

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RSA No.180/2011**

% **14th March, 2014**

SH. DHARAM PAL AND ANR. Appellants
Through: Mr. Rajesh Gupta, Advocate with Mr.
Harpreet Singh, Advocate.

VERSUS

SH. BALDEV DASS Respondent
Through: Mr. D.L. Dhingra, Advocate.
Mr. Imran, Advocate with Mr. Mohit
Chaudhary, Advocate for applicant.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.4896/2014(under Section 151 CPC by applicants)

1. Application is dismissed as not pressed as the applicants if they have any rights in the suit property will initiate and take proper orders in the said proceedings. This is so observed because the judgment passed in a civil proceeding is only binding inter parties as per Section 11 of Code of Civil Procedure, 1908 (CPC) and will not bind third parties unless they claim through the parties to the suit.

Application is dismissed as not pressed with the aforesaid observations and liberty.

+ RSA No.180/2011 and C.M. No.19491/2011 (stay)

2. This Second Appeal is filed under Section 100 of CPC against the judgment of the first appellate court dated 27.8.2011. The first appellate court by its impugned judgment set aside the judgment of the trial court dated 24.12.2009 whereby the trial court had dismissed the suit for permanent injunction filed by the respondent/plaintiff.

3. The dispute in the present case pertains to a plot of 200 sq yds situated in khasra No.630/227, Vinod Nagar, Village Ghazipur, Illaqa Shahdara, Delhi. Whereas the respondent/plaintiff claimed to have purchased the suit property by means of a registered and irrevocable general power of attorney Ex.PW1/1 dated 2.4.1974, the appellants/defendants claimed ownership of the suit plot by means of an unregistered general power of attorney Ex.DW1/D1 dated 17.5.1977.

4. Trial court dismissed the suit by holding that the respondent/plaintiff is not the owner of the suit property and is not in possession. Trial court refused to look into the report of the Local Commissioner who was appointed by the court to ascertain the location of the property and in whose possession the same is. The Local

Commissioner's report is dated 29.4.1986. Trial court held that this Local Commissioner's report is not proved inasmuch as the Local Commissioner was not called to prove the report.

5. The first appellate court has set aside the conclusions of the trial court that Local Commissioner's report cannot be looked into inasmuch as not only no objections were filed by the appellants/defendants to the report of the Local Commissioner but also the Local Commissioner's report was proved by the respondent/plaintiff in his evidence.

6. In addition to the observations of the first appellate court, and which I will reproduce hereinafter, it is also relevant to note that the Local Commissioner before conducting the inspection had issued notice to both the parties. However, only the respondent/plaintiff participated in the process and the appellants/defendants who refused to receive the notice did not participate, and which aspect is noted in the report of the Local Commissioner. Once notices are issued by the Local Commissioner before initiation of Local Commissioner's proceedings i.e Local Commissioner's report is prepared after notices are issued to the parties, Local Commissioner's report in fact need not even be formally proved because Local Commissioner's report prepared after notices to both the parties becomes evidence in the case as per Order 26 Rule 10 CPC.

7. Reference in this regard can be made to the judgment of a learned Single Judge of this Court in the case of *New Multan Timber Store & Ors. Vs. Rattan Chand Sood (1997) 68 DLT 680*. Paras 10 and 14 of this judgment are relevant and the same read as under:-

“10. Since we are concerned with the construction of Order 26 Rules 9 and 10 Civil Procedure Code it would be just and proper to examine them in extenso. The same are in the following words:-

“Commissions to make local investigations.

9. In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court;

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

Procedure of Commissioner.

10(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.

Report and depositions to be evidence in suit - (2) 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 reports 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, on as to his report, or as to the manner in which he has made the investigations.

(3).....”

14. Learned counsel for the appellants has next contended that the appellants filed objections to the report of the Commissioner,

however, the same were not disposed of. This contention of the learned counsel is also devoid of any force. The objections were considered by both the learned Sub Judge as well as by the first Appellate Court. The learned Sub Judge was of the view that since the Commissioner was not examined hence the report submitted by him could not be read in evidence. The said view was obviously not correct in accordance with law and, as such, the learned Additional District Judge dis-agreed with the said view and found that the report of the Local Commissioner is a legal evidence under Order 26 Rule 10(2) Civil Procedure Code and the same can be looked into and relied upon without formal proof of the said report.”

8. It has also been held by a learned Single Judge in the case reported as ***Kenneth Loyal @ Manmohan Singh Loyal Vs. Sh. Vipin Vinod Diwan & Ors. 2011 (123) DRJ 368*** that the report of Local Commissioner can be read in evidence without examination of the Local Commissioner if no objections were filed to the report of the Local Commissioner.

9. The first appellate court has made the following relevant observations to set aside the findings of the trial court and to hold that Local Commissioner’s report in fact should be looked at:-

“14. Ld. Local Commissioner was appointed in this matter who has given the report that the possession over the suit property was of the plaintiff, there was no dispute with respect to the report of the Local Commissioner as the defendant has not filed any objections against this report. The Ld. Trial Court however has not considered the report on the ground that the report has not been proved and the judgment AIR 2003 Bombay 52 has been relied upon by the Ld. Trial Court. I have perused that judgment also. The said judgment reads as under:-

“The Trial Court in the present case has proceeded to decree the suit essentially relying on the commission’s report and on the assumption that the said report has been proved. For assuming that the

said report has not been proved. The Trial Court perhaps took note of the fact that defendant did not raise any objection with reference to the Commissioner's report. Merely because no objection was raised by the defendant to the Commissioner's report that does not mean that the report stands proved on record. There is established procedure known to law by which the Commissioner's report can be proved on evidence. That has not been done in the present case. In such a situation, the Trial Court could not have decided the suit on merits."

15. That suit which is relied upon by the Ld. Trial Court although was decided by the Hon'ble High Court was on same lines as in that case also objections were not raised by the defendant to the report of the Local Commissioner and that is the position here also in the present case. The Hon'ble High Court however has held that the Ld. Trial Court can not decide the title of the property merely on the basis of the report of the Local Commissioner.

16. That judgment appears to be entirely on different footing as far as title is concerned. This court is of the opinion that the Ld. Trial Court has not considered the remaining paragraphs of that very judgment as in the very said judgment it was inter alia held that to prove such a fact the evidence was required and the plaintiff in the present matter by way of evidence has filed the copy of registered power of attorney in his favour in which the property has been described in terms of the contents of said Ex.PW1/1. Therefore, keeping in view the registered power of attorney filed on record and keeping in view the report of Local Commissioner which is not challenged by the defendants, this court is of the opinion that it was sufficient evidence before the Ld. Trial Court to come to the conclusion prima facie that the possession is of the plaintiff.

17. Further, the Ld. Trial Court has held that the plaintiff has not proved the report of the Ld. Local Commissioner whereas the fact remains that the plaintiff has duly proved the report of Local Commissioner in his evidence which was recorded on 18.02.1991 when he was examined in chief. The Ld. Trial Court has held that the plaintiff has not proved the report of the Ld. Local Commissioner by summoning him. This court is of the opinion that in view of the fact of the present case, the Ld. Trial Court has not been able to appreciate the

fact that the report has been duly proved by the defendant himself. It is specifically come in the evidence that the Local Commissioner was got appointed from the court and evidence the site and it is very clearly written that both the parties have no objection if this report of Ld. Local Commissioner be read as Ex.C1. The relevant para of the evidence of the plaintiff is reproduced as follows:-

“In the suit filed Local Commissioner was got appointed from the court he visited the site. (both the counsels stated that this report may be read in evidence as such the report is mark as Ex.C1).”

18. Therefore, this court is of the opinion that the Ld. Trial Court has somehow could not appreciate this evidence while relying upon the judgment AIR 2003 Bombay 52, which was only to the effect that if the report was not proved by way of evidence, the same can be read in evidence. In the present case the report of Local Commissioner has been duly proved and it has been proved with the consent of Ld. Counsel for both the parties. Further it is also settled position of law under section 58 of Indian Evidence Act that admitted facts need not be proved by way of calling evidence.

19. Now once the court has held that the report of the Ld. Local Commissioner is admissible, his report can be read in evidence. The court has also perused the site plan, which has been prepared by the Local Commissioner. The site plan which was prepared by the Ld. Local Commissioner is in consonance with the property shown in the registered power of attorney Ex.PW1/1 as filed by the plaintiff. It is also clearly observed by this court that the unregistered power of attorney which has been filed by the defendant is not corroborating with the report of Ld. Local Commissioner and as per unregistered power of attorney filed by the defendants, the property of the defendants is bounded differently whereas the plaintiff is claiming altogether different suit property. No doubt the Khasra No.630/227 in the same. The defendants may be the owner of the property in the same khasra number but as far as the property which is being claimed by the plaintiffs is matching with this site plan prepared and filed by the Ld. Local Commissioner and is matching with the report of Local Commissioner which report of Local Commissioner has been accepted by both the parties in the evidence recorded by the Ld. Trial Court on 18.02.1991. On the report of Local Commissioner, there are signatures

of about 6-7 persons who were witness to the report of Local Commissioner. Therefore, this court is of the opinion that the Ld. Trial Court has held incorrectly that the report of Local Commissioner is not admissible and has not appreciated the said report.”

(underlining added)

10. A reading of the aforesaid paras show that the first appellate Court has rightly discarded the conclusion of the trial court of not looking at the report of the Local Commissioner. In fact, in para 17 of the impugned judgment, the first appellate court records that during the recording of evidence of the plaintiff it is noted that both the counsel for the parties stated that report be read as evidence, and consequently the report was marked as Ex.C1. Accordingly, the first appellate court was justified in referring to the Local Commissioner’s report to decide the vexed questions which were raised between the parties.

11. So far as the issue of location of the suit property is concerned, the first appellate court notes that when we look at the report of the Local Commissioner, it is found that the location of the suit property which is mentioned therein is the plot which is more similar to the plot of the respondent/plaintiff and not the appellants/defendants inasmuch as whereas in the boundaries of the plot which was purchased by the appellants/defendants by the unregistered power of attorney Ex.DW1/D1

there was a plot on the east which was owned by one Smt. Kale whereas as
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per the report of the Local Commissioner on the east of the subject plot, which is claimed by the respondent/plaintiff, there is in fact a road. These aspects are noted by the first appellate court in paras 11 and 12 of the impugned judgment and which read as under:-

“11. The power of attorney which is filed by the defendants shows that the property which was purchased by the defendants is bounded as under:-

East: Remaining portion of same khasra in possession of Kale

West: Plot of Inder Kaur

North: Kundli Road

South: House of Surjit Singh and Nirmal Kaur.

12. As far as situation of the property of the defendants towards East and West side is concerned, it is bounded by the plot of other persons. Therefore, the property which is being claimed by the plaintiff prima facie appears to be different property than the property which is being claimed by the defendants, as if the suit property would have been the same as is being claimed by the defendant it would have been bounded in similar direction with respect to the property of the plaintiff where there is a road on eastern side whereas in the power of attorney filed the defendants, it is stated that on the eastern side there is remaining portion of same khasra in possession of Kale.”

12. I completely agree with the aforesaid conclusions and accordingly hold that the subject plot is a plot which is in fact in the ownership of the plaintiff by virtue of the registered general power of attorney, Ex.PW1/1 and not the plot which was the subject matter of the power of attorney in favour of the appellants/defendants, Ex.DW1/D1. I

may note that as per the Local Commissioner the respondent/plaintiff is
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found in possession and this is as per enquiries at the spot and the statements of the neighbourers which have been recorded. Once no objections have been filed to the report of the Local Commissioner, I have no hesitation in holding that the first appellate court was justified in referring to this report rightly to hold that the respondent/plaintiff was in possession of the suit property. Since the subject suit was a suit for injunction, and the respondent/plaintiff is shown to have ownership interest in the property by means of the registered general power of attorney, Ex.PW1/1(vide Section 202 Contract Act and *Suraj Lamps Vs. State of Haryana, 2011 (183) DLT 1* and was found in possession as per the report of the Local Commissioner, I do not think that there is any merit in the case of the appellants/defendants.

13. Counsel for the appellants did seek to vehemently argue that report of the Local Commissioner does not show possession of the respondent/plaintiff, however, the said argument is factually incorrect because report of the Local Commissioner shows that the respondent/plaintiff was found to be in possession of the suit plot, and which aspect is duly confirmed by the statements of the neighbourers which were recorded by the Local Commissioner.

14. In view of the above, no substantial question of law arises under Section 100 CPC, and the appeal is therefore dismissed, leaving the parties to bear their own costs.

MARCH 14, 2014
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VALMIKI J. MEHTA, J.