

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 1417 of 2023

Swapan Kumar Pal

VERSUS

Arun Kumar Roy & Ors.

For the petitioner:

Mr. Rabindra Narayan Dutta, Adv.
Mr. Sibashish Ghosh, Adv.
Mr. Dwariknath Mukherjee, Adv.
Mr. Arkadoy Mukherjee, Adv.
Mr. Soham Banerjee, Adv.
Mrs. Sudipa Bhattacharya, Adv.

For the opposite party nos. 1 to 3:

Mr. Manas Kumar Das, Adv.
Mr. Aritra Kumar Thokdar, Adv.

Last Heard on: November 29, 2024

Judgment on: December 24, 2024

Biswaroop Chowdhury,J:

The petitioner before this Court is a defendant in Title Suit for declaration and Permanent injunction and is aggrieved by the Order dated 23/02/2023 passed by Learned Civil Judge (Junior Division) 2nd Court Kandi

Murshidabad in Title Suit No-181 of 2014, in rejecting the objection to the report submitted by Learned Commissioner.

The contention of the petitioner/defendant no-1 in the Learned Trial Court with regard to the report of the Learned Commissioner is that the Commissioner failed to follow the legal position for making investigation and also to record the submission of the defendant no-1/petitioner, and arbitrarily submitted the report. It was further contended that the Learned Commissioner in his report has described K1 schedule as part and parcel of K schedule which cannot be accepted. It is also contended that the Commissioner has mentioned the area at Dag No-946/1446 as 6.94 Decimals but as per record, the said area is 8 decimals and there is no explanation for the property having 1.06 decimals.

Learned Trial Judge upon considering the application of the petitioner/defendant no-1 was pleased to reject the same by order dated 23/02/2023.

Learned Trial Court in its Order dated 23/02/2022 was pleased to observe and direct as follows:

The commission report as well as the field note and hand sketch map have been perused. Record shows that initially a commission work was submitted by Learned Advocate Apurba Tribedi and submitted a report to that effect. As per the said report the Ka-1 schedule was a part and parcel of the ka schedule. The said report was rejected on the ground that there were no field

note attached to the Commission report and the final report is prepared on the basis of the field note subsequently. The Court had directed re-commission work and the present report is at hand is for adjudicating regarding its acceptance. It is seen that the Ld. Commissioner had duly submitted the field book along with the final report and the hard sketch map. It is also seen that fixed points have been duly taken by the Ld. Commissioner. It is further seen that the investigation commission was allowed by the Court to be conducted as per the CR, or the RS Mauza map, as depicted in the schedule of the said application and the investigation was conducted accordingly, as per the Report and the evidence of the Ld. Commissioner. Thus the Court finds no ground for rejecting the commission report.

Thus, it is held that the Commission report is hereby accepted.'

The petitioner/defendant no-1 being aggrieved by the order dated 23/02/2023 passed by the Learned Trial Court has come up with the instant application under Article 227 of the Constitution of India.

It is the contention of the petitioner/defendant no-1 that the Learned Trial Court erred in accepting an arbitrary, illegal and malafide report of the Investigation Commissioner without considering the written objection and Additional Written Objection as filed by the Defendant No-1/Petitioner and also cross-examination to the said Learned Investigation Commissioner and more particularly in not allowing the Defendant no-1 to adduce evidence in support of his written objection. It is further contended that the Learned Trial Court

erred in law in passing the impugned order and accepting the alleged report without considering the Written Objection and additional written objection against the report of the Learned Investigation Commissioner. It is also contended that if the impugned order be allowed to stand there will be an occasion of failure of consequential natural justice and in that case the Petitioner being the defendant no-1 shall suffer immense loss and injury and also will be seriously prejudiced.

Pursuant to filing of this application notice was issued upon the opposite parties no-1 to 5, who are plaintiffs before the Learned Trial Court. However service of notice upon Proforma Opposite Parties no-6 to 9 is dispensed with. Opposite Party no 1 to 3 entered appearance and contested the application.

Heard Learned Advocate for the Petitioner, and Learned Advocate for opposite Party no 1 to 3. Perused the petition filed and materials on record.

Learned Advocate for the petitioner submits that it was orally argued by the Learned Advocate for the defendant no.1/petitioner before Learned Trial Court that the investigation Commissioner's report is totally arbitrary illegal and based on surmise and conjecture as the Learned Investigation Commissioner did not follow the directions in the writ of commission wherein the points for investigation as mentioned in the petition for local investigation was already stated. Learned Advocate further submits that it was argued before the Learned Trial Court that the Learned Investigation Commissioner in the Cross examination admitted and stated as follows:

I did not measure the mother plot. I had measured the disputed plot. After measurement as per the R.S. Mouza Map, I found the area of the disputed plot is 07 decimal whereas the area mentioned in the plaint is 08 decimal.....I had taken the fixed point from the plot no. 950....' Learned Advocate also submits that it was admitted by the said Commissioner that he did not measure the R.S. and L.R. plot No. 946 and also did not mention whether there is any boundary wall between 'ka' and 'kha' schedule property or not and also admitted that the investigation commissioner measured on the basis of a photocopy of the C.S. Map.

Learned Advocate for the opposite party no. 1 to 3 although admitted that the mother plot was not investigated and measured as specified in the writ but submitted that the writ was not prepared as per the schedule of the petition for appointment of Commissioner, Learned Advocate submits it is a technical mistake and the same may be ignored.

The following decisions are relied upon by Learned Advocate for the petitioner.

Baidyanath Pal.

VS

Uttam Manna.

Reported in 2016(4) CHN. Cal. 241.

Zarif Ahmad.(Dead) through

Legal Representative

VS

Mahd Farook.

Reported in (2015) 13 SCC. P-673.

Unreported Judgment in the case of FMA 1390 of 2011 (Sailendra Kumar Bag vs Ashok Kumar Baul and ors).

Upon hearing the Learned Advocates and considering the facts of the case this Court is of the view that when writ is issued for making Local Investigation it is incumbent upon the Commissioner to make investigation on the points specified in the writ, he cannot deviate from the writ. In the event either of the party has any grievance with regard to any point mentioned in the writ necessary prayer may be made before the Court for rectification. In the instant case there is deviation made from the writ. Thus the report submitted by the Learned Investigation Commissioner cannot be sustained and the same should be set aside. However as the Learned Trial Court by its earlier order appointed Commissioner for local investigation for the purpose of elucidating certain matters in dispute and upon considering the nature of the suit this Court is of the view that in the interest of justice there should be an appointment of Commissioner on the application of the plaintiffs afresh, and necessary steps may be taken in this regard.

Hence this application under Article 227 of the Constitution is allowed Order dated 23/02/2023 passed by Learned Civil Judge (Jr. Division) 2nd Court Kandi Murshidabad in T.S. No-181 of 2014 is set aside. Plaintiffs are granted liberty to make application under Order 26 Rule 9 of the Code of Civil Procedure for appointment of Commissioner to cause Local investigation. Learned Trial Court shall consider and decide the application without being influenced by this order.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury,J)