IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present :

THE HON'BLE JUSTICE PARTHA SARATHI SEN

C.O. No.3062 of 2022

Amit Mines Private Limited

Vs.

Maithan Alloys Limited & Anr.

For the Petitioner :	Mr. Jayanta Kumar Mitra, Sr. Adv.,
	Mr. Srijib Chakraborty, Adv.
	Mr. Iftekar Munshi , Adv.,
	Mr. Aditya Mondal , Adv.
For the O.Ps. .:	Mr. Debajyoti Basu, Adv.,
	Mr. Subhojit Seal, Adv.

Last Heard on:	: 12.04.2023
Judgment on:	: 18.04.2023

Partha Sarathi Sen, J. : –

1. In this revisional application as filed under Article 227 of the Constitution of India the Order no. 162 dated 12.09.2022 as passed in Title Suit No. 32 of 2008 by the learned Civil Judge, Senior Division, 1st Court at Assansol has been assailed. By the impugned order learned trial court while disposing an application dated 06.04.2019 (original application dated 04.02.2015 and as amended vide order dated 12.09.2009 by the self same court) as filed by the defendant with a prayer for setting aside the ex parte

report as submitted by the Accounts Commissioner on 6th January, 2015 with a further prayer for fixing another date of commission for holding a fresh accounts commission has been disposed by directing that the commission's report so submitted would again be reconsidered in presence of both the sides taking into account any point or contention raised by the defendant before the Accounts Commissioner on two specified dates. The defendant of the said suit felt aggrieved and thus preferred the instant revisional application.

2. Mr. Mitra, learned Senior Advocate appearing on behalf of the defendant/petitioner at the very outset took me to the list of dates as filed by the defendant/petitioner. Attention of this Court is also drawn to the plaint as filed in Title Suit no. 32 of 2008 before the learned trial court as well as to the preliminary decree as passed against his client. It is contended by Mr. Mitra that though in the preliminary decree learned trial court while appointing an accounts commissioner directed that the said accounts commissioner shall have to proceed to prepare his report after giving due information to both the sides but from the facts as involved in the lis as pending before the learned trial court it would reveal that the said accounts commissioner completed his work of commission and submitted his report before the learned trial court without serving any notice upon the defendant/petitioner and thus violated the provisions of Order 26 of the Code of Civil Procedure as well as the mandate of the learned trial court.

3. Drawing attention to the provisions of Order 26 Rules 12 and 18 of the said Code, it is argued that though the learned trial court while passing the impugned order was satisfied that the present defendant/ petitioner was

not served with notice of commission, the learned trial court instead of proceeding under the provisions of Order 26 Rule 12(2) of the said Code i.e. instead of directing further enquiry by way of commission afresh, kept the ex parte repot of the commission pending and further directed that the said commission's report be again reconsidered in presence of both the sides taking into account any point of contention raised by the defendant. Mr. Mitra, Learned Senior Advocate for the defendant/petitioner in course of his argument also draws attention of this Court to the photocopy of the commission's report as submitted before the learned trial court as well as to the impugned order. It is submitted by Mr. Mitra that on bare perusal of the said report it would reveal that the said report is cryptic one which ought to have been set aside by the learned trial court on the basis of reasoning as given by the learned trial court in the self same impugned order. It is further argued on behalf of the defendant/petitioner that though the learned trial court while passing the impugned order was fully satisfied that there exists a good number of points of dissatisfaction in the said commissioner's report as already submitted by the learned commissioner, but the learned trial court for the reason best known to him instead of proceeding under the provision of Order 26 Rule12(2) of the Code of Civil Procedure passed a clumsy order which tantamounts to violation of proper dispensation of justice and thereby caused serious miscarriage of justice which should be rectified by this Court in exercise of its power under Article 227 of the Constitution of India.

4. It is thus argued that in the event the accounts commissioner's report as submitted before the learned trial court had not been set aside with a

further direction to issue fresh commission after serving notice to both the sides, the present defendant/petitioner would suffer irreparable loss and injury. Placing his reliance upon the reported decision of ***Rani Aloka Dudhoria and others vs. Gautam Dudhoria and others*** reported in ***(2009)13 SCC 569*** it is argued that in the said reported decision the Hon'ble Apex Court made it clear that prior to holding commission, notice to all the parties to a suit is a sine qua non. It is thus submitted that since in the case in hand such principle of law has not been followed the instant revisional application may be allowed by setting aside the impugned order.

5. Per contra, Mr. Basu, learned advocate for the plaintiffs/opposite parties also draws attention of this Court to the certified copy of the impugned order. It is submitted by Mr. Basu that it would not be proper for this Court to interfere with the impugned order sitting in the superintendence jurisdiction of High Court unless the impugned order suffers from patent illegality. Drawing attention to the petition dated 6.4.2019 as filed before the learned trial court it is contended on behalf of the plaintiffs/opposite parties that since within the four corners of the petition dated 6.4.2019 no allegation has been lavelled against the accounts commissioner, learned trial court is very much justified in not setting aside the entire commission's report . It is argued that by the impugned order that no prejudice has been caused to the defendant/petitioner since the learned trial court had given him an opportunity to agitate its points of contention before the accounts commissioner on the specified dates as fixed by the learned trial court. Drawing attention to the order no.103 dated 28.1.2016 as available from page nos. 65-69 of the affidavit-in-opposition it is

submitted that by the said order learned trial court though recalled the acceptance of commission's report as done by the said learned trial court earlier but at the same time liberty was given to the present defendant/petitioner to cross-examine the accounts commissioner which the defendant/petitioner did not avail for the reason best known to him. It is contended thus that since before the learned trial court nothing could be placed to show at least prima facie that the report of the accounts commissioner as filed suffers from any patent illegality, Learned trial court is very much justified in not setting aside the said commission's report while passing the impugned order.

6. Drawing attention to the provisions of Order 26 Rules 11 and 12 of the Code of Civil Procedure it is further argued by Mr. Basu that either before the learned trial court or before this Court also the defendant/petitioner has miserably failed to substantiate even prima facie that the accounts commissioner submitted his report without considering the exhibited documents and in view of such fact there cannot be any reason to reject the commission's report as prayed for by the defendant/petitioner before the learned trial court. In support of his contention, Mr. Basu places his reliance upon the following reported decisions :

(i) ***Ohandan Mull Indra Kumar and Ors. vs. Ohiman Lal Girdhar Das Pareeh and Anr.*** *Reported in* ***44 CWN 205;***

(ii) ***M/s Roy and Co. and Anr vs. Sm. Nani Bala Dey and Ors.*** *reported in* ***1978 SCC Online Cal 235: AIR 1979 Cal 50****;*

(iii) ***Amena Bibi and Ors. vs. Sk. Abdul Haque*** *reported in* ***AIR 1997 Calcutta 59;***

(iv) ***Harihar Misra vs. Narhari Setti Sitaramiah and Anr.*** *Reported in* ***1965 SCC Online Ori 18: AIR 1996 Ori 121****;*

(v) ***Garment Craft vs. Prakash Chand Goel*** *reported in (****2022) 4 SCC 181;*** *and*

(vi) ***Soni Dineshbhai Manilal and Ors. vs. Jagjtvan Mulchand Chokshi*** *reported in* ***(2007) 13 SCC 293****.*

Mr. Basu thus contends that it is a fit case for dismissal of the instant revisional application.

7. On perusal of the impugned order, it reveals that the Learned Trial Court while passing the impugned order observed the followings:

a. On 16.02.2015 the Learned Trial Court allowed the petition as filed by the defendant for recalling the order of acceptance of the report of the accounts commissioner which was held in absence of the defendant of the said suit.

b. Learned Trial Court felt it justified not to rely on the consent as given by the Learned Advocate for the defendant and thus gave a chance to the defendant to cross examine the Learned Accounts Commissioner for justifying the cause of both sides.

c. While passing the preliminary decree, the Learned Trial Court directed that the Commissioner shall prepare the report after giving information and making communication with both sides.

d. It is admitted position that commission was done in absence of the defendant.

e. The plaintiff did not inform the Learned Trial Court about the non availability of the defendant or about the non-service of the notice or about the refusal of the Learned Advocate for the defendant to receive notice or about the holding of commission in absence of the defendant.

f. Had the plaintiff made the Learned Trial Court aware of the situations as stated above, the Learned Trial Court could have taken better initiative for conducting a better commission.

g. For not seeking instructions of the Learned Trial Court on account of the non-availability of the defendant during holding of commission, the process of holding the commission itself suffers from **material irregularity** as it was done in contravention of the order of the Court.

h. On account of the absence of the defendant at the time of commission, the defendant can obviously have reasonable doubt and question as to whether his documents have been properly considered by Learned Accounts Commissioner and may have his points put forward in respect of the same.

i. It is not wise to pass any final order during the subsistence of such troubled state of affairs and without giving equal opportunity to the other side.

j. The whole purpose of issuing commission and holding thereof in presence of both sides is to pass a properly executable order.

Based on the above observation, the Learned Trial Court have held thus :

> "...........*Considering the long pendency of the case and the delay being caused in the final disposal of the case, this Court,*

in order to avoid unnecessary delay, finds it proper not to wipe out the entire commission report or rather set it aside totally and order fresh commission, but this Court is of the opinion that the commission report may be reconsidered in the presence of the both sides, thus allowing the defendant to contend and give explanation, if any, regarding his documents and his side of the case or bring forth to the Commissioner any document or point there which may affect the final summation of the commission report................."

8. Based on the aforementioned observation and the findings as noted above, the Learned Trial Court passed the impugned order which has been assailed before this Court.

9. Keeping in the mind the entire scenario as discussed herein above and after giving due thought over the submissions of the Learned Advocates for the contending parties, it appears to this Court that before the Learned Trial Court neither parties have raised any doubt with regard to the honesty and integrity of the accounts commissioner. On the contrary, the core issue before the Learned Trial Court as well as before this Court also is with regard to the non-wiping of the commissioner's report on account of the absence of the defendant during commission.

10. It is to be kept into mind that when Commissioner submits his report, the same becomes part of the case record though that does not mean however that parties are precluded from challenging and/or assailing the report either by cross examining the commissioner or by examining any other witnesses to countermand the effect of the report.

11. In this backdrop, it appears to this Court that when the Learned Trial Court himself found that the process of holding the commission itself

suffers from **material irregularity** as it was done in contravention of the order of the Court and when there is still opportunity to regularise the same by ordering fresh commission(which has been also done by the impugned order), there cannot be any justification to keep the previous commissioner's report alive instead of setting aside the same since there is every chance of submission of two contradictory reports by the self same commissioner.

12. In view of the circumstances as discussed hereinabove and keeping in mind the mandate of the provisions of Order 26 Rule 18 of the Code of Civil Procedure, it appears to this Court that the impugned order is not sustainable in Law. However considering the entire scenario as discussed in the impugned order, this Court is not in agreement with the Learned Trial Court that the defendant and /or his Learned Advocate appearing in the trial Court are no way responsible for their absence during the holding of Commission by the accounts commissioner. This Court has every reason to believe that the defendant absented himself in the process of commission either by refusing to take notice of commission or by otherwise with an intention to drag the proceedings as pending before the Learned Trial Court.

13. Accordingly the instant revisional application is hereby allowed on contest. The impugned order No. 162 dated 12.09.2022 as passed by the Learned Civil Judge, Senior Division, First Court at Asansol in Title Suit No. 32 of 2008 is hereby set aside.

14. Consequently the defendant/petitioner's application dated 06.04.2019 (original application dated 04.02.2015 and as amended vide order dated 12.09.2009 by the self same court) for setting aside the report of the Commissioner dated 06.01.2015 stands hereby allowed, however

considering the conduct of the defendant in the Learned Trial Court with cost of Rs. 1,00,000/- out of which Rs. 75,000/- is to be paid by the defendant/petitioner to the plaintiff directly and the remaining sum or Rs. 25,000/- is to be deposited with the Secretary, Calcutta High Court Legal Services Committee positively within a fortnight from the date of passing of this order. The time limit for payment of cost is mandatory.

15. It is further ordered that the receipts showing deposit of cost shall have to be filed before the Learned Trial Court on 10.05.2023 and on the said day the authorised representatives of the plaintiff and the defendant of Title Suit No. 32 of 2008 with their respective Learned Advocates shall remain present in person before the Learned Trial Court at 2 P.M.

16. It is further ordered that in presence of the authorised representatives of the plaintiff and the defendant of Title Suit No. 32 of 2008 and their respective Learned Advocates, Learned Trial Court shall fix five consecutive dates for holding accounts commission at the cost of the defendant to be assessed by the Learned Trial Court which is to be deposited by the defendant within three days from the date passing of such order. Learned Trial Court is further directed to announce the dates and timing of holding the commission in its Court cause list which will be treated as notice to the parties regarding the dates and time of holding commission by the accounts commissioner.

17. Learned Accounts Commissioner is also directed to hold the commission as per schedule to be fixed by the Learned Trial Court and he shall have to submit his final report within a week from the date of conclusion of the work of commission.

18. It is made clear that in the event the defendant/petitioner fails to deposit the cost as imposed by this Court and/or the cost of Accounts Commission within the time as fixed by this Court, it shall be presumed that no favourable order has been passed by this Court in favour of the defendant/petitioner in this revisional application and in that event liberty is given to the Learned Trial Court to proceed with the Title Suit No. 32 of 2008 in accordance with Law.

19. Trial Court is further directed to forward a copy of this order to the accounts commissioner at the earliest.

20. Considering the long pendency of Title Suit No. 32 of 2008, Learned Trial Court is further directed to dispose of Title Suit No. 32 of 2008 within a period of three months from the date of communication of this order.

21. Parties to act on the server copies of this order.

22. Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

(Partha Sarathi Sen, J.)