

S/L 6
20.3.2023
Court No.652
SD

CO 949 of 2020

Mantu Chowdhury
Vs.
Subhas Chowdhury & Anr.

Mr. Subhajeet Mookerjee
Mr. Subroto Mookherjee

...for the Petitioners.

Ms. Shila Sarkar

...for the Opposite Parties.

Being aggrieved and dissatisfied with the impugned order no.128 dated 07.01.2020 passed by the learned Civil Judge (Senior Division), 1st Court, Malda in O.C. Suit No.154 of 1999, present application under Article 227 of the Constitution of India has been preferred.

In the present case, the plaintiff/petitioner herein filed suit for declaration of title with a prayer for recovery of possession. The plaintiff's further case is that he had purchased 'Ka' schedule property to the plaintiff and on 22.04.1999, taking advantage of the absence of the plaintiff, the defendants dispossessed the plaintiff from 'Ga' schedule property out of 'Ka' schedule property described in the plaintiff. The measurement of 'Ga' schedule described in 'Gha' schedule to the plaintiff. The encroached portion is 12 ft. 4 inches in length and 8 ft. 2 inches in breadth.

In the said suit, plaintiff also filed an application under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure praying for local investigation

commission for ascertainment of allegation of encroachment. Accordingly, commissioner was appointed who submitted his report stating that the suit land is the part of the residential old room occupied by the defendants and commissioner also stated that the area of the 'Ga' schedule property is $5' \times 16' = 80$ sq. ft. out of 0.06 acre of land and as per sketch map annexed with report the encroached land is the 16 ft. long towards North to South direction and 5 ft. wide in East to West direction.

The petitioner filed objection against the said report stating that the encroached land is measuring with $12'4'' \times 8'2'' = 100.72$ sq.ft. but the pleader commissioner erroneously mentioned the measurement of the encroached land as $5' \times 16' = 80$ sq.ft. without relayment in gross violation of court's order of appointment of commissioner and accordingly petitioner herein prayed for fresh commission.

The learned commissioner was examined before acceptance of the report and finally, learned Civil Judge (Senior Division) accepted the report of the pleader commissioner by an order dated May 20, 2017. Being aggrieved by the said order dated May 20, 2017 the petitioner herein preferred a revisional application under Section 115/115A of the Code of Civil Procedure before learned Additional District Judge, Malda who after hearing both the parties set aside the order dated May 20, 2017 passed by the learned Civil Judge (Senior Division), Malda

and granted liberty to the petitioner to file petition afresh for local investigation commission by another pleader commissioner.

In term of the order dated May 22, 2018 passed by the learned Additional District Judge, 5th Court, Malda in C.R. No.3 of 2017, petitioner filed an application afresh for local investigation by another pleader commissioner and the learned court was pleased to allow the said prayer. The defendant/opposite parties being dissatisfied with the order dated 22.3.2018 challenged the same before High Court in CO No.1248 of 2018 under Article 227 of the Constitution of India alleging that the revisional court below improperly exercised its authority in connection with application under Section 115A of the Code of Civil Procedure, while setting aside the order dated May 20, 2017, accepting the investigation commissioner's report as said order is not revisable in view of the amended provisions of Section 115A of the Code of Civil Procedure. As the earlier Revision case was filed under misconception of fact, petitioner herein invoked jurisdiction of this court by filing application under Article 227 of constitution of India being C.O. 3025 of 2018 against aforesaid order dated 20th May, 2017.

On 28.6.2019 both CO 3025 of 2018 and CO 1248 of 2018 came up before this Court and after hearing, this Court was pleased to set aside the order dated May 20, 2017 by which the court below accepted investigation commissioner report and this court directed the learned Civil Judge (Senior

Division), Malda to hear afresh the report of the Commissioner which was submitted on 04.3.2003. Learned Civil Judge (Senior Division), 1st Court, Malda thereafter reheard the commissioner's report in view of the order passed by this Court in CO 3025 of 2018 and CO 1248 of 2018 and learned court below by its impugned order dated 07.01.2020 accepted the report filed by the advocate commissioner.

Learned counsel appearing on behalf of the petitioner submits that the learned court below acted illegally with material irregularity in exercising of its jurisdiction by accepting the report of the advocate commissioner without considering the written objection filed by the petitioner against such report. He should have rejected the report of the advocate commissioner.

He further submits that from the advocate commissioner's report it is clear that he did not find out any trijunction pillar and could not locate fixed points and did not ascertain the boundary line of plot no.722 from different sides as well as different angles to locate the actual existence of said plot as per C.S. map or R.S. map. The order suffers gross irregularity and without application of judicial mind. Learned court below did not consider that the learned commissioner did not measure the four sides of the so called room though the learned commissioner in his report stated that the suit land is part of the residential old room occupied

by the defendant/opposite parties. Accordingly, he has prayed for setting aside the order impugned.

Learned counsel appearing on behalf of the opposite parties referred the provision of Order XXVI Rule 10(2) of the Code of Civil Procedure and contended that the report and deposition are to be treated as evidence which forms part of the record and such objection and the evidence adduced by the learned commissioner in support of his report shall be scrutinized and considered in the appropriate stage of trial and instead the defendants challenged the said report at this stage by preferring application under Article 227 of the Constitution of India. In this context, opposite parties have relied upon a judgment reported in (2013) 4 ICC 922.

Opposite parties further contended that from the impugned order it is clear that learned commissioner has conducted the commission work in terms of the prayer of the investigation commissioner and moreover, from the order itself it is clear that at the time of investigation commission, the petitioner herein did not raise any objection in respect of the said measurement and accordingly, at this stage he is estopped from challenging the validity and legality of the report submitted by the commissioner. Accordingly, learned counsel for the opposite parties submits that the order impugned is justified and does not call for any interference.

I have carefully considered the submissions made by both the parties.

From the order passed by this court in CO 3025 of 2018 and CO 1248 of 2018, it appears that this court while disposing of the said revisional applications was pleased to direct to hear afresh learned commissioner's report submitted on 04.3.2003 giving sufficient opportunities to hear to either of the parties to the case and decide the issue in accordance with law supporting appropriate reasons available under the provisions of law.

On perusal of the order impugned, it appears that learned court below accepted the said report of learned commissioner, since the petitioner herein did not raise any objection at the time of investigation commission work although commission was held in presence of both the parties and since in the application for local investigation commission, he did not find that any prayer was made for the measurement of four sides of the old room, so court below concluded that the local investigation commission work was conducted as per writ and as per schedule of application for investigation commission.

Needless to say that real dispute between the parties in the present suit is about defendant's alleged encroached portion on the plaintiff's land and the actual measurement of the alleged encroached land for which the local investigation commissioner was appointed. It appears that the commissioner has submitted his report stating that the encroached portion in the case map 5' x 16' = 80 sqft. which is equivalent to 180 square links out of .06 acre and the said

land is part of the residential old room occupied by the defendants.

The said commissioner in his evidence has categorically stated that he did not find any trijunction pillar though he has not mentioned the same in his report. He also admitted that he did not take any permanent fixed point of the town during investigation as fixed point for the purpose of investigation work. He has taken west corner of plot no. 725 as fixed point only by comparing the same with R.S map and at the same time he also admitted in his evidence that without original R.S map he cannot say that instant survey work was done correctly or perfectly. He also stated that it would have been better had the fixed points are selected from all the sides of the suit plot. He also admitted that in connection with the 'ga' schedule he has not given any measurement towards north south direction. Finally, he admitted that he did not measure plot no.722 by keeping fixed points from all four sides. Furthermore, though he has stated in his report that encroached land is the part of the residential old room occupied by the defendant but he admitted that he did not measure the four sides of the so called old room.

In view of the above, it is quite clear that said report which was accepted by the court below by the impugned order is full of anomalies and has not been prepared on the basis of any scientific investigation. In his evidence, he also admitted that the work has not been done in proper manner

and accordingly, there is sufficient scope to say that the report of the survey commissioner suffers from serious irregularities and it should not have been accepted by the court below only on the ground that at the time of investigation commission, the defendant/petitioner did not raise any objection or that as because there was no prayer for taking measurement of the four sides of the room, so he was not obliged to do the same in order to ascertain the actual encroached portion.

Fixed points in survey operations are paramount fixtures and if the fixed points were not available near about the disputed plot, the commissioner has to find out other permanent structure near about the plot and take the measurement. Here no permanent points were fixed or located before stating the measurement of the land in dispute and as such the sketch map and report prepared by the survey commissioner are not reliable. In fact the integrity, credibility and carefulness of the commissioner's report herein is questionable. The commissioner's report is deficient on various points as admitted by him in evidence and as such I have no hesitation to say that the impugned report is unsatisfactory to adjudicate real dispute between the parties.

Considering all these the order no.128 dated 07.01.2020 and the impugned investigation commission report dated 04.03.2003 are hereby set aside.

The learned court below is hereby directed to appoint fresh local investigation commissioner within a period of four weeks from the date of communication of the order with a direction upon the learned Commissioner to make the investigation commission in terms of prayer, covering all the lacuna that has been pointed out in the earlier report and such commission work shall be concluded within a period of twelve weeks from the date of his appointment.

There will be no order as to costs.

C.O. 949 of 2020 accordingly disposed of.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Ajoy Kumar Mukherjee, J.)