

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**RSA No. 861 of 2011 (O&M)
Date of Decision: January 19, 2017**

Tara Chand

..Appellant(s)

Versus

Parshotmi Devi and others

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. M.S. Khaira, Senior Advocate with
Mr. Randeep S. Khaira, Advocate
for the appellant.

Mr. Vijay Lath, Advocate
for the respondents.

ANITA CHAUDHRY, J.

This is the defendant's second appeal and is aggrieved by
the judgments of both the Courts below.

The suit of the plaintiffs was for issuance of permanent
injunction, restraining the defendant from raising any construction or
blocking the common Katcha passage marked by letters ABCDEFA
shown in the site plan annexed with the plaint. In the alternative the
plea was that in case the defendant raised any construction or
obstruction during the pendency of the suit then for directions to restore
the passage and removal of the obstruction.

The plaintiffs had pleaded that their houses were situated within the Lal Lakir of the village Bandlehri and were shown by letters HIAJ and NOPLMBN shown in yellow in the site plan Annexure P-1. There was another plot of the plaintiffs which was marked by letters RSTU also shown in yellow in the site plan. This property was earlier owned and possessed by the father of plaintiffs no.2 & 3 and husband of plaintiff no.1. It was pleaded that the plaintiffs were the owners and co-sharers in possession of the residential property. It was further averred that the property of the plaintiffs was connected with the main Pakka road through a common passage that was shown by letters ABCDEFA shown in red colour in the site plan, which connected it to the street constructed by the Gram Panchayat at point ED. It was pleaded that there was no other passage connecting their house. It was pleaded that the property of the defendant adjoins this passage on its Western side and they were giving threats to encroach on this passage and block it. It was pleaded that in the event any obstruction was raised, the passage to their house would be blocked and they had the right of easement by necessity as they were using it for the last more than 50 years.

The defendant took the plea of non-joinder, mis-joinder and suppression of material facts. It was pleaded that the plaintiffs had no cause of action against him and he was the exclusive owner of the property shown by him in green colour in site plan Ex.D-1. It was pleaded that the house of the plaintiffs was connected with a Rasta,

shown in yellow and this passage connected to the main Rasta on the Eastern side and the plaintiffs could not claim any passage through his property and he had raised the construction prior to the filing of the suit and the report of the Local Commissioner dated 16.01.2002 was wrong and they had filed objections to the Local Commissioner's report.

The suit was filed on 27.09.2002 and an *ex parte* order was passed directing the parties to maintain *status quo* regarding the nature of the passage in dispute till 16.10.2002. However, on 05.10.2002 an application was moved by the plaintiffs seeking appointment of a Local Commissioner. It was alleged that the defendant had started raising construction on the disputed passage illegally and he refused to obey the Court order and requested the trial Court to appoint a Local Commissioner. The trial Court appointed a Local Commissioner and directed it to visit the spot after giving prior notice to the parties and give his report regarding the existing position. The Local Commissioner visited the spot and prepared a report Ex.P-2. He had also prepared a memo of parties, a site plan and had taken the thumb impressions of the parties present. It was reported that Tara Chand defendant was present but he had refused to sign. The defendant filed objections but there is no reference to the filing in the zimni order. The date on the verification is of 12.11.2002. It appears that the defendant did not press for any issue nor moved an application for framing additional issue and it also escaped the notice of both the Courts below.

The trial Court after giving both the parties an opportunity to lead evidence decreed the suit. The appeal filed by the defendant was also dismissed.

The defendant filed this appeal and the main objection is that they had filed objections to the Local Commissioner's report and those were not decided. It was their contention that both the parties did not possess any document of title as the property was within the Lal Lakir and the site plan submitted by the plaintiffs was incomplete and they have not been given an opportunity to cross-examine the Local Commissioner and the objections should have been decided by the trial Court. It was urged that it was obligatory on the part of the Court to deal with the objections before relying upon the report for deciding the issues raised by the parties and those were not considered and therefore, it was a fit case for remand and the trial Court be directed to decide the objections and then decide the main suit. Reliance was placed upon ***Ditar Singh Vs. Waryan Singh 2004(1) CLJ (HP) 151 and Rattani & Ors. Vs. Dharam Chand @ Dharmanan and Ors. 200(1) Cur.L.J.(CCR 609.***

The submission on the other hand was that the report of the Local Commissioner can be received in evidence without examining any witness and no objection was raised to the site plan filed by them when it was exhibited and the Lambardar was present and the defendant hurriedly started the construction and those are noted in the Local Commissioner's report that there was fresh construction and the

defendant had only made a formality of filing the objections but they did not press for it.

I have gone through the record.

There is no denying that objections were not decided. Rule 10 Order 26 of the Civil Procedure Code in so far as it is material for the present case reads:-

“1.

2. *Report and depositions to be evidence in suit. - 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 record; 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, or as to his report, or as to the manner in which he has made the investigation.*
3. *Commissioner may be examined in person. - Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.”*

A plain reading of sub-rule (2) above shows that report of the Commissioner would be evidence in the proceedings in which the Commissioner is appointed. The court has the power and the parties have a right to examine the Commissioner personally in Court touching any matter referred to by him in the report or as to the manner in which he had carried out the investigation.

It was contended that the defendants having filed the objections to the report, the learned trial Court was bound to consider and decide the objections before relying on such report.

In Re.P.Moosa Kutty, AIR 1953 Calcutta 717, it has been held that it is open to a party to show that the report of the Commissioner is incorrect and that it is not entitled to credence.

In Harbhajan Singh Vs. Smt. Shankuntala Devi Sharma and another AIR 1976 Delhi 175, where the objections filed by the tenant to the report of the Commissioner were not considered by the Court, it was held that it was obligatory for the Court to deal with such objections before relying upon the report.

The Orissa High Court also in Kalandi Swain and Others Vs. Braja Kishore Dass and others. AIR 1980 Orissa 98, has held that it was the duty of the Court to dispose of the objections filed by a party against the report of the Commissioner before proceeding to dispose of the case on merits.

Both the Courts below have relied upon the Local Commissioner's report and treated it as evidence without first deciding the objections made thereto by the parties. A grave error has been committed by the two Courts below in placing reliance on the report of the Local Commissioner without disposing off and deciding the objections. As a result, the present appeal is allowed. The judgment and decree of both the Courts below are set aside. The Civil Suit No. 251/27-9-2002, decided on 1-4-2009 is remanded back to the trial Court to decide afresh after disposing off the objections to the report of the Local Commissioner, after affording an opportunity to the parties to produce such evidence as they may wish to produce with regard to the

objections alone but since the matter is very old, it would restrict the opportunity as it may consider fit. The parties are directed to appear before the District Judge, Rupnagar on 30.01.2017 who would send the case to the Successor Court. Records be returned forthwith so as to reach before the date fixed.

Before parting, it may be observed that the suit pertains to the year 2002, therefore, the learned trial Court shall make all endeavor to dispose off the suit by 31st July, 2017. It will be the duty of the parties to appear on their own. No notices are required to be given to either of them and the status quo shall be maintained till the decision of the suit.

(ANITA CHAUDHRY)
JUDGE

January 19, 2017
sunil

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No