

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

RSA No.4105 of 2016

Date of Decision.21.02.2018

Chander Bhan

.....Appellant

Vs

Bijender Singh and others

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Lokesh Sinhal, Advocate
for the appellant.

-:-

AMIT RAWAL J.(ORAL)

The appellant-defendant is in regular second appeal against the judgment and decree of the lower Appellate Court dated 30.04.2016 whereby the appeal of the respondent-plaintiff against the judgment and decree dated 31.10.2014 rendered by the Civil Judge (Senior Division) dismissing the suit has been set aside, in essence, it decreed the suit.

Before advertng to the contentions of learned counsel for the appellant, it would be apt to give preface of the matter. The respondent-plaintiff instituted the suit on the ground that he was owner in possession of house consisting of one room varandah, open space and toilet bearing MCF-188/178/231, Sanjay Colony, Ballabgarh, District Faridabad measuring 15'x30' total 50 sq. yards having plot No.28, out of khasra No.90/8, 9 situated within the revenue estate of Ballabgarh, Tehsil Ballabgarh, District Faridabad vide registered sale deed bearing vasika No.3398 dated 18.09.1995. As per the site plan, it was submitted that there was a 15' wide road/Rasta Aam on the west side of the house of the plaintiff and the main gate of the house of the plaintiff opens on this road, which is connected to

main Mathura Road. The plaintiff and previous owner of the suit property namely Ram Kishan son of Hori Lal (sale deed No.1065 dated 13.06.1986), Prem Singh son of Kanhiya Lal (sale deed No.777 dated 20.04.1979) and other residents of the colony used 15' road as rasta /aam passage for ingress and egress as well as the connecting road to 33' road and the main Mathura road for the last more than 35 years. The defendants made a shed on the North side of the house of plaintiff, adjacent to 33' wide road after the house of his neighbour Lachi Ram and forcibly, illegally and unauthorizedly raised walls on 15' wide rasta shown in yellow colour in the site plan attached. In this process, the rasta aam/passage of 15' wide was blocked, resulting into stoppage of ingress and egress of the plaintiff. The defendants were requested to remove the aforementioned wall but they did not accede to that, necessitating the plaintiff to move an application before the police authority, government officials but that was not taken heed of.

On receipt of the notice, defendant No.1 filed the written statement taking customary pleas of maintainability, locus standi, cause of action, mis-joinder of parties etc. On merits, it was submitted that there was no encroachment on the passage. The rasta was not even in existence. The property in dispute is a part of property belonging to him, purchased vide sale deed dated 14.6.1988 and 29.03.1988 measuring 200 sq. yards each.

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

- “1. Whether the plaintiff is entitled to get a decree of permanent injunction, as prayed for? OPP*
- 2. Whether the plaintiff is entitled to get a decree of mandatory injunction directing the defendants from removing the mud*

walls? OPP

3. Whether the suit of the plaintiff is not maintainable in the present form? OPD

4. Whether the plaintiff has no cause of action and locus standi in the present suit? OPD

5. Whether the plaintiff has not come with clean hands? OPD

6. Whether the suit of the plaintiff is bad for mis-joinder and non-joinder of parties? OPD

7. Relief.”

The plaintiff in support of his case examined himself as PW1 and tendered his affidavit as Ex.PW1/A along with documents Ex.P1 to P4. The defendant examined himself as DW1 and tendered his affidavit as Ex.DW1/A along with Ex.D1 site plan and Ex.D2 to D7 sale deeds. On the preponderance of evidence, the trial Court disagreed with the report of the local commissioner namely Captain Deepak, Tehsildar on the premise that the same was not proved. However, the lower Appellate Court in appeal by the respondent-plaintiff while taking into consideration the aforementioned report allowed the same, hence the second appeal.

Mr. Lokesh Sinhal, learned counsel appearing on behalf of the appellant-defendant submitted that the trial Court had rightly dismissed the suit of the plaintiff having failed to lead evidence to prove his case by discarding the report Ex.P5, which could not be looked into evidence as the local commissioner did not appear in the witness box. It is a matter of record that the defendant had filed the objections to the report of the local commissioner which were disposed of by the trial Court vide order dated 15.05.2012 by observing that the objection can be raised at the time of

examination of the local commissioner.

However, the lower Appellate Court illegally and erroneously set aside the judgment by believing the report, which is not permissible. The respondent-plaintiff failed to prove the site plan, much less, placed on record any demarcation report to establish the encroachment, thus, failed to discharge onus under Section 101 of the Indian Evidence Act. Even report of the local commissioner could not have been looked into evidence, or, it was vague and evasive. He did not mention as to how and in what manner, he found the existence of the rasta. He did not even conduct the demarcation. The sale deeds as mentioned above do not show the existence of rasta/passage but only an open space, that could not be construed as rasta/passage, thus, urges this Court for setting aside the judgment and decree under challenge.

I have heard learned counsel for the appellant, appraised the paper book and of the view that there is no force and merit in the arguments of Mr. Sinhal. Before advertng to the arguments of Mr. Sinhal, it would be apt to reproduce Order 26 Rule 10 CPC of the Code of Civil Procedure, which is as under:-

“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.”

The aforementioned provisions came to be pondered upon by a Division Bench of this Court in **Balbir Dewan Cold Storage and General Mills Vs. Naveen Chander 1989 PLJ 257** and in paragraph 5 of the same, this Court observed 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 certainly 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."

A plain and simple reading of the aforementioned provisions of law and as well as interpretation given by this Court, leads to irresistible conclusion that report of local commissioner is *per se* admissible and there is no provision for filing objection of the local commissioner.

The appellant-defendant was not prevented from summoning the local commissioner to test the veracity of the report Ex.P5. The report of the local commissioner and the site plan prepared *ex facie* revealed the existence of rasta, which had been encroached by the appellant-defendant and it is in this context mandatory injunction had been sought in the suit. The local commissioner had conducted the demarcation in the presence of the parties. Since the sale deeds of the appellant-defendant reflected the vacant space on the *dakshin* (southern) side, the argument of Mr. Sinhal that the respondent-plaintiff has not been able to prove existence of rasta falls flat.

In my view, the appellant-defendant has not been able to belie the report of the local commissioner, which is *per se* admissible in view of the finding of this Court rendered in **Balbir Dewan Cold Storage and General Mill** (supra). Nothing prevented the appellant-defendant to get the second local commissioner examined or take the assistance of the Court for demarcation. In my view, the respondent-plaintiff has discharged the onus in support of pleadings.

In view of the aforementioned, I do not find any illegality and perversity in the finding rendered by the lower Appellate Court 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. Resultantly, the second appeal stands dismissed.

(AMIT RAWAL)
JUDGE

February 21, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No