

**IN THE HIGH COURT AT CALCUTTA
(Civil Appellate Jurisdiction)
APPELLATE SIDE**

Present:

The Hon'ble Justice Supratim Bhattacharya

S.A. 25 of 2017

With

IA No: CAN 1 of 2016 (Old No: CAN 9122 of 2016)

Arabindu Das & Ors.

-Vs.

Badal Bera & Ors.

For the Appellants : Mr. Amit Baran Dash
 Ms. Ankana Sarkar

For the Respondent : Mr. Mahendra Prasad Gupta
 Mr. Asit Kumar De
 Mr. Ayan Mitra
 Ms. Susmita Senapati

Heard On : 12.04.2024

Judgement Delivered On : 11.07.2024

Supratim Bhattacharya, J.:

1. The appellants herein have preferred the instant appeal being aggrieved by and dissatisfied with the judgment passed by the Ld. Civil Judge (Sr. Divn.) 1st Court Contai, in Title Appeal No. 37 of 2011. Through the said judgment the Ld. First Appellate Court has been pleased to dismiss the appeal on contest without any order as to cost.
2. The appellants herein were the plaintiffs before the Ld. Trial Court and the appellants before the Ld. First Appellate Court while the

respondents herein were the defendants before the Ld. Trial Court and respondents before the Ld. First Appellate Court.

3. Facts before the Trial Court:

The appellants/plaintiffs instituted the instant *lis* in the year 2008 by filing a title suit being Title Suit No. 27 of 2008 praying for declaration and injunction in respect of the properties mentioned in the schedule A and schedule B of the plaint.

The respondents/defendants contested the said suit by filing written statement and controverted the claim of the appellants/plaintiffs and in addition to that has prayed counter claim in respect of the schedule properties.

On the basis of the pleadings the Ld. Trial Judge framed the following issues:

- “1) Is the suit maintainable in its present form and prayer?*
- 2) Is the suit barred by any law?*
- 3) Do the plaintiffs have any right, title, interest or possession over the suit land?*
- 4) Are the plaintiffs entitled to get the decree as prayed for?*
- 5) To what other relief, if any, are the plaintiffs entitled?*
- 6) Are the defendants entitled to get their counter claim decreed?”*

- 4.** During the proceedings the defendants prayed for appointment of a survey knowing Commissioner and the Ld. Trial Judge after hearing both sides was pleased to appoint a survey knowing Commissioner. The survey passed Commissioner conducted superposition of the maps and thereafter submitted report on 27.05.2008. The

appellants/plaintiffs prayed for adjournment on several occasions for filing written objection in respect of the said report of the Commissioner but in spite of passage of eleven months the appellants/plaintiffs had not been able to file any objection, as such the Ld. Trial Judge ultimately accepted the report provisionally on 17.04.2009.

The appellants/plaintiffs did not prefer any appeal or revision against the said order of acceptance of the report on the contrary evidence was adduced on behalf of the appellants/plaintiffs and thereafter the respondents/defendants also adduced their evidence.

Two witnesses deposed on behalf of the plaintiffs and record of right under the Bengal Tenancy Act and Revisional Settlement Record of right were exhibited by them.

Four witnesses deposed on behalf of the defendants and they exhibited 17 documents which included several record of rights and sale deeds.

After consideration of the oral and the documentary evidence the Ld. Trial Judge had been pleased to pass the judgment and decreed the suit in part on contest and decreed the counter claim by passing the following order:

“That the suit be and the same is decreed in part on contest against all the defendants without cost

And

That the Counter Claim be and the same is decreed on contest against all the plaintiffs without cost.

It is hereby declared that the defendants have right, title, interest and possession as regards 'A' schedule land of the Counter claim and that the plaintiffs have right, title, interest and possession as regards 10 dec., land of suit plot no. 3516 and 09 dec. land of suit plot no. 3520 only. ..."

- 5.** Being aggrieved by and dissatisfied with the judgment of the Ld. Trial Court the plaintiffs preferred an appeal being Title Appeal No. 37 of 2011.

The said title appeal was heard and disposed of by the Ld. Civil Judge (Sr. Divn) 1st Court Contai and has passed the impugned judgment, dismissing the said appeal by passing the following order:

"That the appeal is dismissed on contest without any order as to costs.

The Judgement dated 30.07.2011 and decree dated 29.08.2011 passed by Ld. Civil Judge(Junior Division), 1st Additional Court, Contai, in Title Suit No. 27/2008 is hereby affirmed."

- 6.** Against the said order of dismissal the instant appeal has been preferred.
- 7.** The following two substantial questions of law have been framed.

"i) Whether the learned Courts below substantially erred in law in passing a decree on the basis of a Commissioner's report, conducted without any relayment vis-à-vis the purported sale deed of 1937 on the basis of which the respondents claim title and only based on a superimposition of the C.S. and R.S. map?

ii) Whether the learned Appellate Court below committed a substantial error of law in affirming the learned Trial Court's decree declaring title of the parties in respect of specific portions of land without any partition being effected, despite

holding that the parties are co-sharers in respect of the suit property? ”

8. Heard Mr. Amit Baran Dash being assisted by Ms. Ankana Sarkar on behalf of the appellants and Mr. Mahendra Prasad Gupta being assisted by Mr. Asit Kumar De, Mr. Ayan Mitra and Ms. Susmita Senapati.
9. The Ld. Counsel representing the appellants/ plaintiffs has submitted the following:
 - i) The Ld. Counsel representing the appellants/plaintiffs submitted that ‘Ka’ and ‘Kha’ schedule properties originally belonged to Guruprasad Das, the father of the plaintiffs. Guruprasad sold 39 decimals out of 64 decimals in plot no. 3520 to Lakshmikanta Bera and others. Since purchase the respondents/defendants are possessing the said land jointly with the appellants/plaintiffs.
 - ii) He has further submitted that on the expiry of Guruprasad the appellants inherited the entire ‘Ka’ schedule property and 25/64 share of the ‘Kha’ schedule property.
 - iii) He has further submitted that the RS and LR Record of Rights have been erroneously recorded in the name of the respondents/defendants.
 - iv) The Ld. Counsel has further submitted that the plaintiff witness no.1 has specifically stated in his cross-examination

that he has no knowledge about the survey and superposition map in respect of plot no. 2072, so he had not filed any objection against the same.

- v) The Ld. Counsel has further submitted that the Ld. Trial Court and the Ld. First Appellate Court have relied upon deeds which have been subsequently executed.
- vi) The Ld. Counsel has further submitted that the Commissioner's report was not accepted at any point of time on the other hand it was only provisionally accepted and there is very much difference in between acceptance and provisional acceptance. The said report was not exhibited and the contents of the report were not proved and the Commissioner was not summoned to present himself for cross-examination.
- vii) The Ld. Counsel has further submitted that the respondent /defendants could not prove that the plot no. 2072 mentioned in the deed of the year 1937 was converted into two plots being plots no. 3516 and 3525.
- viii) He has further submitted that the impugned deed that is the deed of the year 1937 had no specific demarcation.
- ix) The Ld. Counsel has further submitted that the exhibit-F that is the gift deed bearing No. 597 of 1990 has been declared as void by the Ld. Trial Court and has not been challenged by the respondents/defendants.

- x) The Ld. Counsel has further submitted that the Commissioner had filed the report without serving notice upon the appellants/plaintiffs.
- xi) He has further submitted that the judgment reported in (2003) 1 SCC 722 as regards to the report by a partition commissioner is not applicable in this instant case.
- xii) The Ld. Counsel has relied upon the following judgments:
 - 1. 80 CWN 979
 - 2. AIR 1973 Ori 240
 - 3. AIR 2003 Bom 52

Banking upon the aforesaid submission the Ld. Counsel prayed for allowing the instant appeal

10. The Ld. Counsel representing the respondents/defendants has submitted the following:

- i) He has submitted that Guruprasad Das had transferred 61 decimals of land along with 39 decimals of land through the same deed. The said 61 decimals of land was sold from plot no. 2072 of the settlement of 1903-04 as Guruprasad did not know the number as per the settlement of 1937.
- ii) He has further submitted that the number of the other plot wherefrom the rest of the 39 decimal was sold, was numbered

2072/2482 as per the settlement of 1903-04 and the said plot was renumbered as 3520 during the settlement of 1937.

- iii) The Ld. Counsel has further submitted that the plot no. 2072 of the settlement of the 1903-04 was converted to plot nos. 3516 and 3525 in the settlement of 1937 and in the settlement of 1954-56 the purchased 39 decimal of land of plot no. 3520 was not recorded in the name of the predecessors in interest of the original defendant. As such the original defendant and his brother had filed the title suit being TS No. 01 of 1980 and the said suit was decreed.
- iv) The Ld. Counsel has further submitted that 59 decimals of land out of the total 63 decimals of land of plot no. 3516 and 8 decimals of land of plot no. 3525 was recorded in the name of the predecessor of the original defendant in the settlement of 1954-56, while the total purchased land in the said two plots was 61 decimals only.
- v) The Ld. Counsel has further submitted that when the original plaintiffs claimed the extra 6 decimals of land mentioning about the deed executed by their predecessor, the original defendant executed a deed of gift on 15.02.1990 in favour of the original plaintiffs of plot no. 3516.
- vi) The Ld. Counsel has stressed upon the point that the deed of 1937 clearly indicates that specific portion was sold and the

demarcation of the property has been mentioned in the said deed.

- vii) The Ld. Counsel has further emphasized upon the point that against the report of the Commissioner which was provisionally accepted on 17.04.2009 the appellants/plaintiffs had not filed any revisional application and/or any objection against the order of acceptance of the Commissioner's report.
- viii) The Ld. Counsel has further submitted that the appellants/plaintiffs had taken several adjournments to file written objection against the report of the Commissioner but no written objection had been filed as such the order dated 17.04.2009 attained finality.
- ix) The Ld. Counsel has further submitted that the order of acceptance of the Commissioner's report had attained finality vide the said order dated 17.04.2009 in the suit itself.
- x) The Ld. Counsel has further submitted that the appellants plaintiffs could not adduce any rebuttable evidence based on which the report of the Ld. Commissioner could have been disbelieved.
- xi) The Ld. Counsel has further submitted that the Commissioner had relied upon the map of 1903-04 and the map of 1933-36.
- xii) The Ld. Counsel has relied upon the following authorities which are as follows:

1. (2020) 19 SCC 399
2. (2019) 6 SCC 409
3. (2018) 4 SCC 369
4. (2001) 6 SCC 238

Relying upon the aforementioned submission the Ld. Counsel has prayed for dismissal of the instant appeal.

- 11.** The moot point to be considered in this instant appeal is as to whether the Ld. First Appellate Court has reached to the conclusion correctly or not thereby affirming the judgment of the Trial Court.
- 12.** From the substantial questions of law it transpires that it is to be considered as to whether the Commissioner's report conducted without relaying taking into consideration the purported sale deed of the year 1937 and only banking upon superposition of the CS and RS map and is to be considered whether error has been committed declaring title of the parties in respect of specific portions of land without any partition being effected.
- 13.** First of all it is to be taken into consideration that the Ld. Trial Court had appointed the survey knowing Commissioner after hearing both the counsels representing the plaintiffs and the defendants. After performing the function of superposition the Ld. Investigation Commissioner filed a report on 27.05.2008. Thereafter the plaintiffs had sought to file objection to the said report filed by the Ld.

Commissioner and had been granted several opportunities to file the written objection. In the meantime nearly 11 months passed by but the plaintiffs could not file an objection in respect of the said Commission Report and ultimately the Ld. Trial Judge was pleased to provisionally accept the report of the Commissioner on 17.04.2009. in this regard Order XXVI Rules 10(1) and (2) of the Code of Civil Procedure is laid down which is as follows:

“10. Procedure of Commissioner.—(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court. (2) Report and depositions to be evidence in suit. Commissioner may be examined in person.—The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.”

- 14.** Against the said order of acceptance the plaintiffs neither preferred any review of the said order nor did they prefer any revision or appeal, on the other hand, evidence in respect of the said suit commenced on and from 07.07.2009 and both the plaintiffs and defendants had adduced oral and documentary evidence. Even at the stage of adducing evidence the plaintiffs had the opportunity to call the

Commissioner and controvert the report filed by the Commissioner but the plaintiffs did not avail any of the several aforementioned opportunities.

- 15.** In such circumstance, it can be presumed and inferred that the plaintiffs had accepted the said report submitted by the Commissioner.

In this regard the following judgment passed by the Hon'ble High Court of Himachal Pradesh reported in 2014 SCC OnLine HP 1466 is laid down:

“31. The Andhra Pradesh High Court in the case titled as Vemuseti Appayamma v. Lakshman Sahu, reported in AIR 1973 Andhra Pradesh 168, laid down the same proposition. It is apt to reproduce para 6 of the judgment herein:

“6. The learned counsel for the appellant however, objects to the Commissioner's report being accepted and acted upon without its being marked and without the Commissioner being examined. But when the Court appoints a Commissioner under O. 26, R.9, C.P.C. for making a local inspection and to submit a report, the Commissioner is given the discretion to make a local inspection and record evidence if necessary and submit a report together with such evidence as he thinks fit. Under sub-rule (2) of Rule 10 of Order 26, C.P.C., the report of the Commissioner and the evidence taken by him form part of the record. When the Rule lays down that it forms part of the record irrespective of whether it is marked or not, the Court is bound to take that evidence

into consideration. The failure to mark it as a document on behalf of the parties does not exclude it from the record. Sub-rule (2), however, lays down that either the Court or any of the parties may examine the Commissioner but if the Commissioner is not examined, the report submitted by him does not cease to form part of the record. It is nowhere laid down that unless the Commissioner is examined and through him his report is marked as an exhibit, the report of the Commissioner cannot be acted upon. That being so, the lower Appellate Court was right in considering the Commissioner's report and in accepting the defendant's evidence and rejecting that of the plaintiffs witnesses in the light of that. The finding whether the plaintiff is in possession of the plaintiff schedule site or not is a finding of fact which is supported by the evidence on record and is binding on this Court in Second Appeal."

32. The same question came up for consideration before Patna High Court in the year 1962 in the case titled as Ramautar Gope v. Sheonandan Mistri, reported in AIR 1962 Patna 273 and it was held that the fact that the Local Commissioner has not been examined at the trial cannot, in law, make his report inadmissible in evidence. It is apt to reproduce para 4 of the judgment herein:

"(4). Then comes the criticism against the report of the Commissioner. It appears that at the trial, the Court had appointed a commissioner for measuring the land in dispute, and, in pursuance of that order, the commissioner had submitted a report. That report in law is obviously admissible, and, in fact, forms part of the case, as provided in Rule 10(2) of Order XXVI of the Code of Civil Procedure. It

is, however, stated by Mr. Chatterji that though an application had been filed on behalf of the appellants to examine that commissioner as a witness in the case in support of the objections raised on their behalf, he was ultimately not examined as by the time the case was taken up for trial, he was dead. In my opinion, the fact that the commissioner was not examined at the trial cannot, in law, make his report inadmissible in evidence. Secondly, no such objection was raised against the report of the commissioner either at the trial or in the lower appellate Court. On the contrary, it appears, as stated by the lower appellate Court, that on the 10th July, 1958, the lawyers of both the parties prayed before the trial Court that the report of the commissioner should be considered at the time of the hearing of the suit along with other evidence on the record. Therefore, in my opinion, it is too belated on the part of the appellants to submit now that simple because the commissioner could not be examined at the trial due to his death, his report should not have been admitted in evidence. Thus the second point also fails.”

33. The objection to the report submitted by the Commissioner has been raised later in point of time, which was rightly rejected by the First Appellate Court. Case with similar facts came up for consideration before the Kerala High Court in *State of Kerala v. Kottammal Mammeeriyakutty*, reported in AIR 1985 Kerala 109. It is apt to reproduce para 5 of the judgment herein:

“5. The Advocate-General then contended that, if for the reason that the Engineer who was the author of the valuation statement was not examined in court, the court below was

not prepared to accept the valuation made by him, for the same reason the valuation found in Exts. XI and Ext. X2 reports made by the Commissioner who also was not examined in court, ought not to have been accepted by the court below. This submission, in our view, overlooks the provisions of Order XXVI R. 10 C.P.C Sub-rule (2) of Rule 10 of Order XXVI reads as follows:

“Report and depositions to be evidence in suit-Commissioner may be examined in person - the report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the records; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report or as to the manner in which he has made the investigation.”

There could be no doubt that the court below was perfectly justified in placing reliance on the materials found in Exts. XI and X2, which formed part of the records, and which is evidence in the case. Of course, if the opposite side had any objection to any of the matters mentioned in the reports, or the manner in which he (the Commissioner) made the investigation, what that party ought to have done was to have the Commissioner examined with the leave of the court and elicit such information as it required. Not having been chosen to do that, the appellant State could not at this distance of time make a submission that the court below ought not to have relied on Exts. XI and X2 reports submitted by the Commissioner which, as already noticed, would be

evidence in the case, and would form part of the record in the case.”

34. The Privy Council in the year 1940 has laid down the same proposition in the case titled as Chandan Mull Indra Kumar v. Chiman Lal Girdhar Das Parekh, reported in AIR 1940 Privy Council 3.

35. The Apex Court in the cases titled as Shreepat v. Rajendra Prasad, reported in JT 2000 (7) SC 379; Subhaga v. Shobha, reported in 2006 AIR SCW 4855 and Haryana Waqf Board v. Shanti Sarup, reported in AIR 2008 SC (Supp) 616 laid down the same proposition.”

16. It will not be out of context to state that the Ld. Investigation Commissioner was directed by the Ld. Court the fact as to whether the property sold by Guruprasad Das by virtue of the deed dated 26.04.1937 wherein the Cadastral Settlement (CS) Dag No. 2072 has been mentioned corresponding to the Revisional Settlement (RS) dag nos. 3516, 3525, 3517 and 3518, by superposition of the maps of the CS and RS. It was also directed to file the report of the superposition performed. So it is apparent that the Court intended to check whether the said CS dag No. 2072 corresponds with the RS dag Nos. 3516, 3525, 3517 and 3518 or not.

17. This court is of the view that to tally/compare dag numbers existing in the CS and RS can be inferred by superposition of the maps of the said two settlements. Relaying on the other hand, reveals the portion of the land which has been encroached or is in dispute, so

to come to the conclusion as regards to dag numbers, it is superposition of the maps which can clarify the dispute.

18. The appellants/plaintiffs had instituted the instant *lis* seeking relief of declaration and injunction, even the respondents /defendants through their counter claim also prayed for declaration and injunction. There was no prayer made either in the plaint or in the counter claim as regards to partition. From the evidence adduced it transpires that some definite portion had been transferred through the sale deed being No. 480 of 1937 which is exhibit-B. On perusal of the said deed it is clear that Guruprasad had transferred specific portions of the property which was owned by him to Lakhikanta Bera, MahendraNath Bera, GajendraNath Bera, Bhojohari Bera and Jahtucharan Bera so the predecessors of the plaintiffs had sold specific portion to the predecessors of the defendants as such specific mentioning of the properties is not incorrect.

19. The Ld. First Appellate Court has assessed the judgment of the Ld. Trial Court minutely on all points. It has been discussed at length that the earlier plot number 2072 has been renumbered during the revisional settlement to 3516, 3517, 3518 and 3525 which measured 63 decimals, 1 decimal, 7 decimals and 8 decimals respectively. It has also been stated that 61 decimals of land transferred through the deed dated 24.04.1937 confers to the CS plot No. 2072 which was executed by Guruprasad Das in favour of the predecessor of the

respondents. It has also been dealt that 39 decimals of land of plot no 2972/2428 was renumbered as 3520.

- 20.** The Ld. First Appellate Court has dealt with the Survey Commissioner's report and has come to the finding that the Ld. Commissioner has performed his work of survey in accordance with the process and method which was to be adopted by the Ld. Commissioner.
- 21.** The Ld. First Appellate Court has also dealt with the fact that property measuring 61 decimals are part of the dag numbers 3516 and 3525 and has also observed that the burial ground which forms part of 3525 has been entirely included in the plot of land measuring 61 decimals. The point as regards to the plot numbers 3516 and 3525 have been mentioned in the deeds subsequent to the deed of 1937 also favours the respondent and has come to the same finding as that of the Ld. Trial Judge.
- 22.** Considering the exhibits the First Appellate Court has come to the finding that the appellants could not have more than 9 decimals of land in the plot no. 3520. The First Appellate Court has also dealt with the fact that apart from plot no 3525 the appellants are co-sharers of other two plots. As regards to the 'Ka' scheduled property mentioned in the plaint it is fact that the entire property described in schedule 'Ka' was acquired by way of transfer and inheritance by the original defendant and his four brothers which transpires from the

exhibits, and the respondents inherited the property on the death of the original defendant and the Ld. First Appellate Court has also expressed the same view.

23. The appellants have not produced any document challenging that the predecessor in interest of the respondents did not have any title. From the exhibits it is apparent the title was conferred upon the predecessor in interest of the respondents.

24. The First Appellate Court has also dealt as regards to the error in respect of plot no. 3520 and has come to the finding that the title suit no. 1 of 2018 has concluded the entire dispute by deciding in favour of the original defendant and his brothers which is evident from the exhibit.

25. It has also been dealt that the erroneous RS records of right has been rectified in respect of plot nos. 3520 and 3516 which have been renumbered as LR plot No 4102 and 4098 which is evident from the LR record of rights.

26. The entries in respect of RS plot no. 3525 corresponding to LR plot no. 4105 are correct which has also been mentioned.

27. The appellants have title in respect of land measuring 10 decimals in plot numbers 3516 and 9 decimals in plot no. 3520 and the appellants do not have any right in respect of plot no. 3525 and thus the appellants are entitled to get part of their relief whereas the respondents are entitled to have their counter claim decreed is the

finding of the First Appellate Court which this Court feels is the correct finding and does not require interference.

28. As regards to the substantial questions of law this Court finds that both the questions of law are decided in favour of the respondents.

Considering the aforestated discussion, this Court is of the view that the judgment passed by the Ld. First Appellate Court is correct.

The instant appeal being **S.A. 25 of 2017** with **IA No: CAN 1 of 2016 (Old No: CAN 9122 of 2016)** is hereby **dismissed**.

29. Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.

30. Urgent certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Supratim Bhattacharya, J.)