

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHAITALI CHATTERJEE DAS.

CO/4274/2024

GITA RANI PATRA

VS

RENUKA NASKAR AND ORS.

For the Petitioner : Mr. Ashoke Kr. Banerjee, Adv.
Mr. Tapas Singha Roy, Adv.

For the Opposite
Parties : Mr. Sounak Bhattacharya, Adv.
Ms. Sharmistha China, Adv.

Last heard on : 01.05.2025

Judgement on : 14.05.2025

CHAITALI CHATTERJEE DAS, J.:-

- 1.** This application under Article 227 of the Constitution of India is directed against an order dated November 28, 2024 passed by the Learned Court of Civil Judge (Junior Division) 4th Court, Howrah in title suit no 263 of 2012 (Smt. Gita Rani Patra versus Renuka Naskar and others) refusing to accept the Commissioners report submitted by the Learned Advocate Commissioner on August 28, 2019.
- 2.** The matter arises out of a suit for declaration, mandatory injunction and permanent injunction registered as title suit no 263 of 2012 was filed by the present petitioner being plaintiff praying for :-

- a) Decree for declaration that the plaintiff are the owner of the property as described in Schedule A,C of the plaint and have right for using the common passage as described in Schedule D and E of the plaint.
- b) Decree for mandatory injunction directing the defendant to remove the offending construction which has been constructed on the common passage as described in Schedule D and e of the plaint failing which the plaintiff may be given liberty to remove the encroached portion as shown in the sketch map.
- c) Decree for permanent injunction restraining the defendant including his men agent and employees from making any further attempt to encroach the common passage of the plaintiff as described in schedule D and E of the plaint.

3. The dispute pertains to encroachment of common passage as described in the plaint as scheduled D and E and for the purpose of proper adjudication the petitioner plaintiff took out an application under Order 26 Rule 9 read with Section 151 of the Code of Civil Procedure,1908 with a prayer for appointment of Investigation Commissioner to draw a rough sketch map on A,B,C,D,E of the plaint by relying on Mouza map and also to note the extent of encroached portion after taking fixed object and actual measurement of existing property of the plaintiff and defendant and such prayer was rejected by the trial court after fixing the matter for framing of issue. Challenging the said Order dated September 18, 2013 an application under Article 227 of the Constitution of India being CO No 4094 of 2013 was filed. The co-ordinate Bench on September 24, 2014 passed an order giving liberty to the plaintiff/ petitioner to describe D and E schedule property in the plaint and

to pray for local investigation afresh. Accordingly the amendment petition was filed to rectify the schedule A and schedule E of the plaint and thereafter again filed the application under Order 26 Rule 9 for appointment of Investigation Commissioner. The Learned Court vide an order dated June 19, 2015 allowed such prayer after contested hearing and appointed Mr. Jibananda Dutta the Learned Advocate as Investigation Commissioner to carry out the investigation according to the points mentioned in the said petition. Against the said order the present Opposite Parties filed a Revisional Application being C.O. No 2605 of 2015 and upon hearing the parties the Hon'ble Court dismissed the said revisional application with certain observation and direction. According to Mr. Banerjee, the said Learned Advocate Commissioner duly carried out the investigation work upon notice to both the parties pursuant to the direction passed in C.O. No 2605 of 2015 and then filed his report before the Learned Trial Court on August 28, 2019. After considering the objection and the evidence adduced by the parties the court refused to accept the same with the observation that the report is ambiguous and does not depict the real picture of the suit Dag number and schedule D and E property of the plaint.

4. Being aggrieved thereby this revisional application has been filed by the petitioner. The Learned Senior Advocate Mr. Ashoke Banerjee draws the attention of this Court to the order passed by Hon'ble Justice Harish Tandon on July 23, 2015 where certain observations were made by the Hon'ble Court and specifically observed that *"There is no hesitation in my mind that the dispute pertains to be a boundary dispute and to elucidate such matter, investigation is required under Order 26 Rule 9 of the Code by*

appointing a commissioner.” It is further pointed out that the direction of the Hon’ble Court was the investigation to be made after relay and survey of both the properties on the basis of respective deeds as well as on Mouza map. The Learned Advocate strenuously argued that the Advocate Commissioner duly followed such direction, gave notice, draw a sketch map, decided the fixed points from all side, compare the two title deeds, took physical measurement of the area possessed by the plaintiff and defendant and the portion encroached and shown the same in the plan in red colour and marked it as A and B which is described in plaint as schedule E and D. However, the Learned Trial Court failed to consider the above and on the basis of minor deviations from his evidence and the document the learned court refused to accept such report. It is further argued that the defendant since the inception of the suit has tried their level best to delay the entire proceeding and became unsuccessful before the Hon’ble Court when specific observation was made against them. Therefore with that oblique motive no objection was raised during the commission of investigation but raises the objection only after the report was filed, in order to cause further delay in the proceeding and accordingly such order of the Learned Trial Court is liable to be set aside.

- 5.** Per contra the Learned Advocate appearing on behalf of the Opposite Parties submits there are glaring inconsistencies in the report which was beyond the scope of the writ .The sketch map prepared by the Commissioner clearly shows it was prepared in connivance with the plaintiff. As an instance notice of this court was drawn to the sketch map which is not signed by the defendant but it bears the signature of the plaintiff and the Commissioner.

It is argued that the Commissioner on one hand deposed that all the rough sketch maps had been prepared by him at the site when he further deposed that the sketch map was prepared at his home. There are glaring inconsistencies in the sketch map prepared where from the specific area as described in the schedule D and E of the plaint cannot be identified. The Commissioner in his report mentioned about one Kali temple and thereby exceeded his authority beyond the writ issued in his favour. The method of commissioner's field work and his system of writing of field book are not according to the rules of survey and are also unscientific and not intelligibly understood. It is further argued that the investigation Commissioner at his instance filed petition with a prayer to accept to rough sketch map which were not submitted by him at the time of filing of his commissioners report and those sketch map did not have the signature of the Learned Advocate for the defendants either, therefore the entire sketch map was after thought and prepared at home though the commission work was done in presence of both the parties.

- 6.** It is argued that the matter relates to encroachment of common passage and to ascertain whether the right to egress and ingress of the plaintiff has been suffered because of such encroachment. The Advocate Commissioner did not confine himself within the specific writ issued by the Learned Court and the Learned Court after examining the report vividly on considering the evidence arrived at a finding that the report is ambiguous .Hence this revisional application is devoid of any merit and is liable to be rejected.
- 7.** After hearing both the Learned Counsel and on careful perusal of entire materials placed before this Court it appears there is a chequered history

regarding the dispute which is pending since long between the present petitioner and the predecessor of the present Opposite Parties. Fact of the case in a nutshell is that the suit was filed for declaration as to the ownership of the plaintiff in respect of the property as described in schedule A & C of the plaint and the right for using the common passage was described in schedule D and E of the plaint. The decree for permanent injunction was prayed for making any further attempt by the defendant /opposite party to encroach the common passage of the plaintiff as described in the schedule D and E of the plaint. The schedule D is mentioned:

Schedule D:-

A piece and parcel of land covering unauthorised construction measuring 2 fit into 35 fit - for 70 sq. fit.

Schedule E:-

A piece and parcel of land covering unauthorised construction measuring 3 fit into 27 sq. fit.

- 8.** The initial application under Order 26 Rule 9 was rejected observing that the Schedule D and E touches other plots of Dag no 172 on both sides and plaintiff did not mention the names of the owners of the plots situated at the Northern side and Southern side Dag no 172. The Hon'ble High Court vide Order dated September 24, 2014 granted liberty to the present petitioner/plaintiff to describe D and E schedule property properly in the plaint and to pray for local investigation afresh by filing an application

under Order 26 Rule 9 of the Code of Civil procedure. The subsequent application under Order 26 Rule 9 read with Section 151 CPC was filed with points for local investigation where it was mentioned whether Schedule D and E of plaint is common passage as per back deed as well as defendants deed dated 09.12.1964. The Opposite Party denied such allegation of encroachment and raises objection to the said application.

- 9.** The Learned Court after hearing allowed the application but observed that the description of the Schedule property has been made deliberately or out of laches and accordingly directed to pay cost of Rs.1200. The matter when came before the Hon'ble Court at the instance of the Opposite Party it was observed that the defendant/Opposite Party has taken all imaginable pleas to resist the claim of the petitioner and specifically mentioned that the dispute hinges as to whether the property described in Schedule D and E to the plaint are the common passage and a part there of has been encroached by the defendant by making construction and therefore the investigation is required after relay and survey of both the properties on the basis of respective deeds as well as on Mouza Map. Therefore it is clear from the above that the local investigation is to be carried out on the basis of the deeds as well as the Mouza Map along with other required measures in order to ascertain whether schedule D and E of the plaint is common passage and or any construction exist there or not. The Learned Advocate Commissioner prepared the report and adduced evidence. Admittedly he did not submit the sketch map at the time of filing his Commissioner report that is on 28th August, 2019 and long thereafter the Investigation Commissioner

filed the petition on July 6, 2022 with a prayer to accept the rough sketch map.

10. It is undisputed that non filing of the sketch map along with the Commissioners report creates a suspicion regarding the tenability of such Commissioners report though the reason assigned by the advocate was a human error. However, The Learned Court vide Order dated February 6, 2023 allowed such prayer of the Learned Advocate Commissioner considering the possibility of misplacement of the said Map earlier with liberty to the Opposite Party to file additional objection against such report and accordingly the Opposite Parties filed the additional objection specifically taking the point that such sketch map bears the signature of the Learned Advocate for the plaintiff only and of the Commissioner. The said order was not challenged by the opposite party/defendant.

11. It is a settled law as pronounced by the Hon'ble Supreme Court in Padam Sen vs State of U.P AIR 1961 SC 218 that the object of local investigation is not to collect evidence which can be taken in court but to obtain evidence which from its very peculiar nature can be had only on the spot . This is necessary for the purpose of proper assessment of the evidence on record and to arrive at a just conclusion. The Learned advocate of the Opposite party has relied upon a decision of Hon'ble Orissa High court as reported in AIR Orissa 6 (Gopal Behara vs Loknath Sahu & ors. Where it was held that the commissioner's report is intended to assist the Court in proper appreciation of the matter in dispute .Therefore if a defective report is accepted brushing aside the serious discrepancies in the evidence of the commissioner and his report and materials recorded during local

investigation, such a report instead of assisting the court is likely to mislead it.

12. In the instant case the plaintiff petitioner claimed to be the owner of A schedule property and Defendant is the owner of B schedule property. Subsequently the plaintiff became the owner of C schedule Land and both of them purchased their respective properties along with their right in common passage which is described in D and E schedule properties .The cause of action of the suit arose since when the defendant forcefully and illegally made encroachment of such common passage by making illegal construction in the year 2011as alleged. The Hon'ble court observed while disposing of the civil revisional application that both the deeds do not have any sketch map or plan and therefore report of the advocate commissioner is necessary for proper assessment of the materials on record. Accordingly the petition under order 6 rule 17 was allowed by the learned trial court with the writ

- A) to draw a rough sketch map of ABCDE of the plaint by relying Mouza map
- B) to note the extent of encroached portion as described in schedule D&E of the plaint
- C) to take fixed object and actual measurement of existing property of the plaintiff and defendant.

13. On careful perusal of the sketch map primarily no specific identification can be seen to identify the ABCDE schedule property. However the report said that the encroached portion has been delineated in RED colour and marked as A & B which is described in the plaint as E & D .So the schedule

D & E has been depicted as A & B in the sketch map. Nothing has been stated as to why such deviation from the order of the learned court was necessary specially when he was to draw the sketch map of D & E schedule property of plaintiff as well as B schedule as per Mouza map. As per report the commissioner prepared the sketch Map to the scale INCH and the said map depicted details of D & E schedule property of C.S Dag no.172 of Mouza Tentulkuli, J.L NO. 53 Sheet I.P.S Domjur, District Howrah as per showing boundaries there of the parties and the case map forms a part of his report. He showed the encroached portion in red colour and marked as A & B meanwhile it is described in plaintiff as Schedule E & D and after measure also the same is marked as A & B. This version as found in the report prepared by the commissioner appears to be primarily ambiguous which would certainly make it difficult for the trial court to properly adjudicate the dispute.

- 14.** It is further seen that the commissioner annexed all the necessary documents as annexure to the Report excepting the sketch map. The commissioner started his commission work on 31.7.2015 and lastly held on 24.3.2018 and finally submitted his report on 28.8.2019 before the trial court without the sketch map and was subsequently during cross examination submitted by filing an application for acceptance on behalf of the commissioner on 14.6.22. The signature of the defendant's advocate was not in the sketch map when the survey was done in presence of both the parties. The Learned Court observed that the Commissioner did not mention /shown any fixed object in the sketch map and any fixed point for cross checking the fixed point taken for the survey which are being shown

in the map and that is a table work from the Mouza Map .The testimony of the commissioner himself appears to be inconsistent since once he said that sketch map no. 6 was prepared at his home when specifically stated in cross-examination that all the rough sketch map were prepared by him at the site. In the field note there was no fixed object selected at the locale, no fixed object was verified at the locale by the learned advocate commissioner and no stations traverse lines have been shown, no check line is being found for drawing of plan which are essential for taking convenient measurement in the site to any direction. Therefore as primarily appears the learned trial court after scrutiny of the entire report detected a number of inconsistencies which would make it difficult for the court in proper adjudication of the dispute and also prima facie creates suspicion. The Learned Senior Advocate relied upon a decision of Hon'ble Punjab & Haryana High Court where it was observed that

'The court noticed that the plaintiff had given specific boundaries of the suit land and it was clear from the sketch prepared by the commissioner that the disputed constructions lay in the suit land that it belonged the plaintiff . It was further observed that the property can be identified either by boundary or by any other specific description is well established. Here an attempt had been to identify the suit property with reference to the boundaries and the commissioner has identified that property with reference to such boundaries. Even if there was any discrepancy, normally the boundaries should prevail. There was no occasion to spin a theory that it was necessary in this suit to survey all the adjacent lands to find out whether an encroachment was made in the land belonging to the plaintiff'.

15. In the instant case the learned court has specifically observed that in the commissioner's report area of property purchased by the plaintiff and in possession of the plaintiff has not been mentioned. Admittedly the dispute relates to encroachment of common passage where no site plan is annexed with the deeds on the basis of which the parties are claiming their rights and the learned Advocate commissioner must give a clear picture explaining the doubts which exists in the materials on record in order to assist the court to understand the evidence on record.

16. It is settled law that the court should not act as an expert to overrule the report of the commissioner unless some glaring inconsistencies are found but in view of the discrepancies and inconsistencies in evidence and the report and also the ambiguity that prevails this court is unable to accept the contention of the Learned Senior Advocate and find no reason to differ with the views expressed by the Learned court.

17. Therefore on considering the entire facts and circumstances this court finds no reason to interfere with the order passed by the Learned court .However that will not preclude the petitioner to approach the court with a prayer for appointment of an advocate commissioner afresh. It is pertinent to mention herein that a prolong period was taken in filing the report by the advocate commissioner and keeping in mind the long pendency of the suit the Learned Court is directed to consider a time frame for submission of such report if any order of appointment of advocate commissioner is passed on the application if any to be filed by the plaintiff.

18. Hence this revisional application is dismissed .The order passed by the learned trial court dated November 28, 2024 is hereby affirmed.

19. No order of costs.

20. Let a copy of this order be sent to the learned trial court for information.

Urgent Photostat copy of the order be supplied upon compliance of all formalities.

(CHAITALI CHATTERJEE DAS,J.)

