

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.286 of 1989

(Appeal against the judgment and decree dated 22.04.1989 passed by learned 2nd Additional District Judge, Siwan in Title Appeal No.33 of 1984/85 of 1987 and against the judgment and decree of the learned Trial Court dated 08.02.1984 passed in Title Suit No.117 of 1974/80 of 1983).

Vidya Prakash Singh, Son of Sri Mangal Singh, Resident of Village-Jhunapur, Police Station-Siwan (Pachrukhi), District- Siwan.

--(Plaintiff-Appellants in the court below)--Appellant

Versus

Late Mahavir Singh through L.Rs & Ors

.... Defendant/Respondents

Appearance :

For the Appellant/s : Mr. Binod Kumar Singh, Adv.

: Mr. Raghav Prasad, Adv.

For the Respondent Nos.1 to 3: Mr.S.S.Dwivedi,Sr. Adv.

Mr.VIJAY KR.SINHA 1

Mr. P.J.Pandey

Mr. P.C.Gupta

Mr. Dharmaindva Choubai

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR

C.A.V. JUDGMENT

Date: 09-03-2018

The sole appellant had brought Title Suit No.117 of 1974 before the court of learned Munsif, Siwan for declaration of title and recovery of possession. The case and claim of the appellant is that the appellant had acquired Plot No. 1026 through registered sale deed vide Ext-1 and Plot No.1027 alongwith other plots through registered deed of gift vide Ext-3. The plaintiff constructed a house on the amalgamated portion of both the aforesaid plots leaving some vacant lands around the constructed house. The case of the



plaintiff is that the respondent 1st Set are owner of Plot Nos.1028 and 1029 in the southern boundary and defendant 2nd Set are owner of Plot No.1023 in the northern boundary of the plaintiff's land. Both have encroached upon a portion of the land of the plaintiff in their respective side fully detailed in the plaint.

2. The respondents in their written statement denied the allegation of encroachment. However, they did not dispute the title of the plaintiff on Plot Nos.1026 and 1027 and their respective titles on the adjoining land as referred above.

3. Thus, the dispute whether there was any encroachment by the respondents on the land of the plaintiff-appellant could have been resolved only by scientific measurement of the area of the land of the plaintiff and of the respondents. Further, the actual area of encroachment, if any, could have been established by the scientific measurement only.

4. The record reveals that two Advocate Commissioners had measured the land. They are P.W.5, Surendra Prasad Singh and D.W.5, Phulena Singh. They had submitted their report.

5. The learned Trial Court while dismissing the suit recorded that D.W.5, Phulena Singh is not reliable, as he has not scientifically measured the land of the plaintiff. Similarly, P.W.5, Surendra Prasad Singh had also not



scientifically measured. Hence, their reports were not acceptable. Other oral evidence produced in the case had persuaded the learned Trial Court to hold that the defendants are in possession of the so called encroached portion.

6. While affirming the aforesaid finding of the learned Trial Court, the learned lower Appellate Court formulated two points for consideration i.e. whether the disputed land is part and parcel of plaintiff's Plot Nos.1026 and 1027 or it is part of defendants' Plot Nos. 1028, 1029 and 1023. Another points relating to title of the defendants by adverse possession has not been decided by the lower appellate court. The learned lower Appellate Court also did not rely on the testimony of the experts, P.W.5 and D.W.5 above and rejected their reports due to lack of scientific measurement.

7. The substantial question of law raised for adjudication in this appeal, is whether the court of appeal below was right in rejecting the Pleader Commissioner's report on the ground stated, ignoring the provisions of Order 26 Rule 10 of the Code of Civil Procedure.

8. Heard Mr. Raghav Prasad, learned counsel for the appellant and Mr. S.S.Dwivedi, learned senior counsel for the respondent Nos.1 to 3. No one appeared for the rest of the respondents rather learned Advocate on record for other respondents informed that he has no instruction from the client.



9. Perused the records.

10. Submission of the learned counsel for the appellant is that once the courts below were of the view that the report of the expert is not scientific report, the court below should have rejected the report and appointed a fresh Commissioner for scientific measurement of the land because the only way for adjudication of the dispute raised was to scientifically measure the land and to come to definite conclusion whether there was any encroachment on the land of the plaintiff by the defendants and if to what extent. Both the courts below have erred in not appointing a fresh Commissioner after rejection of the report of the earlier Commissioner. Hence, the point is a substantial question of law for just decision of the case. Reliance has been placed on case of **Sita Ram Thakur Vs. Nandu Jha & Ors**, reported in **1986 PLJR 527**.

11. Learned senior counsel for the respondent Nos.1 to 3 submits that there is concurrent finding of fact. Hence, normally, this Court should not interfere with the judgment and decree passed by the learned courts below. However, learned senior counsel does not dispute the factual position of this case and the duty of the learned courts below after rejection of the report of scientific measurement submitted by the Commissioner.

12. In paragraph-8 of the judgment (Supra), a



Bench of this Court observed as follows:

8. *“As mentioned above, the plaintiffs were heavily relying on the report of the Commissioner appointed under Order XXVI of the Civil procedure Code and they were entitled to do so, specially after the prayer in this regard was allowed by the trial court. From the judgments of the courts below, it is manifest that the report was to play a vital role. The court below by not appointing another Commissioner after rejecting the report illegally denied the plaintiffs their right to bring relevant and vital evidence in the case. This amounts to a serious error which the High Court ought to correct in second appeal. The omission of clause (c) in the original Section 100 does not lead to the inference that the High Court has been deprived of the power to interfere on the ground mentioned therein, even where the mistake amounts to a substantial error of law. Of course, a procedural irregularity or error, not so substantial in nature as to affect the ultimate result in the case, cannot be urged as*



valid ground, but that is not the position here. I, therefore, hold that the mistake committed by the court below is covered by the present Section 100 and I, accordingly, allow this second appeal, set aside the decisions of the two courts below and remit the case to the first court. The trial court shall appoint a new Commissioner who should, on making an inspection after informing the parties, submit his report expeditiously.”

13. The provisions of Order 26 Rule 9 and 10 of the Code of Civil Procedure which are relevant for this purpose are being reproduced below:

9.Comissions to make local investigations.- *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.

10. Procedure of Commissioner.-(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.*

(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.

14. This Court is of the view that both the courts below have erred in not considering that for substantial justice in this case the scientific measurement of the land was necessary which was not done by the Commissioners appointed in the case. Both the courts have erred in not appointing a fresh Commissioner after rejection of the report of the earlier Commissioner. Even at the time of appointment of those Commissioners, the learned Trial Court did not specify as to what the Commissioner had to do in the matter. Therefore, considering the judgment in **Sita Ram Thakur** which squarely covers the present case, the judgment and decree of both the courts below are hereby set aside and the matter is remitted back to the learned Trial Court with following directions:

(i) The learned Trial Court shall appoint a Survey Knowing Advocate Commissioner with a direction to scientifically measure the actual area of the land of the plaintiff as well as the referred plots of the respondents. The Commissioners shall further report whether anyone is in possession of more land than the actual area and if so to what extent. The Commissioner shall ensure that the measurement be done on the basis of counter checking from three fixed



points. The Commissioner shall be appointed at the cost of the plaintiff, if the respondents would like to lead evidence on the point including by measurement through another Commissioner, they would also be at liberty to avail the opportunity and thereafter the learned court below shall adjudicate the matter and pass judgment and decree according to law. The entire costs of the litigation shall be borne by the party ultimately loosing the case.

15. I.A.No.4421 of 2017 for grant of injunction stands disposed of accordingly.

(Birendra Kumar, J)

Nitesh/-

AFR	AFR
CAV DATE	01.09.2017
Uploading Date	09.03.2018
Transmission Date	NA

