

Dhadi Barik and ors. Vs. Arjun Barik and ors.

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SooperKanoon Citation : sooperkanoon.com/528002

Court : Orissa

Decided On : Jan-30-1986

Reported in : AIR1986Ori203; 61(1986)CLT487; 1986(I)OLR395

Judge : K.P. Mohapatra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 26, Rule 14(2)

Appeal No. : Civil Revn. No. 43 of 1982

Appellant : Dhadi Barik and ors.

Respondent : Arjun Barik and ors.

Advocate for Def. : S.P. Misra, ;D. Das, ;S.K. Choudhury and ;S. Lalit, Advs.

Advocate for Pet/Ap. : M. Patra, ;B. Dagar, ;R.K. Patra, ;G.C. Mohapatra and ;J.K. Mohapatra, Advs.

Disposition : Revision allowed

Judgement :

ORDER

K.P. Mohapatra, J.

1. This revision is directed against the order passed by the learned Sub-Judge Kendrapara directing the parties in the final decree proceeding of Title Suit No. 25

of 1969 for partition to adduce evidence in order to substantiate objection to the report, map and allotment sheets prepared by the Civil Court Commissioner. The plaintiffs are the petitioners.

2. In the suit for partition a preliminary decree was passed defining the share of the plaintiffs and allotting the land covered under Ext. A in favour of defendant No. 3 and directing issuance of a commission to effect partition by metes and bounds giving due respect to the possession of the parties in respect of the suit land as far as practicable. The preliminary decree was upheld in Title Appeal No. 55 of 1971 and Second Appeal No. 59 of 1973. In the final decree proceedings, a commission was issued for effecting the partition in accordance with the directions contained in the preliminary decree. The Commissioner after due enquiry submitted his report (Ext. I) map (Ext. II) and allotment sheets (Ext. III). Defendants 2 and 3 filed objection to the report, map and allotment sheets, mainly, on the ground that the Commissioner did not give due respect to the possession of parties in respect of specific portions of the suit land, he did not take notice of improvements made by them and the valuation fixed by him was improper. In order to substantiate their objection, the Commissioner was examined and was cross-examined by defendants 2 and 3. Without deciding the objection, the learned lower court by order dt. 8-5-1981 directed the parties to adduce further evidence. The plaintiffs and defendant No. 1 however, opposed the above direction and submitted that no further evidence could be taken by the court at that stage. Defendants 2 and 3 on the other hand, contended that they were entitled to lead further evidence strictly confining the same to the grounds of objection raised by them to the report, map and allotment sheets of the Commissioner, After hearing both parties in the matter, the learned Sub-Judge, in the impugned order held that the party desirous of leading evidence to oppose the report, map and allotment sheets of the Commissioner could do so.

3. The only point for consideration is whether in a final decree proceeding in a suit for partition, a party thereto who has raised objection to the report, map and allotment sheets of the Commissioner deputed to effect partition, can, in addition to examining the Commissioner to substantiate his objection, adduce other evidence. While Mr. M. Patra, learned counsel appearing for the plaintiffs

contended that in final decree proceedings of this nature, besides the Commissioner who has effected partition, no other witness can be examined in support of the objection, which if done would be a trial within a trial: Mr. S. P. Misra, appearing for the defendants urged that there is no embargo in law prohibiting a party in a suit for partition raising objection to the report, map and allotment sheets of the Commissioner to adduce other evidence to substantiate his objection.

4. Order 26 Rules 13, 14 and 15 of the Code of Civil Procedure ('Code' for short) relate to commissions to make partitions of immovable property. Rule 14 provides the procedure to be adopted by the Commissioner. Sub-rule (2) thereof as amended in Orissa which is relevant for the purpose of our discussion is quoted below for easy reference : --

'The Commissioner shall then prepare and sign a report or the Commissioners where the commission was issued to more than one person and they cannot agree shall prepare and sign separate reports appointing the share of each party and distinguishing each share if necessary by metes and bounds. The Commissioner or Commissioners shall append to the report, or where there is more than one, to each report a schedule showing the plots and areas allotted to each party and also, unless otherwise directed by the Court, a map showing in different colours, the plots or portions of plots allotted to each party. In the event of a plot being sub-divided, the area of each sub-plot shall be given in the schedule and also measurements showing how the plot is to be divided. Such report or reports with the schedule and the map, if any, shall be annexed to the commission and transmitted to the Court, and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.'

5. The controversy between the parties centres round the scope and meaning of the expression 'after hearing any objections which the parties may make to the report or reports'. Before I come to discuss about the same, it would be useful to state the general practice in Civil courts in Orissa in the matter of hearing of objections to reports, maps and allotment sheets of Commissioners in final decree

proceedings of suits for partition. After the report, map and allotment sheets of the Commissioner are received in court, the parties are given opportunity to file their objections, if any. If no objections are filed, then the court passes a final decree of which the report map and allotment sheets form part. If objection is raised, the Commissioner is examined as a witness in court so that the party concerned may substantiate the objection to the report, map and allotment sheets. After examination of the Commissioner, arguments of the parties are heard and thereafter the court by a reasoned order either accepts the report, map and allotment sheets or rejects them either in whole or in part. In the former case, the court passes a final decree of which the report, map and allotment sheets form part and in the latter case, the court either directs the same Commissioner to hold fresh enquiry in view of the court's order and furnish his further or fresh report, map and allotment sheets or appoints another Commissioner to make fresh enquiry and make division of the subject matter of partition in accordance with the directions given by it. After the Commissioner submits his report, map and allotment sheets, the same process is repeated until the court is satisfied that the division made by the Commissioner is in accordance with the directions contained in the preliminary decree. Hardly other witnesses are examined at such a stage.

6. A plain reading of Order 26 Rule 14(2) quoted above, particularly the expression 'after hearing any objections which the parties may make to the report or reports' gives the impression that there is no embargo disabling a party raising objection to the report of the Commissioner in the final decree proceeding of a suit for partition to adduce evidence to substantiate the same. It cannot be interpreted that besides examining the Commissioner, no other witnesses can be examined. In other words, a party raising objection to the report of the Commissioner in the final decree proceeding of a suit for partition, can, besides examining the Commissioner, examine other witnesses to substantiate his objection and does not suffer from any legal disability therefor.

7. Authorities to throw light on the subject of discussion are very scarce. No decision of this Court could be cited at the bar to illuminate on the subject of controversy, perhaps because of the uniformity of practice in the Civil courts of the State of examining the Commissioner alone to substantiate objections to his report

in final decree proceeding in partition suits. Two decisions reported in AIR 1935 Lah 501, Nazir Ahmed v. Sarfraz-ur-Rahman Khan and AIR 1957 Cal 90, Gourhari Das v. Jaharlal Seal were cited. A Division Bench of Lahore High Court in the case of Nazir Ahmad examined the provisions of Order 26 Rule 14 of the Code and observed : --

'This implies that the parties are entitled to substantiate their objections but in such cases as a rule of practice the Commissioner should first be examined with reference to the objections, if any, and if it appears from the statement of the Commissioner that there is ground for further enquiry into any matter which is raised in the objections then the parties should be allowed to produce evidence or the Commissioner directed to amend his report accordingly. In my opinion in the present case the Court should have examined the Commissioner to ascertain from him whether he had excluded from his valuation the improvements if any made by the appellants to the property in dispute. If he had not excluded them, then the Court should have given opportunity to the appellants to prove that They had made improvements or should have directed the Commissioner to report whether any improvements had been made by the appellants and to submit a report as to their value.'

A Division Bench of the Calcutta High Court similarly examined the same provisions and observed :--

'From the report submitted by the Commissioner it further appears that no reason, either general or detailed, have been given for fixing the valuations of the different items of property. It is desirable that the Commissioner should submit a supplementary report giving the reasons for the recommendations made by him. After such a supplementary report is received, the parties will be given opportunity to file objections to the Commissioner's report. If any one of the parties prays for the examination of the Commissioner in Court that is to be allowed. As to what further evidence will be allowed to be adduced, if at all, is to be determined by the Court below after the Commissioner has been examined, and the learned Judge has formed an opinion as regards the objections raised by the parties.'

8. In both the decisions it has been emphasised that the Commissioner should be first examined and if after his examination the Court will determine that it will be necessary to make further enquiry relating to any particular objection for which parties may be allowed to lead evidence, then nothing will prevent the Court to so direct the parties. Both the decisions have not given unrestricted power to Courts to freely allow parties to adduce evidence to substantiate objections to reports of the Commissioner. The reason therefor, which is not far to seek, seems to be avoidance of unnecessary delay in encouraging parties to fight out a further suit within a suit with all evil incidents connected thereto, such as loss of court's time, expenditure, continuance of bitterness, as well as, expeditious passing of the final decree, so as to, decide the rights of the parties effectively and completely for all times to come.

9. In view of the practice by and large followed by the Civil courts in the State and the principles laid down in the cases referred to above, it is clear that in a final decree proceeding of a suit for partition, if objection has been raised to the report, map and allotment sheets prepared by the Commissioner deputed to effect partition in accordance with directions contained in the preliminary decree, the Commissioner should first be examined with reference to the objection. If from the statements made by the Commissioner and after hearing arguments of the parties the court will come to the conclusion that the objection cannot be sustained, then the Court should proceed to pass a final decree by making the report, map and allotment sheets part thereof. If however, it would not be possible for the Court to accept the same on sustaining the objection or part thereof, and it is considered that that purpose will be served and the objection, if valid, can be met by giving suitable directions to the Commissioner to make further enquiry and submit fresh or amended report, map and allotment sheets, which if done the party shall have no grievance, the Court should do likewise. If the Court will come to the conclusion that it would be necessary to entirely set aside the report, map and allotment sheets, the Court shall be free to do so and shall direct the same Commissioner or another Commissioner to make fresh enquiry and effect partition of the suit property in accordance with the directions contained in the preliminary decree and furnish his fresh report, map and allotment sheets. If however, after examining the Commissioner, the Court shall form an opinion that further enquiry is necessary in

connection with any matter relating to the objection for which the parties should adduce other evidence, he shall determine the nature of such evidence, which shall on no account be a repetition of the evidence adduced during trial of the suit and shall be free to direct the parties to lead such evidence only. After recording such evidence and hearing the parties, the Court may entirely accept the report, map and allotment sheets of the Commissioner and pass a final decree or may in the event of further objection take recourse to any of the methods indicated above to secure the desired objective of having before him a report of the Commissioner, just and fair and free from any possible objection. Therefore in a matter like this, the Court has great responsibility to act as the situation would demand with the sole objective of passing a just final decree with utmost expediency so as to resolve the disputes of parties relating to partition of property completely and finally.

10. In the present case, the learned Sub-Judge without any application of mind and without determining the merits of the objection raised by defendants 2 and 3 vis-a-vis the report, map and allotment sheets of the Commissioner, gave a general direction to the parties to adduce evidence which in my view was not proper. At the first instance, he should have made a thorough examination thereof in order to arrive at any of the conclusions indicated above. May be, he could have come to the conclusion that the objection was not substantiated, in which case, the next step he was to take was to accept the report, map and allotment sheets and pass a final decree. May be, he would have held that the objection or a part thereof was substantiated, in which case, he could have directed a fresh enquiry by the same Commissioner or by another Commissioner, It is therefore a fit case in which the learned Sub-Judge should determine what course he should follow after analysing the evidence of the Commissioner on hearing arguments from the parties on the objection. To enable him to do so, it is necessary to set aside the impugned order.

11. In the result, the Civil revision is allowed and the impugned order is set aside. The final decree proceeding shall continue in the light of the observations made in this order. Parties to bear their own costs.

