

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.456 of 2016**

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Ramrup Rai S/o Late Khaikhar Rai Resident of Village Pachhimbari
Rauza, Post Chhapra, District- Saran (Chhapra).

.... Petitioner

Versus

1. Rampatia D/o Laljee Rai
2. Laljee Rai S/o Late Budhan Rai Both residents of Village Pachhimbari
Rauza, P.S. Chhapra Nagar, District- Saran (Chhapra).

.... Respondents

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Appearance :

For the Appellant/s : Mr. J.K.Verma, Advocate
Mr. Anjani Kumar, Advocate
For the Respondent/s : Mr. Chandra Kant, Advocate

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CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL ORDER

6 07-04-2017 Heard Mr. J.K.Verma, learned Counsel for the petitioner, and
Mr. Chandra Kant, learned Counsel appearing for the respondents.

The legal sustainability of the impugned orders by which the learned court below has refused the prayer of the defendant for examination of the Pleader Commissioner and has further directed for consideration of the report of the Pleader Commissioner along with objection on behalf of the petitioner at the time of decision of the suit, has been questioned in the present application under Article 227 of the Constitution of India.

The matrix of facts discloses that T.S. No. 20 of 2011 has been filed by the plaintiff-respondent for declaration of title over the suit land and further for removal of encroachment from the suit land described in Schedule 'Ka' Item I and for grant of injunction with regard to the suit land described in Schedule 'Ka' Item II. During pendency of the suit, the prayer of the plaintiff for appointment of the



Pleader Commissioner was allowed and the Pleader Commissioner was appointed, in spite of objection by the defendant, who submitted his local inspection report. The defendant filed his objection to the said report of the survey knowing Pleader Commissioner on 21.9.2012 and thereafter another petition was filed on 25.7.2013 on behalf of the defendant praying for examination of the Pleader Commissioner and for the said purpose for issuing Dasti Summon to the said survey knowing Pleader Commissioner. From the order sheets as enclosed at Annexure 1 series, it transpires that on 9.1.2014 the Pleader Commissioner could not be present and a prayer was made on behalf of the defendant for fixing another date for his examination. However, the said prayer of the defendant was allowed by the learned court below by imposing cost on the defendant and granting him the last opportunity for examination of the said Pleader Commissioner. It further transpires from the next order dated 10.2.2014 that the learned court below refused to grant adjournment for examination of the said Pleader Commissioner and declined to extend the time for his examination and ordered for consideration of the objection to the Pleader Commissioner's report at the time of decision of the suit. The defendant-petitioner filed a review petition for review/recall of the said order, which was also rejected by the order, dated 15.5.2014.

The present application under Article 227 of the Constitution of India has been filed on 12.7.2016 praying for quashing of the aforesaid order(s) dated 10.2.2014 and 15.5.2014.

Mr. Verma, learned Counsel for the petitioner has submitted



that the impugned order suffers from the vice of perversity in as much as the learned Court below has manifestly treated the said Pleader Commissioner to be a witness on behalf of the defendant-petitioner even when the said Pleader Commissioner was appointed by the court on the prayer of the plaintiff-respondent and the defendant-petitioner has only made a prayer for his examination after filing the objection to the report submitted by him. It has further been also canvassed that the direction for consideration of the objection to the report of the said Pleader Commissioner at the time of decision of the suit is itself contrary to the provision as contained under Order 26 Rule 10 CPC and the principle in this regard has also been laid down by this Court in the case of **Jagdish Bhagat & ors. Vs. Sri Baijnath Rai & ors, 2007 (3) PLJR 719**, wherein it has been laid down that it is incumbent upon the court to decide the objection to the report of the Pleader Commissioner and not to defer it for determination at the time of final hearing of the suit. It has also been contended that though the defendant-petitioner has approached this Court belatedly and nearly after two years of delay, but that will not preclude the exercise of supervisory jurisdiction as envisaged under Article 227 of the Constitution of India. Elaborating the submission, it has been argued that the perversity is apparent on the face of the order and there is continuity of facts, and the delay and laches cannot be a ground for refusal of interference by this Court either under Article 226 or Article 227 of the Constitution of India. In support of his submission, the learned Counsel has also placed reliance upon a decision in the case of **Surya Dev Rai Vs. Ram Chander Rai & ors.**



AIR 2003 SC 3044, in the case of ***Tukaram Kana Joshi & ors through Power of Attorney Holder vs. M.I.D.C. & ors, 2013 (1) PLJR 289 (SC)***, in the case of ***Chandra Bai (Dead) through Legal Representatives vs. Khandalwal Vipra Vidyalaya Samiti & ors, (2016) 12 SCC 534*** and also in the case of ***G. Christhudas & anr. Vs. Anbiah (dead) and ors. AIR 2003 SC 1590.***

The learned Counsel for the plaintiff-respondent, on the other hand, has been emphatic in his submission that the petitioner has approached this Court after inordinate delay and there is no explanation at all with regard to this delay. It has been argued that the delay, that too a long delay without any explanation, would itself be sufficient for refusal to exercise the discretion or jurisdiction under Article 227 of the Constitution of India in the facts and circumstances of the present case. The learned Counsel has placed reliance upon the decision in the case of ***P. Girdharan Prasad Missir & anr. Vs. State AIR 1968 Patna 77*** and in the case of ***Punjabai Bhilasa vs Bhavandas Kisandas AIR 1929 Bombay 89.***

It has been next submitted on behalf of the plaintiff-respondent that as the court has deferred the consideration of the objection of the defendant at the time of decision of the suit, the same is not likely to prejudice the petitioner in any manner as otherwise also the petitioner is entitled to submit a report of the private survey knowing Pleader Commissioner by way of evidence in the suit. It has thus been submitted that no case for interference with the impugned order has been made out by the petitioner.

After considering the submissions, the factual background



and the perusal of the impugned orders, it is manifest that the suit has been filed for declaration of title with the consequential relief including the relief of removal of encroachment from part of the suit land i.e. Item I of Schedule 'Ka'. It is also transparent that a survey knowing Pleader Commissioner was appointed on the prayer of the plaintiff-respondent by the court and the said survey knowing Pleader Commissioner has submitted his report. The defendant-petitioner filed his objection to the report of the said survey knowing Pleader Commissioner and further made a prayer for examining him (the said Pleader Commissioner). The said prayer was allowed by the court and summons were issued to the said Pleader Commissioner. The said Pleader Commissioner, however, for one reason or the other, could not appear before the court for his examination as prayed by the defendant-petitioner. From the perusal of the orders dated 9.1.2014, 10.2.2014 and 15.5.2014 (Annexure 1 series) it is demonstrably clear that the learned court below has treated the said Pleader Commissioner to be a witness to be examined on behalf of the defendant and therefore has imposed cost upon the defendant-petitioner for not ensuring the presence of the said Pleader Commissioner and further has refused to extend the time for examination of the said Pleader Commissioner directing the objection of the defendant to the report of the said Pleader Commissioner to be considered at the time of final decision in the suit. The said factual misconception of the learned court below is further apparent from the order dated 15.5.2014 when the learned court below has refused to recall its earlier order on the prayer of the defendant-petitioner on the



ground that the defendant-petitioner has failed to produce the said Pleader Commissioner even after issuance of Dasti summons. The learned Court below has definitely committed serious error in ignoring the fact that the said survey knowing Pleader Commissioner was to be examined by the defendant who had filed objection to his report as envisaged under Order 26 Rule 10 CPC and there can be no manner of doubt that the said survey knowing Pleader Commissioner could not have been a witness to be examined on behalf of the defendant or for that purpose, the defendant could have been penalized for not producing him as witness. The said serious misconception has resulted in three orders as above mentioned for no justifiable reason. The provisions of Order 26 Rule 10(2) CPC stipulates that the report of the Pleader Commissioner is to be part of the evidence and any of the parties to the suit including the party who has filed objection to the said report is entitled to examine the said Pleader Commissioner with regard to his report. This provision has come up for consideration in the case of **Jagdish Bhagat & ors vs. Sri Baijnath Rai & ors. 2007 (3) PLJR 719**, wherein this Court after consideration of the said provision as well as the other authority has come to the conclusion that determination of the objection against the report of the Pleader Commissioner cannot be deferred for consideration at a later stage and that too at the time of final decision of the suit. This clearly supports the contention on behalf of the petitioner that the learned court below has committed illegality in refusing the opportunity to the defendant for examination of the said Pleader Commissioner and deferring the consideration of the objection at the time of decision of



the suit.

This Court, therefore, does not find substance in the submission of the learned Counsel for the respondent that the impugned order is not going to cause prejudice to the petitioner in any manner as he has the liberty to submit a report of the private survey knowing Pleader Commissioner and examine him in the suit. The impugned order is clearly perverse and has been passed dehors the principles of law as well statutory provisions.

However, the matter does not end here as it has been argued on behalf of the plaintiff-respondent that jurisdiction under Article 227 as prayed cannot be invoked as the petitioner has approached this Court after two years of passing of the order and laches on the part of the petitioner is explicit in absence of any explanation in that regard. The exercise of jurisdiction under Article 227 of the Constitution of India has come up for consideration in several decisions of the apex court including the decision in the case of **Surya Dev Rai (supra)**, where their lordships have held that the exercise of jurisdiction under Article 227 of the Constitution of India cannot be refused on technical ground when the perversity in the order of the court below is apparent. The rule that the interference by this Court under the supervisory jurisdiction under Article 227 should not be declined on the ground of delay and laches further finds recognition in the decision of the apex court in the case of **Tukaram Kana Joshi vs. M.I.D.C. & ors 2013 (1) PLJR 289 (SC)**.

It is also apposite to take into notice the admitted fact on behalf of the parties that adducing of evidence in the suit on behalf of



the parties is yet to commence and the matter is pending at the stage of Section 89 CPC for settlement.

After considering the fact situation as well as the well laid dictums, this Court is convinced that illegality has been committed by the learned court below in passing the impugned orders dated 10.2.2014 and 15.5.2014 in refusing to grant opportunity to the petitioner for examination/cross-examination of the survey knowing Pleader Commissioner, who has submitted the report in the suit and objection has been filed to the said report by the petitioner, and further in directing for consideration of the objection on the said report at the time of final decision in the suit.

Accordingly, the present application is allowed and the impugned orders dated 10.2.2014 and 15.5.2014 are quashed. The learned court below is directed to proceed in accordance with law granting liberty to the defendant-petitioner for examination/cross-examination of the Pleader Commissioner and thereafter to pass appropriate orders in accordance with law on the report submitted by the survey knowing Pleader Commissioner.

(V. Nath, J.)

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