

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

**RSA No.2263 of 1990 (O&M)
Date of Decision.03.08.2018**

Suresh

.....Appellant

Vs

Mir Singh (deceased) through LRs and others

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Alok Mittal, Advocate and
Mr. Ramesh Hooda, Advocate
for the appellant.

Mr. V.K. Jindal, Senior Advocate with
Ms. Janya Sirohi, Advocate
for the respondent.

Mr. Saurabh Dalal, Advocate
for respondent Nos.1 (i) to (vi).

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AMIT RAWAL J. (ORAL)

The appellant-defendant No.1 is aggrieved of the concurrent finding of fact whereby the suit for possession of the suit property against the appellant-defendant has been decreed by the trial Court and upheld by the lower Appellate Court.

The respondent No.1-plaintiff instituted the suit for possession of plot No.824 located in Khewat No.1565, Khatoni No.2932 situated in village Badli, District Rohtak. It was alleged that defendants had encroached upon part of the plot in the absence of the respondent-plaintiff shown in red colour and marked as ABCD in the site plan but despite his repeated requests, defendants did not vacate the same as their plot bearing No.825 was adjacent being owners in possession of the plot bearing No.825.

The defendant No.1 contested the suit denying the

alleged encroachment, much less, site plan. It was averred that defendant No.1 had raised construction of the house in the presence of the plaintiff but no objection was raised by him. Ownership and possession of the plaintiff over the suit property was also emphatically denied. Additionally, the defendants had taken the plea that construction over the disputed plot had been done 20 (twenty) years ago and had been in continuous and settled possession, which was notorious and hostile, much less, to the knowledge of the plaintiff and therefore, they had become owners by way of adverse possession.

Replication was also filed by the plaintiff controverting the averments made by the defendants.

Since the parties were at variance, the trial Court framed the following issues:-

- “1. Whether plaintiff is the owner of the site shown by letters ABCD in the site plan attached with the plaint?*
- 2. Whether the plaintiff is estopped from filing the suit by his act and conduct as alleged in para No.2 of the W.S.? OPD*
- 3. Whether the defendants have become the owners of the site in question by adverse possession? OPD*
- 4. Whether the report of the local commissioner is liable to be set aside on the grounds mentioned in the objection petition? OPD*
- 5. Relief.”*

Both the parties examined witnesses in support of their respective cases.

It is a matter of record that during the pendency of the suit, on the request of learned counsel for the parties, an expert was appointed as local commissioner to find out whether defendant No.1 had encroached upon part of the plot No.824 or not. The local commissioner after giving notice to the parties, inspected the premises and submitted its report wherein it was found that there was encroachment on some part of the land belonging to the plaintiff in the following manner:-

“R.S. 14 feet 1 inch

Q.T 14 feet 3 inch

S.Q 104 ½ feet

R.T. 108 feet.”

The trial Court on the basis of the aforementioned report of the local commissioner decreed the suit. The appeal taken before the lower Appellate Court by the defendant was also dismissed.

Mr. Alok Mittal & Mr. Ramesh Hooda, learned counsel appearing on behalf of the appellant-defendant submitted that report of the local commissioner was not in accordance with High Court Rules and Regulations as no permanent points were taken into consideration for the purpose of taking measurements in order to find out alleged encroachment. The report of local commissioner in his absence was exhibited as Ex.P4 and therefore, no opportunity was granted to cross-examine the witness, thus, there is gross illegality and perversity, much less, prejudice has been caused to the

defendants as they have been prevented from ascertaining the truth vis-a-vis report Ex.P4.

In the main written statement, no plea of adverse possession was taken, therefore, the Court could not have non-suited the appellant-defendant on the ground of having, allegedly, admitted ownership and title of the plaintiff. Ex.P8 was site plan prepared by the local commissioner, which did not tally with the site plan Ex.P1 annexed with the plaint. Though there is no requirement in law to file objections to the report of local commissioner but where there is dispute particularly in respect of encroachment, the adverse party cannot be prevented to ascertain the truth on account of non-appearance of the local commissioner. The local commissioner erroneously had taken the total area as 1 kanal in khasra No.824 instead of 18 marlas. The report of the local commissioner suffers from the basic deformities in measurement and therefore, cannot be taken as conclusive piece of evidence, thus, urges this Court for setting aside the findings under challenge.

Per contra, Mr. Jindal, learned senior counsel assisted by Ms. Janya Sirohi and Mr. Saurabh Dalal, Advocate for respondent No.1(i) to (vi) submitted that plea of adverse possession tantamounts to admitting of title of the property. Defendants have not denied the alleged encroachment but asserted that they had become owners by virtue of long, settled, continuous, notorious and peaceful possession which was in the knowledge of the plaintiff for the last 20 years. However, no evidence in this regard had been placed on record to bring the case within the parameters of Article 65 of the Limitation

Act. The concurrent findings of fact cannot be interfered unless and until there is gross illegality and perversity. Defendants have unnecessarily enjoying possession of the property for the last so many years as there is interim order dated 01.11.1991. No steps have been taken as per sub-rule 2 of Rule 10 of Rule 26 Code of Civil Procedure, thus, urges this Court for upholding the concurrent finding of fact.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is no force and merit in the submissions of Mr. Alok Mittal and Mr. Ramesh Hooda, learned counsel appearing for the appellant. Provisions of Order 26 Rule 9 CPC empowers the Court to appoint local commissioner to ascertain the actual position existing at the spot. Rule 10 of Order 26 CPC deals with the procedure with regard to report and opportunity to the parties to disbelieve the report by taking the assistance of the Court. For the sake of brevity, Rule 9 and 10 of Order 26 reads as under:-

“9. Commissions 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.”*

On plain and simple reading of provisions of Rule 9 and 10 of Order 26 CPC, it is crystal clear that defendants did not take permission of the Court to cross-examine the local commissioner as report of the local commissioner is *per se* admissible in evidence, in view of the law laid down by Division Bench of this Court in **Balbir Dewan Cold Storage and General Mills Vs. Naveen Chander 1989 PLJ 247.**

The plea of adverse possession tantamounts to admission of title and therefore, did not lie in the mouth of appellant-defendant to belie the ownership of plaintiff. The defendants in the absence of any direct and cogent evidence have not been able to succeed in setting up title by way of adverse possession. The local

commissioner had visited the spot after giving notices to the parties and if at all, defendants were having any grievance, they could have raised the objection then and there or sought the indulgence of the Court for appointment of some expert/revenue official for ascertaining the alleged encroachment. Having failed to do so, in my view, the defendants have not been able to rebut the burden discharged by the plaintiff.

As an upshot of my finding, I do not find any illegality and perversity in the findings rendered by the Courts below, much less, the arguments of Mr. Mittal have not been able to cut ice to form a different opinion than the one already formed by the Courts below. No ground for interference is made out. The second appeal is dismissed. The interim order granted by this Court on 15.02.1991, which was made absolute on 01.11.1991, is ordered to vacated.

(AMIT RAWAL)
JUDGE

August 03, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No