

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.399 of 2017

Sanjiv Prasad @ Tuntun Prasad Son of late Rameshwar Prasad Resident of
Village- Kariyama, Post Office- Bhathar, Police Station- Tharthari, District-
Nalanda.

... .. Petitioner/s

Versus

1. Jitendra Kumar Son of late Ram Sharan Mahto
2. Shiv Shankar Prasad Son of late Ram Sharan Mahto
3. Bhagwat Mahto Son of late Mitrajit Mahto
4. Mahendra Prasad Son of late Chandeshwar Mahto All Residents of Village-
Kashmiri Chak, Police Station- Noorsarai, District Nalanda.
5. Chandeshwar Prasad
6. Umesh Prasad Both Sons of late Bulki Chand Mahto both Resident of
Village- Lakshmipur ,Police Station- Parwalpur, District- Nalanda.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr.Bal Bhushan Choudhary, Advocate
		Mr. Harshwardhan Sahay, Advocate
		Mr. Manish Kishore, Advocate
For the Respondent/s	:	Mr.Dilip Kumar, Advocate
		Mr. Nitya Nand Neeraj, Advocate
		Mr. Rahul Kumar, Advocate
		Ms. Kiran Kumari, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date : 29-02-2024

The present petition has been filed under Article
227 of the Constitution of India and is directed against the
operative part of the order dated 25.01.2017 passed in Title Suit
No. 174 of 1969 by learned Sub Judge-II, Hilsa.



2. Briefly stated, the facts of the case are that originally Keowli Devi Devi and Rohni Devi filed a suit for partition against their cousin Harihar Mahto and his son Radha Krishna Prasad and descendants and other cousins Wazir Mahto, Dhalu Mahto and Mahabir Mahto. The plaintiffs also impleaded their full sisters Sukni Devi and Mangri Devi as defendant nos. 16 and 17. The said suit was filed on 17.12.1969 in the court of learned 2nd Additional Sub-Judge, Biharsharif, Nalanda as Title Suit No. 174 of 1969/34 of 1974. The defendants appeared and filed their written statement and contested the suit. During the pendency of the suit some of the defendants died and their heirs were substituted and in the same manner after death of original plaintiffs their legal heirs/representatives came on record. The suit of the plaintiffs was filed for the following reliefs:-

“I. A decree for partition allotting a separate Takhta for 16,3/4 Paisa share in the properties detailed in schedule No. 1 and 2 of the plaint be separated by metes and bounds.

II. That it be declared that the alleged registered deed of gift dated 12.05.1969 said to have been executed by Jhaman Das in favour of defendant no. 2 Radha Krishna and in favour of defendant nos. 10 and 11 and thirdly in favour of



defendant no. 9 Ram Sharan Prasad, fourthly in favour of defendant no. 15 Munni Devi are forged, fabricated and null and void documents and are not binding to the plaintiffs and the same be set aside.

III. Cost of the suit.

IV. Any other relief/reliefs to which the plaintiffs may be held entitled.”

3. Thereafter, the learned Additional Sub Judge-II, Hilsa decreed the suit vide judgment dated 23.12.1982 and passed the following order “It is therefore ordered that the suit be decreed against the contesting defendants and ex-parte against the rest with cost. The plaintiffs are directed to take necessary steps for appointment of survey knowing Pleader Commissioner so that their separate Takhta of their share be carved out. Let the preliminary decree be drawn up accordingly. It is further ordered that the alleged four deeds of gift dated 12.05.1969 are forged and fabricated are not binding on the plaintiffs.” In terms of direction of the learned court, the preliminary decree was drawn up and sealed and signed on 07.01.1983. The defendants Harihar Mahto and others being aggrieved by the said judgment dated 23.12.1982 preferred First Appeal No. 161 of 1983 before this Court against the plaintiffs and defendant nos. 16 and 17 impleading them as



respondents in the appeal. On the other hand, as per order and direction of the learned court below, the plaintiffs filed petition for appointment of survey knowing Pleader Commissioner. Sri Vishnudeo Prasad Singh, learned Advocate was appointed as Pleader Commissioner for effecting the partition and to carve out separate Takhta of the plaintiffs in respect of their share $16\frac{3}{4}$ paisa in the joint properties detailed in Schedule I and II of the plaint. The writ of appointment to the Pleader Commissioner was issued on 08.05.1985 and he started the work of commission. During the pendency of the final decree proceedings, the original plaintiffs died and in their place their heirs/legal representatives were substituted, who are the respondents before this Court. Similarly, Radha Krishna Prasad and other defendants also died and their heirs were substituted. But in the cause title the name of Bhola Mahto and Radha Krishna Prasad continued to appear. The learned Pleader Commissioner prepared a report dated 03.07.1998, i.e., 13 years after issuance of writ, which was subsequently filed in the learned trial court. The defendant nos. 1, 2, 10 and 13 jointly filed an objection petition dated 15.05.1999 in the court of learned Sub Judge-I, Hilsa with prayer to set aside the report of the Pleader Commissioner. Thereafter, on 02.02.2016 the



petitioner/substituted defendant no. 13(d) also filed petition for filing objection to the report of survey knowing Pleader Commissioner dated 03.07.1998. Thereafter, on 09.02.2016 petitioner/defendant no. 1 filed his objection on the report of survey knowing Pleader Commissioner with prayer to set aside the report. After filing of objections dated 15.05.1999, the case was transferred to the court of learned Sub Judge-II, Hilsa and after hearing the parties on objection petition dated 10.02.2016, the learned Sub Judge-II, Hilsa passed the impugned order dated 25.01.2017 accepting the report of the Pleader Commissioner and the learned Sub Judge further passed the order directing the objectors to put themselves and other parties in possession as per share allotted by survey knowing Pleader Commissioner. The said order has been challenged before this Court.

4. Learned counsel for the petitioner submits that the learned trial has committed gross error while passing the impugned order. The learned trial court did not pass any order for preparation of final decree in terms of Order 26 Rule 14(3) of the Code of Civil Procedure (hereinafter 'the Code'). The learned trial court instead of passing order for preparation of final decree wrongly directed for delivery of possession to the



concerned parties on the disputed land as per the Dazbandi allotted by the Advocate Commissioner within ten days from the date of passing of the order, which is contrary to the provisions of Order 26 Rule 14(3) of the Code. Learned counsel further submitted that respondents became embolden by the operative part of the impugned order and they want to evict the petitioner by force. Learned counsel further submitted that the Pleader Commissioner has committed several errors while preparing the report. The said report is collusive, incorrect and unscientific. But the petitioner could not file any appeal against the impugned order dated 25.01.2017 unless final decree is drawn up on the requisite value of stamp. The petitioner reserves his right to prefer appeal against the final decree after its preparation. Learned counsel further submitted that the order of the learned trial court is not sustainable on account of the fact that no reason has been given for rejecting the objection petition filed on behalf of defendant no. 13(d). The report of the survey knowing Pleader Commissioner has been filed after 13 years and this delay has not been explained. The parties were not heard by survey knowing Pleader Commissioner on valuation of the disputed land. All the proceedings were done in presence of plaintiff, defendant no. 16 and defendant no. 17.



Field book and valuation chart were not examined. Learned counsel further submitted that the Pleader Commissioner did not explain how he had arrived at the conclusion in his report. Learned counsel further submitted that the Pleader Commissioner did not go to the site and prepared the report sitting in his office and has not made any proper technical evaluation. Learned counsel further submitted that no opportunity was given to the petitioner to join the survey which was done only in presence of plaintiff no. 1, defendant no. 16 and defendant no. 17. Thus, learned counsel submitted that as the learned trial court did not follow the mandatory provision under Order 26 Rule 14(3) and did not take into consideration the objection filed by the petitioner, the impugned order is wholly improper and without jurisdiction.

5. Per contra, learned counsel for the respondents submitted that there is no infirmity in the impugned order and the same has been passed after due consideration of the facts and circumstances and the report of survey knowing Pleader Commissioner. The Pleader Commissioner was appointed in terms of judgment and decree of the learned court below. Learned counsel further submitted that the appeal against the first preliminary decree was dismissed on 26.08.2013. The



matter remained pending in anticipation of filing of report of survey knowing Pleader Commissioner which was submitted after 13 years of the appointment of the Pleader Commissioner. Learned counsel further submitted that the court has accepted the explanation for delay in filing the report. The objection petition has been filed after 18 years of submission of report by survey knowing Pleader Commissioner and this fact was taken into consideration by the learned court below. In the objection of the petitioner specific details were also missing and this fact was further taken into consideration while passing the impugned order by the learned trial court. Learned counsel further submitted that this suit was filed in the year 1969 and till date the share of the plaintiffs could not carved out. Learned counsel further submitted that after passage of so many years, it is not of much significance that the learned court below straightway ordered for delivery of possession on the basis of report of the Pleader Commissioner. So there is no infirmity in the impugned order and same may be affirmed.

6. Having regard to the rival submission it is amply clear that the order of the learned Sub Judge-II, Hilsa has been assailed mainly on the ground that after acceptance of survey knowing Pleader Commissioner's report, no final decree has



been issued in terms of Order 26 Rule 14(3) of the Code of Civil Procedure. Order has also been assailed on the ground that the report of the survey knowing Pleader Commissioner was highly belated and it was behind the back of the petitioner and other defendants except defendant nos. 16 and 17. So far second objection is concerned, I think the learned court below has properly explained the same and such explanation is acceptable. Moreover, the conduct of the petitioner in filing objection after 18 years of submission of report of the Pleader Commissioner at a highly belated stage, is an instance of the pot calling the Kettle black. The learned trial court has rightly rejected the objections of the petitioner on the ground of lack of specific details. Learned trial court has also considered that no document was brought on record to support the allegations made in objection petition and whole report was challenged without any reasonable, valid and specific ground.

7. However, at the same time, I find merit in the contention of learned counsel for the petitioner that proper procedure to be adopted by learned trial court would have to accept the report of survey knowing Pleader Commissioner and to issue final decree which was not followed in the present case. After acceptance of the report of survey knowing Pleader



Commissioner, it was incumbent upon the learned court below to prepare a final decree in terms of the report. Order 26 Rule 14(3) of the Code provides as under:-

“14(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.”

8. Hence, the order of the learned court below, directing the objectors to put themselves and other parties in possession of the disputed land allotted by the survey knowing Advocate Commissioner within 10 days from passing of the order, is manifestly wrong and incorrect. The learned Sub Judge exceeded his jurisdiction when he, without preparation of final decree, directed the parties to deliver the possession in accordance with the report of the learned Pleader Commissioner. On this aspect, the impugned order is not sustainable. Therefore, the order dated 25.01.2017, passed by learned Sub Judge-II, Hilsa in Title Suit No. 174 of 1969, is set aside to the extent learned court below has ordered the objectors for handing over the possession in terms of their allotted shares and the impugned order is modified to that extent. The learned trial court is directed to prepare final decree



after accepting Pleader Commissioner’s report as envisaged under Order 26 Rule 14(3) of the Code.

9. Accordingly, the instant petition stands allowed in part.

(Arun Kumar Jha, J)

DKS/-

AFR/NAFR	A.F.R.
CAV DATE	12.02.2024
Uploading Date	29.02.2024
Transmission Date	N.A.

