

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

RSA No.5013 of 2012 (O&M)

Date of Decision.19.02.2018

Balwinder Singh and another

.....Appellants

Vs

Gurdarshan Singh and another

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Rajan Bansal, Advocate
for the appellants.

Mr. Avtar Singh Bhatti, Advocate
for respondent No.1.

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AMIT RAWAL J.

This regular second appeal is being taken up owing to the order of the Hon'ble Supreme Court dated 04.09.2017 whereby while setting aside the judgment passed by this Court remitted the matter back for fresh consideration.

Before advertng to the rival contentions of the parties, it would be apt to give factual matrix of the matter. The appellants-plaintiffs instituted the suit for possession against the defendants on the premise that they are owners in possession of the land comprised in Khewat No.767, 702, 550/1206, 111, 876, Khasra No.95//15/3/4-0, 16/8-0, 25/1/4-0, 25/2/4-0, 94//21/8-0, 22/1/5-16, 95//1-8 as per jamabandi for the year 1995-96. It was alleged that on the southern side of the land of the plaintiffs, land owned by defendant No.1 comprised in khasra No.110//5, 111/1 and land owned by defendant No.2 comprised in khasra No.111/2 situated at village Sanghera.

On 30.11.1999, defendants illegally and forcibly encroached upon the property of the plaintiffs to the extent of 1 kanal 7 marlas and merged with

the property owned by them. The plaintiffs moved an application to the revenue authority for demarcation of the land. On 4.11.1999, demarcation was conducted by the revenue officials. While conducting the aforementioned demarcation, a site plan was also prepared and it was found that the defendants were in illegal possession of 1 kanal 7 marlas of the land.

The defendants did not accede to the request of the plaintiffs for vacation of the premises and necessitated them to institute the suit.

Respondents-defendants contested the suit by taking customary pleas qua maintainability of the suit but on merits stated that on southern side of the land of the defendants, there existed land of the plaintiff.

Defendant No.1 did not take any illegal possession of the land measuring 1 kanal 7 marlas. The Kanungo and Patwari, who were appointed by the Assistant Collector Grade-II, Barnala for demarcation of the land, on 23.11.1999 i.e. subsequent to the demarcation report dated 4.11.1999 in the presence of Balwinder Singh and other respectable of the village, found that no land was encroached upon by the defendants. Since the plaintiffs were not satisfied, another application was moved to the Assistant Collector, 1st Grade, Barnala who appointed field Kanungo and Patwari. The land was again demarcated on 7.12.1999 and it was found that there was no encroachment. Since the parties were at variance, the trial Court framed the following issues:-

“1. Whether the plaintiffs are owners of land as mentioned in para No.1 of the plaint? OPP

2. Whether the defendants on 30.11.99 came into unlawful possession of 1 kanal 7 marlas of land belonging to the plaintiffs? OPP

3. *Whether demarcation report dated 30.11.99 is not correct?*

OPD

4. *Whether the plaintiffs are in actual possession of the suit land?*

5. *Relief.*

In support of their claims, the plaintiffs examined following witnesses:-

<i>"PW-1</i>	<i>-</i>	<i>Prem Parkash</i>
<i>PW-2</i>	<i>-</i>	<i>Hakam Singh</i>
<i>PW-3</i>	<i>—</i>	<i>Balwinder Singh-plaintiff.</i>

The defendants examined DW-1 Bachan Singh, field Kanungo, Dhanuala, DW-2 Maghar Singh, DW-3 Malkit Singh and thereafter, defendant No.1 as DW4.

In the earlier round of litigation, the suit filed by the plaintiffs was dismissed by the trial Court vide judgment and decree dated 19.07.2004.

But in appeal, the lower Appellate Court vide judgment and decree dated 11.11.2006 remanded the matter back to the trial Court while setting aside judgment and decree by observing that the trial Court should have appointed the responsible revenue officials, who could have visited the site as per the provisions of law and given report with regard to the alleged encroachment.

In this backdrop of the matter, the trial Court proceeded to decide the matter, afresh, whereby during the pendency of the suit, fresh report dated 13.06.2007 prepared by Vijay Kumar, Field Kanungo was brought on record. The trial Court on the basis of the preponderance of the evidence dismissed the suit. The plaintiff assailed the aforementioned finding before the lower Appellate Court by filing a Civil Appeal bearing No.30 of 2008.

The lower Appellate Court vide judgment and decree dated 16.08.2012 reiterated the finding rendered by the trial Court. Thereafter, the matter came before this Court and this Court vide judgment dated 11.08.2015 allowed the regular second appeal by decreeing the suit on the premise that as per the report of the local commissioner there was encroachment of 19 marlas of land. It is in this backdrop, the matter reached to the Hon'ble Supreme Court, as indicated above, remitted to this Court and thus, the appeal has been heard again on remand.

Mr. Rajan Bansal, learned counsel appearing on behalf of the appellants submitted that both the Courts below did not consider that demarcation of the land conducted by the trial Court itself by appointing the Field Kanungo and as per the report dated 13.06.2007, it was found that the land measuring 19 marlas was encroached by the defendants-respondents. The trial Court dismissed the suit, resulting into abdication and misdirection, thus, findings rendered by the Courts below cannot be sustained in the eyes of law. Vijay Kumar was appointed as local commissioner as per the provisions of Order 26 Rule 9 CPC whereas the provisions of sub-rule (2) of Rule 10 of Order 26 envisage that the Commissioner can be examined in person and the report of the commissioner and the evidence taken by him shall be treated as evidence in the suit and form part of the record, but the Court or with the permission of the court, any of the parties to suit can examine the Commissioner personally in open court touching any part of the matter or mentioned in the report i.e. with regard to the manner in which he made the investigation. Since the defendants did not invoke the aforementioned provisions by summoning the Commissioner for cross-examination, the report *per se* was admissible. Therefore, there was no need

for Vijay Kumar to be examined as plaintiff's witness. Even in the first report dated 4.11.1999 (Ex.P-1) of Prem Parkash, retired Kanungo, specifically found encroachment of 1 kanal 7 marlas.

In support of his contentions, he relied upon the judgment of This Court in **Roshan Lal Singla Vs. Suresh Kumar 2008(8) RCR (Civil) 355** to submit that report of the local commissioner has to be read in evidence without its being formally proved. He also relied upon judgment rendered by Division Bench of this Court in **Balbir Dewan Cold Storage and General Mills Vs. Naveen Chander 1989 PLJ 247** to contend that there is no provision under Order 26 Rule 9 CPC for inviting objection to the report of the Commissioner and even if the objection are filed, neither of the parties is entitled to claim any issue with respect to the report.

He also drew attention of this Court to the report dated 13.06.2007 wherein the defendant-Gurdarshan Singh despite being present in person refused to append signatures in the presence sheet prepared by the Kanungo for preparation of the report *ibid*, thus, urges this Court for formulating substantial questions of law as culled out in paragraph 16 of the memorandum of appeal.

Per contra, Mr. Avtar Singh Bhatti, learned counsel appearing on behalf of respondent No.1-defendant submitted that a specific objection with regard to the report dated 13.06.2007 was filed but the lower Appellate Court did not decide the same. In other words, it remained undecided. Therefore, the plaintiff cannot take the aid of provisions of law as referred to above.

The local commissioner did not conduct the demarcation report in accordance with High Court Rules and Regulations as he was required to

locate the permanent stones by taking measurement from three sides and connect the permanent stones situated on the opposite side i.e. no measurement was taken at the spot and signatures of the people were taken by going to their houses. No reply to the objection was filed, thus, urges this Court for dismissal of the appeal by upholding the judgments and decrees under challenge.

I have heard learned counsel for the parties, appraised the paper book and the record. Before advertng to the arguments of the counsel appearing for the parties, it would be apt to reproduce sub-rule (2) of Rule 10 of Order 26 CPC:-

“26(10)(2). Report and deposition to be evidence in suit. Commissioner may be examined in person-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 suit may examine the Commissioner personally in open Court touching any part 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.”

A simple and plain reading of the aforementioned provisions reveals that there is no provision for filing objection to the local commissioner’s report.

The relevant finding rendered in paragraph 5 of the judgment of Division Bench of this Court in **Balbir Diwan Cold Storage and General Mills’case** (supra) is reproduced as under:-

“5. The learned counsel for the petitioner submitted that though there may not be any specific provisions for inviting objections under Rule 10 of Order 26 of the Code, if a Commissioner is appointed under Rule 9 of Order 26 of the Code but a reading of Rule 10 thereof as a whole does contemplate that the objections may be filed against the report of the local Commissioner. According to the learned counsel, this is necessary in the larger interest so that the Court may form its opinion on the basis of the objections, as to whether the said report should form part of evidence in the suit or not According to the learned counsel this longstanding practice could not be said to be without any reason. In support of this contention, he referred to [Ram Gopal v. Pawan Kumar](#), 1983 Har Rent R 6, [National Institute of Sports v. Preminder Singh](#), 1982 Cur LJ 677 (Punj & Har), Waryam Singh v. Lachhman Dass S.A.O. No. 52 of 1962 decided on 4th February, 1966(Punj & Har) Ashutosh v. R C Dey, AIR 1953 Pat 133 and [Harbhajan Singh v. Smt. Shakuntla Devi](#), AIR 1976 Del 175. On the other hand, the learned counsel for the respondent cited Jawahar Lal v. Mangu Ram, (1988) 93 Pun LR 139 to contend that no such objections are contemplated under Rule 10 of Order 26 of the Code. In Ram Gopal's case (supra) a view has been taken by this Court that the objections against the report of the local commissioner have to be disposed of first because if it is not done, it would not be possible to dispose of the case at the final arguments and if the objections are sustained at that time the parties will have to be given a fresh opportunity to lead evidence which is bound to result in delaying the proceedings. This point as such, as to whether the objections against the reports could be filed or not, was not decided therein. Similarly, in i National Institute of Sports' case (supra) also, no such argument was raised It was simply observed therein that "it is not disputed that the petitioner did file objections against the report of the Local Commissioner. It is also not disputed that the petitioner was not afforded any opportunity to lead evidence in support of the objections. The impugned order of the trial Court, upholding the report of the Local Commissioner, cannot be sustained." As regards Waryam Singh's case (SAO No. 52 of 1962) (supra) the learned , single Judge observed that "admittedly Order 26 Rule 10, Civil Procedure Code, which deals with the appointment of local Commissioners, does not specifically make any provision for objections by the parties to his report, but it is certainty a well established practice to invite and dispose of such objections." Thus, in none of the cases of this Court, the matter as such has been decided In Ashutosh's case (supra) the Patna High Court in para 5 of the judgment observed, "I do not think that there is any warrant for this assumption in law or fact. When objections are filed to the commissioner's report, the objections generally challenge the correctness of the report on one ground or another. Under Sub-rule (3) of Rule 10, it becomes necessary for the Court to consider whether there are any reasons for being dissatisfied with the proceedings of the commissioner and to decide whether a further enquiry should be made or not. In deciding that question, the Court has to consider the correctness or otherwise of the

Commissioner's report on the materials then available to the Court An order rejecting the objections or confirming the report of the commissioner does not mean that the Court has abdicated its functions and has decided a fact in issue solely on the report of the commissioner and in advance of or irrespective of any other relevant evidence bearing on the question. I do not think that the Court is at all precluded from considering the report of the commissioner again in the light of such fresh materials as may be legally brought into the record by the parties to the action. Sub-rule (2) makes it quite clear that the report of the commissioner and the evidence taken by him 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, etc. It is obvious that when the Court rejects certain objections to the commissioner's report, it is not precluded from examining the commissioner at a later stage either 'suo motu or at the instance of any of the parties to the suit; nor does the Court preclude itself from considering the report of the commissioner in the light of such other evidence as may be given by the parties to the suit" In para 6 thereof the Court further observed that "the matter may also be looked at from the point of view of convenience. If the consideration of the report of the commissioner is deferred till the hearing of the suit, any defect discovered in the report of the commissioner would necessitate in adjournment or postponement of the hearing and the parties will be put to further expenses of an adjourned or postponed trial It is not therefore, right to say that the practice arose by reason of a mistaken analogy based on the provisions of rr.13 and 14 of Order 26. It seems to me that the practice arose, because it was convenient to deal with technical objections to the commissioner's report at an earlier stage in order to determine if there were any reasons to be dissatisfied with the proceedings of the commissioner and if a further enquiry was necessary or not." In Harbhajan Singh's case (Supra), it was held that "since the Commissioner has not been examined by the Authority, the tenant obviously had no opportunity to assail the report or the manner in which the investigation had been carried out. This could have been done by the tenant only by filing objections to the report which the tenant did and that being so, it was obligatory on the Authority to deal with the objections. The report and the material submitted along with it could have been used for the purpose of the proceedings only after the objections had been overruled" It is, therefore, evident from the abovesaid judgments, that the question as such was never considered, as to whether the objections as such were maintainable and if so, whether the Court could frame issue and direct the parties to lead evidence on those issues. As observed earlier, in Waryam Singh's case (supra) the learned single Judge himself observed that Order 26, Rule 10 of the Code which deals with the appointment of the local Commissioners does not specifically make any provision for objections by the parties to Commissioner's report, but certainly it is a well established practice to invite and dispose of such

objections. Under Order 26 of the Code, Local Commissioners are appointed for different purposes and the procedure prescribed for that is also differently provided. If the local Commissioner is appointed under Order 26, Rule 13 of the Code to make partition of immovable property, Rule 14 thereof provides for hearing any objection which the parties may make to his report. Similarly, if the Local Commissioner is appointed to examine or adjust accounts under Rule 11, under Sub-rule (2) of Rule 12, the proceedings and report of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit. As regards the Commissioner to be appointed under Rule 9 of Order 26 of the Code, Rule 10 thereof provides the procedure for that. Sub-rule (2) of Rule 10 further provides that "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." Sub-rule (3) of Rule 10 is in the following terms:

"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"

Sub-rule (3) comes into play after Sub-rule (2) of Rule 10 of Order 26. If under that sub-rule a Commissioner is examined in Court either by the parties or by the Court, itself, then on the examination of the Commissioner, the Court may, if for reasons dissatisfied with the procedure can direct such further inquiry to be made as it shall think fit. Thus, the objections to the report of the Commissioner as such are not contemplated under Rule 10. In any case, even if the objections are filed to draw the attention of the Court as to why the report of the Commissioner should not be accepted, even then the question of framing any issue in that behalf does not arise. A report of the Local Commissioner is not the subject matter of the suit and, therefore, the framing of any issue to that effect was wholly unwarranted. That unnecessarily delays the matter. In that situation, as observed by Patna High Court in the judgment referred to above, the parties can lead their independent evidence to prove the fact which was the subject matter of investigation by the Local Commissioner. According to Rule 10, reports of the Commissioner shall be evidence in the suit and shall form part of the record. It is, therefore, evident that the said report is not conclusive as such but it only forms part of the record. The parties will be at liberty to lead any evidence to support their case irrespective of the said report. In an earlier case reported as Jawahar Lal's case (supra) this matter was considered by this Court and it was observed in para 5 thereof that "O. XXVI, Rule 8 Code of Civil Procedure, deals with the Commissioners to make local investigations. Sub-rule (2) of Rule 10 thereof provides that 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. Thus, there is no provision for filing objections to such reports made by the local Commissioners. Even otherwise, if objections are allowed to be filed to such like reports made by the local Commissioners, then there will be no other way to find out the exact position of the site, in dispute. The inspection by the local Commissioner is made in the presence of the parties. Therefore, the said report is to be ordinarily accepted by the Court appointing the local Commissioner unless any inherent defect could be pointed out therein." Thus, from the provisions of Order 26, Rule 10, it is quite evident that there is no provision for inviting any objection to the report of the local Commissioner appointed under Rule 9 thereof.] In case, any such objections are filed by either of the parties to draw the attention of the Court as to the inherent defects therein, the Court may consider the same and if for any reasons dissatisfied with the proceedings of the Commissioner, may direct such further inquiry to be made as it shall think fit but neither of the parties is entitled to claim any issue with respect to the report. The only provisions under Sub-rule (2) of Rule 10 of Order 26 of the Code is to examine the Commissioner personally in open Court either by the Court itself or by any of the parties with the permission of the Court. The objection, if filed by the parties, shall be considered after the cross-examination, if any, of the local Commissioner by the Court under Rule 10 of Order 26 of the Code and that too along with the other evidence at the time of final hearing."

From a perusal of the finding as extracted above, it emanates that report of the commissioner shall be evidence in the suit by forming part of the record. With the permission of the Court, any of the parties can examine commissioner personally in the open court pertaining to report and its investigation. The inspection by the local commissioner was made in the presence of the parties. Therefore, the said report is to be ordinarily accepted by the Court appointing the Local Commissioner unless any inherent defect could be pointed out therein.

The finding rendered in Para 10 of the judgment rendered by this Court in **Hirdey Ram Vs. Jai Bhagwan 2007(1) PLR 811** reads as under:-

“10. The comparison of the reports leave no manner of doubt that the report produced by Shri Sumer Chand, an expert appointed by the Court as Local Commissioner, is exhaustive. In fact, it has been so found by the learned Rent Controller as well. The said report gives vivid description of the condition of the walls, roof and floor of each part of the building. May be, the said report is silent regarding the extent of cracks but the said fact alone will not be sufficient to hold that the building is fit for human habitation. He has concluded that the building is in deplorable condition. The said Local Commissioner has not been called for the purposes of cross examination by the tenant. It was required of the tenant to call the Local Commissioner for the purposes of cross-examination as held by a Division Bench of this Court in [Balbir Dewan vs. Naveen Chander](#), AIR 1989 Punjab and Haryana, 257. On the other hand, the report given by Shri S.P. Gupta is cryptic and vague. The said report has been discarded by the learned appellate Authority. Even the learned Rent Controller has not given any credence to such report. The learned Appellate Authority has considered the oral evidence as well to return a firm finding of fact that the building in dispute has become unfit and unsafe for human habitation. It is not the age alone which has been taken into consideration by the learned first Appellate Authority to return a finding that the building has become unfit

and unsafe for human habitation. In fact, such finding has been returned on the basis of detailed report of the Local Commissioner appointed by the Court and the oral evidence led by the parties. It is a question of fact in each case whether the building has become unfit and unsafe for human habitation. The evidence on the record supports the finding recorded by the learned first Appellate Authority that the building is unfit and unsafe for human habitation.”

The foundation/genesis of the observations rendered by this Court by this Court in **Hirdev Ram’s case** (supra) is based on the decision rendered in **Balbir Dewan’s case** (supra).

On going through the report of the local commissioner, it is evident that the local commissioner did not take the measurements by taking the permanent point of one stone to other stone for the purpose of determination of encroachment. It was just an eye-wash to conduct the demarcation in compliance of the order of the Court. There was a specific objection taken to the report with regard to aforementioned fact, which has not been dealt with by the trial Court, thus, in my view the case of the appellants did not fall in the finding in paragraph 5, as extracted above, in **Balbir Dewan’s case** as it is not a case where the report was ordinarily to be accepted as it was seriously objected to. Nothing prevented the plaintiffs to summon the Kanungo for proving the contents of the demarcation report in order to belie the objections. Perhaps they were afraid that the truth would not have surfaced. Four reports have been brought on record. Two reports dated 4.11.1999 and 13.06.2007 i.e. first and last report, were against the defendants whereas the remaining two dated 23.11.1999 and 7.12.1999 in

favour of the defendants. Since, there was a variance amongst the reports, it is in this backdrop of the matter, the lower Appellate Court remitted the matter back to undertake the exercise of demarcation of the land in dispute. The lower Appellate Court being the last court of fact and law gone through the report and found that it was not in conformity with the pleadings of the plaintiffs, much less, no exercise was done to measure the spot from three sides and then connect permanent points situated at the opposite side. The plaintiffs were required to refute the objections as stated above, thus, miserably failed to prove the encroachment of 1 kanals 7 marlas or 19 marlas of land at the hands of defendants.

As an upshot of my finding, I do not find any illegality and perversity in the judgments and decree rendered by both the Courts below as the same is based upon correct appreciation of fact and law, much less, no substantial question of law arises for determination by this Court. No ground for interference is made out. The second appeal stands dismissed.

(AMIT RAWAL)
JUDGE

February 19, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable Yes