impugned order is set aside. The two interlocutory applications filed by the petitioners dated 21.09.2013(Annexure-7) are allowed. The learned court below is directed to proceed accordingly, keeping in view the aforesaid observations and directions and to issue Dasti Summons to the pleader

commissioner and fix appropriate early date for his examination
in the proceeding.

Nitesh/-

U			
---	--	--	--

(V. Nath, J)

