

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.572 of 2023**

1. Divya Kumari, Wife of Sri Brajesh Kumar, daughter of Late Sudha Devi and Late Devendra Prasad
2. (Ms). Dipti Kumari, daughter of Late Sudha Devi and Late Devendra Prasad
3. Sushant Kumar, Son of Late Devendra Prasad,
All are residents of Mohalla- Bhim Shani Tola, P.O. - Malsalami, P.S. - Malsalami, District - Patna (Bihar). At present resident of 3 SFS, B-1/5, Bhoot Nath Road, Bahadurpur Housing Colony P.S. - Agam Kuan, District - Patna Through constituent Power of Attorney-Holder Sri Jang Bahadur Singh, Son of Late Ramyash Singh Resident of "Sai Kripa", Ved Nagar, Rukunpura, B.V. College, P.S. - Rupaspur, Bailey Road, Danapur, District - Patna - 14.

... .. Petitioner/s

Versus

Mr. Jugeshwar Nath Srivastava, Son of Late Onkar Nath Srivastava, resident of Mohalla - Naya Tola, Saguna More Near Raghunath Petrol Pump, P.S.- Danapur, Bailey Road, District - Patna (Bihar).

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. J.S. Arora, Sr. Advocate
Mr. Shashi Nath Jha, Advocate
For the Respondent/s : Mr. Amit Shrivastava, Sr. Advocate
Mr. Girish Pandey

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT**

Date : 11-06-2024

The present petition has been filed under Article 227 of the Constitution of India for setting aside the part of the order dated 17.01.2023 passed by the learned Additional District Judge-VI, Danapur, Patna in Title Appeal No. 79/2019 (Divya Kumari & Ors. vs. Jugeshwar Nath Srivastava) whereby and whereunder the application of the present petitioners dated 07.04.2022 filed for scientific measurement of the land in question has been dismissed. The petitioners have further prayed



for direction to the learned first appellate court to appoint a Survey Knowing Advocate Commissioner to conduct and hold scientific measurement of the disputed plot of land by allowing the petitioners' petition dated 07.04.2022 filed under Order 26 Rule 10 A of the Code of Civil Procedure (hereinafter referred to as 'the Code') while holding that the learned first appellate court failed to exercise the jurisdiction vested in it.

2. The conspectus of the case of the parties is that in the year 2011, Title Suit No. 112/2011 (Smt. Sudha Devi & Ors. vs. Jugeshwar Nath Srivastava) was filed by the plaintiffs in the court of learned Sub Judge, Danapur, Patna seeking, *inter alia*, declaration of title and a decree for removal of encroachment and also for removal of construction of house/shop made by the defendant over the suit land. In Schedule-1 of the plaint, the plaintiffs have described the encroached portion measuring 1.5 Katha of land by the defendant. During the pendency of the suit, the plaintiffs through amendment described the illegal construction made by the defendant in Schedule II which is part and parcel of the Schedule-I land of the plain. The defendant appeared and filed his written statement contesting the suit. During pendency of the suit, original plaintiff nos. 1 & 2 (Sudha Devi and Devendra Prasad) died and they were substituted by



their two daughters namely, Divya Kumari and Dipti Kumari. Subsequently, vide power of attorney dated 28.12.2012, all the three heirs of the original plaintiff nos. 1 & 2 including plaintiff no.3 namely, Sushant Kumar granted a fresh power of attorney in favour of Jang Bahadur Singh, who has since then been pursuing the case in the title suit as well as in the title appeal. There appears to be a chunk of land measuring 33 Katha 3 Dhur under Khata No. 144, situated at Mauza-Saguna, Danapur, Patna, out of which, plaintiffs/appellants/petitioners have claim over 8 Katha 3 Dhur, whereas defendant has claim over 25 Katha in the same Plot No. 363 (part). The plaintiffs claimed that defendant has encroached upon 1.5 Katha of land and for removal and restoration of the same, the suit has been filed by the plaintiffs.

3. Further case of the plaintiffs is that on their land of 8 Katha 3 Dhur, the plaintiffs made pilling work of about 8 feet deep at a distance of 7 feet center to center over their land in the year 2003 itself, but the plaintiffs did not erect any boundary wall. However, the plaintiffs claimed that defendant, who owns a big area of same plot adjacent west to the land of the plaintiffs, forcibly made a boundary wall on 23.01.2011 over their land by encroaching about 1 Katha 10 Dhur and, in this way, the



defendant amalgamated the encroached land with his own land. The petitioners further claimed that during pendency of the suit at the instance of the plaintiffs (wrongly submitted as it would become clear later on), one Pleader Commissioner was appointed to ascertain the area of encroached land, but the Pleader Commissioner did not measure the land scientifically and came in collusion with defendant and submitted a faulty and illegal report. Subsequently, at the instance of the plaintiffs and pursuant to the direction of the learned trial court, the concerned Circle Officer appointed a Government Anchal Amin in order to find out the encroached area made by the defendant. The plaintiffs further claimed that subsequently on 31.08.2018, the learned trial court directed the Circle Officer, Danapur to get the measurement of land at the cost of the plaintiffs and the Government Amin visited the spot for measurement, but the defendant and his private Amin restrained the Government Amin from measuring the total disputed lands i.e. 33 Katha and 3 Dhur fully and scientifically and the Government Amin submitted a report on 15.09.2018. The learned trial court having considered the matter and vide judgment and decree dated 03.08.2019 dismissed the suit of the plaintiffs. Aggrieved by the decision of the learned trial court, the plaintiffs filed Title



Appeal No. 79/2019 which is pending adjudication before the learned court of Additional District Judge-VI, Danapur, Patna. During pendency of title appeal, the plaintiffs/appellants filed a petition on 07.04.2022 under Order 26 Rule 10A of the Code for scientific measurement of the entire plot in question so that the total area of Plot No. 363 could be measured scientifically. A rejoinder was filed on 20.04.2022 by the defendant/respondent. The application dated 07.04.2022 was dismissed by the learned first appellate court vide order dated 17.01.2023. The said order has been assailed before this Court in the present civil miscellaneous petition.

4. Mr. J.S. Arora, learned senior counsel appearing on behalf of the petitioners submitted that while passing the impugned order, the learned first appellate court failed to exercise the jurisdiction vested in it and dismissed the petition dated 07.04.2022 filed under Order 26 Rule 10 A of the Code on flimsy and unsustainable grounds. The grounds mentioned by the learned first appellate court while rejecting the prayer for scientific measurement of suit land are all unreasonable, arbitrary and against the well settled legal principles. There was no justification for the learned first appellate court to hold that by allowing the application dated 07.04.2022, the already settled



issues regarding the measurement would be reopened/revived. The learned senior counsel further submitted that the learned first appellate court ought to have held that the evidences collected during trial of the suit are/were not sufficient to decide the question of encroachment made by the defendant/respondent. Since the whole case and claim of the petitioners is based on the encroachment made by the respondent in respect to 1 Katha 10 Dhur of lands of the plaintiffs/appellants, in any case, scientific measurement is essential even at the appellate stage. The learned senior counsel further submitted that the learned first appellate court failed to protect the right, title, interest and possession of the plaintiffs/petitioners and in the interest of justice and equity, it is essential to get the measurement of entire area of land i.e. 33 Katha 3 Dhur relating to Plot No. 363 by a competent Survey Knowing Advocate Commissioner. The learned senior counsel further submitted that much stress has been put by defendant in the written statement that Babban Singh, their vendor, who was the purchaser of 8 Katha 3 Dhur of land and came into its possession since 1973, never raised any dispute regarding defendant having possession of any excess land or having encroached upon any portion of the land of the plaintiffs. But



the whole issue arose after the plaintiffs purchased the land and the defendant constructed a boundary wall in the year 2011. The defendant has also stated in paragraph 30 of his written statement that the defendant was ready for measurement and demarcation of 25 Katha of Plot No. 363 by any competent authority or by appointing Survey Knowing Pleader Commissioner and when the plaintiffs/appellants raised this demand before the learned first appellate court, it has been vehemently opposed by the defendant which is not proper in view of the acceptance for appointment of Survey Knowing Pleader Commissioner by defendant in his written statement. The learned senior counsel further submitted that from bare perusal of the earlier report of Survey Knowing Pleader Commissioner, it is apparent the report was faulty as no second fixed point was ascertained. However, area of land of plaintiffs was found to be 7 Katha 6 Dhurs and 9 Dhurki. The learned senior counsel further submitted that even from perusal of the report of the Government Amin, it transpires that the said report was under dictates of the defendant as the defendant restricted the measurement only to the area on which construction was made and the adjacent land only. The defendant also objected to the fixed point being ascertained by the Amin. Even in this



report the area of the land of the plaintiffs was found to be 7 Katha 1 Dhur, so the land of the plaintiffs was found to be less than their purchased land. The learned senior counsel further submitted that even the writ issued by the learned Sub Judge for scientific measurement was modified by the Circle Officer. The learned senior counsel further submitted that since the proceeding before the learned first appellate court is the continuation of the suit, the report of earlier Survey Knowing Advocate Commissioner or Anchal Amin submitted during the course of trial of the suit would not operate as *res judicata* in the present appellate jurisdiction. Moreover any interlocutory order, passed during course of trial, does not operate as *res judicata* in a subsequent stage of the suit and hence, there is no question of attainment of finality with respect to earlier reports of the Pleader Commissioner and the Anchal Amin. At the same time, principle of estoppel would not apply, if the same questions/issues are raised again in a court of higher jurisdiction arising under the same suit/proceeding.

5. Mr. Arora referred to the decision of this Court in the case of *Dr. Vijay Kumar Jain vs. Smt. Shakuntala Devi*, reported in *2005 (1) PLJR 11* wherein it has been held by the learned Single Judge that even at the stage of appeal, the



appellate court could exercise its power under Order 41 Rule 27 (1) (b) read with Order 26 Rule 9 of the Code to appoint Survey Knowing Pleader Commissioner to decide the issue of encroachment by taking necessary measurement of the plot in question.

6. Mr. Arora further referred to a decision of Bombay High court rendered in the case of *Yasin Gulab Shikalkar vs. Maruti Nagnath Aware and Ors.* in *Writ Petition No. 7278/2022* disposed of on 25.01.2023 wherein under somewhat similar circumstances, the Bombay High Court allowed the writ and set aside the order of learned District Judge by which the petitioner's application for appointment of Court Commissioner for measurement of lands during the pendency of the appeal was rejected. The Bombay High Court held that in cases if the Court Commissioner fails to present correct picture prevailing at the site, the trial court itself was empowered to appoint another Court Commissioner and there was no question of applicability of the principle of *res judicata*. If the earlier measurement conducted was defective, the appellate court should have allowed the application for appointment of Survey Knowing Advocate Commissioner afresh.

7. Mr. Arora further pointed out that the basic fault



with the reports of Survey Knowing Advocate Commissioners and Anchal Amin is that they failed to measure the total area of the suit plot and thereafter the area under occupation of plaintiffs and defendant were to be measured, but the same was not done.

8. Mr. Arora further referred to the decision of the Hon'ble Supreme Court rendered in the case of *Smt. Sukhrani (Dead) by LRs. And Ors. vs. Hari Shanker and Ors.* reported in *AIR 1979 SC 1436* wherein it has been held that a decision given at an earlier stage of a suit will bind the parties at later stages of the same suit. It has been further held that it is equally well settled that because a matter has been decided at an earlier stage by an interlocutory order and no appeal has been taken therefrom or no appeal did lie, a higher Court is not precluded from considering the matter again at a later stage of the same litigation.

9. Mr. Arora also referred to the decision of this Court rendered in the case of *Bal Manohar Jalan vs. Dr. Braj Nandan Sahay & Ors.*, reported in *2012 (3) PLJR 221* on the proposition that if the court is not in a position to ascertain about encroachment of the disputed property, in order to verify the identity of the disputed land, it would be desirable to get the



report of Pleader Commissioner. The Court further held that if the Court refused to decide the issue of appointment of Pleader Commissioner on the grounds that earlier petition which was rejected by the court was not challenged before the higher court and if the court has not decided the case on merits, rejection order was not sustainable and allowed the writ petition.

10. Mr. Arora reiterated that when there is dispute of identity of land and there is allegation of encroachment, the best evidence is to get the report by appointing Survey Knowing Pleader Commissioner. Thus, Mr. Arora submitted that the impugned order is illegal and without proper jurisdiction by the learned first appellate court and the same be set aside and the application of the petitioners for appointment of Survey Knowing Pleader Commissioner be allowed.

11. *Per contra*, Mr. Amit Shrivastava, learned senior counsel appearing on behalf of the defendant/ respondent vehemently opposed the submission made on behalf of the petitioners. The learned senior counsel submitted that the defendant purchased 25 Katha of land in the year 1972 and thereafter came into its possession. The vendors of the original plaintiffs Baban Singh, purchased 8 Katha and 3 Dhur of land. The learned senior counsel further submitted that a detailed



discussion about purchase of different plots of land has been made in another case between the parties which was disposed of by this Court vide judgment dated 05.01.2024 passed in Civil Misc. No.578 of 2023. The plaintiffs have filed the present case with wrong submission as the petitioners of Civil Misc. No. 578 of 2023 are the subsequent purchasers from the original plaintiffs Sudha Devi and Sushant Kumar and between them they purchased only 7 Katha 13 Dhur of land by different sale deeds. If the land purchased by vendees of plaintiff nos. 1 and 3 is deducted from the land purchased by the original vendor Babban Singh, only 10 Dhur of land would remain. So, the claim of the original plaintiffs about the encroachment of 1.5 Katha of land is completely false and concocted and so is the claim of vendees who have been contesting before the learned first appellate court.

12. Mr. Shrivastava further submitted that the petitioners have not approached this Court with clean hands and even made wrong submission in their petition filed before this Court. The original plaintiff no. 3 (petitioner no.3 herein) and substituted plaintiff nos. 1 and 2 have suppressed the material facts of execution of five registered deeds of sale in favour of general power of attorney holder, namely Jang Bahadur Singh



and his family members, but the original plaintiffs or substituted plaintiffs did not bring this fact to the notice of either the trial court or to the first appellate court. Even the general power of attorney holder did not bring this fact to the notice of learned trial court or learned first appellate court nor any averment in this regard has been made in the instant civil miscellaneous petition. The original plaintiffs did not even take the leave of the learned trial court as required under Section 52 of the Transfer of Property Act before the sale of suit properties.

13. Mr. Shrivastava further submitted that law is well settled and the Hon'ble Supreme Court on a number of occasions has held that any person coming to a court of law must come with clean hands and any suppression of material facts by such a party completely disentitles the party from grant of any relief. In this regard, the learned senior counsel relied on the decision of the Hon'ble Supreme Court in the case of *Yashoda Vs. Sukhwinder Singh and Ors. (Civil Appeal No. 8247 of 2009)*.

14. Mr. Shrivastava further submitted that suppression of material facts in a court of law amounts to fraud and for this reason, the case of the petitioners is liable to be thrown out of the Court and could not be entertained.



15. Mr. Srivastava further submitted that the petitioners have again made a false statement in paragraph 10 of the instant civil miscellaneous petition that the Survey Knowing Pleader Commissioner was appointed at the instance of the plaintiffs/petitioners, whereas Survey Knowing Pleader Commissioner was appointed at the instance of the defendant/respondent. The petitioners must be hauled up for making false statement on oath.

16. Mr. Shrivastava further pointed out that the matter is being contested by the general power of attorney holder and when the entire property has been alienated by the plaintiffs, the general power of attorney holder ceases to have any rights. On the date i.e. 18.12.2012, when the general power of attorney was executed, the entire suit property was sold and, as such, the execution of general power of attorney was *void ab initio* and nullity in the eyes of law.

17. Mr. Shrivastava further submitted that there is no whisper about any encroachment in the sale deeds executed by Babban Singh in favour of the original plaintiffs or in the sale deeds of the subsequent purchasers.

18. Mr. Shrivastava further submitted that the petitioners have brought a completely bogus case before this



Court in the instant civil miscellaneous petition. The Government Amin was appointed and submitted its report which was marked as Exhibit 10 before the learned trial court and the said exhibit was marked at the instance of the plaintiffs without any objection. If the said document was exhibited without any objection at the time of trial, the plaintiffs could not be allowed to raise any objection at the appellate stage to the said report. Similarly, the objection raised by the plaintiffs to the report of Survey Knowing Pleader Commissioner (Exhibit B) was rejected by the learned trial court and the same was not challenged, hence, the said report attained finality. Therefore, the petitioners are precluded in law in challenging either the Pleader Commissioner's report or the report of the Anchal Amin. The principles of *res judicata* would also be applicable. Further, as the original plaintiffs have alienated the entire suit properties, that too, without authority of the learned trial court, they are precluded in maintaining the petition dated 07.04.2022.

19. Mr. Shrivastava further submitted that in both the reports, even the land of the defendant was found to be less than 25 Katha. The repeated attempts by the plaintiffs/petitioners is nothing but a deliberate attempt to linger the proceeding and prolong the hearing and disposal of Title Appeal No. 79/2019.



The petitioners have suppressed even different orders passed by the learned trial court like order dated 27.01.2015 of learned Sub judge-III, Danapur in Title Suit No. 112/2011 whereby the petition of the petitioners filed under Order 26 Rule 10 (a) and Section 151 of the Code was rejected and also the order dated 17.07.2018 passed by the learned Sub Judge II, Danapur, Patna in Title Suit No. 112 of 2011. Both these orders challenged the reports of Survey Knowing Pleader Commissioner and were rejected by the learned trial court. However, vide order dated 17.07.2018, in the interest of justice, appointment of Amin was ordered. In this manner, application for further appointment of Survey Knowing Pleader Commissioner was rejected thrice and if no objection was taken earlier and orders of the learned trial court were not challenged, the petitioners are not permitted to raise the issue again in appeal.

20. Mr. Srivastava further submitted that it was the defendant/respondent, who filed a petition on 01.12.2011 in the learned trial court in Title Suit No. 112/2011 to appoint a Survey Knowing Pleader Commissioner to measure and demarcate the land of the defendant. After filing of the aforesaid petition by the defendant, the petitioners filed a petition on 09.05.2012 wherein they formulated seven points for inspection and report



by Survey Knowing Advocate Commissioner. However, the petitioners have suppressed the material fact that the learned trial court vide order dated 22.01.2013 allowed the petition of the respondent dated 01.12.2011 and ordered for appointment of Survey Knowing Advocate Commissioner. In the same order, the learned trial court rejected six, out of seven points raised by the petitioners. Admittedly, the petitioners never challenged the said rejection before any superior Court. Another application filed on 06.09.2014 under Order 26 Rule 10 (A) of the Code before the learned trial court for appointment of Survey Knowing Advocate Commissioner was rejected by a reasoned order dated 27.01.2015. Again on 06.02.2018, the petitioners filed a petition for appointment of Survey Knowing Advocate Commissioner and for rejecting the earlier report. Again the learned trial court, by a reasoned order dated 17.07.2018, rejected the said petition filed on 06.02.2018. In the same order, the learned trial court, in the interest of justice, directed for appointment of a competent Government Amin. With sole and oblique motive of gaining undue advantage over the defendant, the petitioners have deliberately suppressed the aforesaid facts and withheld the aforementioned relevant and material documents in the instant civil miscellaneous petition, and for



this reason, the instant civil miscellaneous petition is fit to be dismissed with exemplary cost. Since the petitioners have never challenged the aforesaid three orders dated 22.01.2013, 27.01.2015 and 17.07.2018, all the three orders have attained finality and cannot be agitated in an appeal. Moreover, the voluntary conduct of the petitioners in not challenging the said three orders is squarely hit by principles of waiver and voluntary relinquishment of their statutory rights as well as *res judicata*.

21. Mr. Shrivastava placed reliance on the decision of Hon'ble Supreme Court in the case of ***U.P. State Road Transport Corporation vs. State of U.P. & Ors.*** reported in ***AIR 2005 SC 446*** on the point of principles of *res judicata*. The Hon'ble Supreme Court in paragraph 11 has held that the principle of *res judicata* is based on the need of giving a finality to judicial decisions. The principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of Section 11 of Code of Civil Procedure in this respect. *Res judicata* applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same



proceedings.

22. Mr. Shrivastava further submitted that the reliance placed by Mr. Arora on the cases of ***Dr. Vijay Kumar Jain (supra)*** and ***Yasin Gulab Shikalkar (supra)*** have no relevance for the purpose of the present case. Unlike Bombay High Court judgment, there has been no objection to the report of Amin in the present case. Moreover, both Survey Knowing Pleader Commissioner as well as Government Amin have been appointed in the case and their reports have been marked as exhibits.

23. Mr. Shrivastava further placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Dalip Singh vs. State of Uttar Pradesh and Ors***, reported in ***(2010) 2 SCC 114*** on the proposition that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. On the same proposition, Mr. Shrivastava further placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Sarvepalli Radha Krishnan University and another Vs. Union of India and Ors. reported in (2019) 14 SCC 761.***

24. Mr. Shrivastava further placed reliance on the decision of Division Bench of this Court in the case of ***Bashid***



Ahmad Vs. State of Bihar and Ors. in *LPA No. 359 of 2024* disposed of on 15.04.2024 on the point of the Court frowning upon on the blatant attempt to mislead the Court.

25. Mr. Shrivastava further placed reliance on the decision rendered in *Gopal Das and another vs. Sri Thakurji and Ors.* reported in *AIR 1943 PC 83* and reiterated in the case of *Lachhmi Narain Singh and Ors. vs. Sarjug Singh and Ors.* reported in *AIR 2021 SC 3873* wherein it has been held that plea regarding mode of proof cannot be permitted to be taken at the appellate stage for the first time, if not raised before the trial court at the appropriate stage. The reliance has been placed with regard to the report of the Government Amin being admitted at the instance of the plaintiffs without any objection. Mr. Shrivastava further submitted that allowing such objection at the appellate stage is inconsistent with the rule of fair play.

26. Mr. Shrivastava further placed reliance on the decision of this Court rendered in the case of *Sarwan Kumar vs. Amrendra Kumar and Ors.* in *Second Appeal No. 34 of 2015* on the point of Amin report being admitted by the plaintiffs and reliance placed upon it by the court.

27. Mr. Shrivastava further placed reliance on the decision of the Hon'ble Supreme Court in the case of *Jai Singh*



and Ors. vs. Municipal Corporation of Delhi and another reported in *(2010) 9 SCC 385* on the point of jurisdiction of this Court under Article 227. The Hon'ble Supreme Court in paragraph 15 has held that the High Court under Article 227 of the Constitution of India has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi-judicial tribunals, exercise the powers vested in them, within the bounds of their authority. The High Court has the power and the jurisdiction to ensure that the Courts act in accordance with the well-established principles of law. The High Court is vested with the powers of superintendency and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution of India. It is, however, beneficial to remember the well-known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection, The exercise of jurisdiction must be within the well-recognized constraints. It cannot be exercised like a "bull in a china shop", to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This



correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice. It has further been held in paragraph 42 that the High Court has the power to reach injustice whenever, wherever found within the scope and ambit of its powers under Article 227 of the Constitution of India.

28. Mr. Shrivastava further placed reliance on the decision of this Court in the case of ***Smt. Shamshad Khatun vs. The State of Bihar & Ors.*** reported in ***2010 (1) PLJR 929*** regarding principle of waiver and estoppel making the appellant not entitled for relief sought in the Letters Patent Appeal.

29. Mr. Shrivastava further placed reliance on the decision of this Court in the case of ***Umesh Pd. Thakur & Ors. vs. Nand Kumar Singh & Ors.*** reported in ***2016 (3) PLJR 447*** on the point of objection not being taken earlier and subsequent objection not being sustainable.

30. Mr. Srivastava also placed reliance on the decision of Madras High Court in the case of ***Pappayee Ammal vs Subbulakshmi Ammal and another*** reported in ***AIR 1983 Madras 344*** on the point that where a Commissioner was appointed by the trial Court to make local inspection of the suit



property and no objection to his report was raised at the stage of trial before the trial Court, the appointment of another Commissioner by the appellate Court during the pendency of the appeal for the very same purpose for which the Commissioner had been appointed by the trial Court would be invalid as it is neither in the interest of justice nor is it recognised by the provisions of Order 41, Rule 27 or under Order 26, Rule 9 read with Section 107.

31. On the strength of aforesaid authorities, Mr. Shrivastava submitted that the order of the learned first appellate court is well reasoned and does not warrant any interference both on facts and in law.

32. By way of reply, Mr. Arora, learned senior counsel appearing on behalf of the petitioners submitted that endeavour of the Court should be towards the adjudication of real controversy between the parties. The present case being a case for deciding encroachment and if earlier reports are insufficient, there is no harm in allowing the application for appointment of Survey Knowing Pleader Commissioner for scientific measurement of the plots. It is in the interest of justice and equity that measurement of entire area of Plot No.363 apart from separate area in possession of the parties to be allowed as



the same is necessary for completely adjudicating the matter. Mr. Arora reiterated that not challenging the orders passed by the learned trial court or non-challenge to the reports of Survey Knowing Pleader Commissioner or Government Amin could not be treated as *res judicata* in the present appellate jurisdiction since these orders were interlocutory orders and passed during the course of trial. Therefore, the petitioners are at liberty to raise the issue before the appellate court. Mr. Arora further submitted that both the reports are meaningless since neither Survey Knowing Pleader Commissioner nor the Government Amin reported about total area of Plot No. 363 and thereafter about respective possession of the parties. Further, in absence of fixed points, how can the surveyors reported about non-encroachment by the defendant/respondent. The surveyors never gave a report about actual physical configuration of Plot No. 363 and 25 Katha of land of the defendant. Since Plot No. 363 was never demarcated and court felt that report was insufficient, it was incumbent upon the learned first appellate court to call for another report. Mr. Arora further reiterated that unless the whole Plot No. 364 measured, it was not possible to demarcate the plots of the parties. Further, under Section 105 of the Code, the petitioners have taken all the grounds in their memo of



appeal. The impugned order is without consideration of the merits of the case of the petitioners.

33. I have given my thoughtful consideration to the rival submission as well as facts of the case. Admittedly, the orders dated 22.01.2013, 27.01.2015 and 17.07.2018 have not been challenged by the petitioners. Thus, these orders have attained finality.

34. The Hon'ble Supreme Court in the case of ***R.V.E Venkatachala Gounder vs. Arulmigu Viswesaraswami and V.P. Temple*** reported in ***(2003) 8 SCC 752***, while dealing with the aspect of disallowing objection as to mode of proof at appellate stage as a rule of fair play to avoid prejudice to the other side, has held in paragraph 20 as under :

“20.....In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The



omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence....”

35. So, the petitioners could not now again take the same plea before the appellate court in same proceeding for appointment of Survey Knowing Pleader Commissioner for scientific measurement of the disputed plots.

36. Further, reliance could be placed on the decision of the Privy Council in the case of **Gopal Das** (supra) wherein



it has been held that objection as to the mode of proof must be taken when the document is tendered and before it is marked as an exhibit, it cannot be taken in appeal.

37. Only option available as of now for the petitioners is that they could raise the issue before the appellate court and as it appears from the petition of the petitioners that in memo of appeal, they have raised this issue and assailed the reports before the learned first appellate court.

38. The Hon'ble Supreme Court in the case of ***Kusheshwar Prasad Singh v. State of Bihar*** reported in (2007) 11 SCC 447 has held as under :

“13. The appellant is also right in contending before this Court that the power under Section 32-B of the Act to initiate fresh proceedings could not have been exercised. Admittedly, Section 32-B came on the statute book by Bihar Act 55 of 1982. The case of the appellant was over much prior to the amendment of the Act and insertion of Section 32-B. The appellant, therefore, is right in contending that the authorities cannot be allowed to take undue advantage of their own default in failure to act in accordance with law and initiate fresh proceedings.

14. In this connection, our attention has been invited by the learned counsel for the appellant



to a decision of this Court in Mrutunjay Pani v. Narmada Bala Sasmal [AIR 1961 SC 1353] wherein it was held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim commodum ex injuria sua nemo habere debet (no party can take undue advantage of his own wrong)”.

39. If the petitioners did not challenge the aforesaid three orders dated 22.01.2013, 27.01.2015 and 17.07.2018, they cannot be allowed to re-agitate the matter at the appellate stage as the same would be akin to allowing them to take advantage of their own wrong. On this ground, I am of the view that the petitioners were not entitled to move before the learned first appellate court for making a prayer for appointment of Survey Knowing Pleader Commissioner in the light of rejection of the same prayer thrice by the learned trial court, which have not been challenged.

40. Moreover, there has been appointment of Survey Knowing Pleader Commissioner and Government Amin for the purpose of demarcation of the suit property and the area in possession of the parties. Furthermore, the petitioners have failed to point out that the learned trial court expressed any opinion that the evidence before it was insufficient for deciding



the issue involved in the present matter. If no such inability has been shown by the learned trial court and the objections raised against the reports have been disposed of on merits by reasoned orders, not once or twice but thrice, the said issue cannot be allowed to remain alive for all time to come and cannot be allowed to be agitated at the instance of the petitioners till their satisfaction. In any case, it is always open to the first appellate court to appraise the evidence recorded during the trial to arrive at a finding whether the evidence is sufficient or not for deciding the issues and it can always take a call for appointment of a Survey Knowing Pleader Commissioner in accordance with law, if it feels so.

41. In the light of discussion made, the reliance placed by the learned senior counsel appearing on behalf of the petitioners is of no help to the case of the petitioners since the facts of the present case are quite dissimilar to the facts of the cases cited by the learned senior counsel.

42. Therefore, I do not think the learned first appellate court committed any wrong or illegality and thus hold that there is no infirmity in the impugned order dated 17.01.2023 passed by the learned Additional District Judge-VI, Danapur, Patna in Title Appeal No. 79 of 2019 and hence, the same is affirmed.



43. The present petition fails and, accordingly, the same is dismissed.

44. However, it is made clear that this Court has not expressed any opinion on the merits of the case and whatever has been observed here-in-before is only for the purpose of disposal of the present petition and hence, the learned first appellate court is directed to proceed with the matter uninfluenced by any observation made by this Court and it is further directed to dispose of the appeal at the earliest considering the earlier judgment of this Court passed in Civil Misc. No.578 of 2023.

45. So far as the allegation of concealment of facts or playing fraud upon the court are concerned, at this stage, this Court is not inclined to enter into the matter and the respondents are at liberty to take up this issue before the court concerned.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	AFR
CAV DATE	07.05.2024
Uploading Date	11.06.2024
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