

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

SAO No.49 of 2015 (O&M)
Date of decision: 29.08.2018

Mulakh Raj

... Appellant

Vs.

Hawa Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. N.C.Kinra, Advocate
for the appellant.

Mr. C.R.Dahiya, Advocate
for respondents No.1 to 6.

AMIT RAWAL J.

The appellant-defendant assailed the judgment and decree dated 07.05.2015 of the Lower Appellate Court remitting the case to the trial Court which had allowed the suit, vide judgment and decree dated 29.08.2013.

The respondent-plaintiffs filed the suit for possession of land bearing khasra no.109//26/1(0-9) comprised in khewat No.5801, khatoni no.7044, as per jamabandi for the year 2003-04 situated in Mirzapur road, Hisar (hereinafter referred to as “suit property”) on the premise that in the month of January 2006 defendant being strong and influential person illegally raised two shops and Chaubara over the piece of land owned by them. The aforementioned illegal construction/encroachment was

ascertained on the basis of demarcation report dated 02.11.2006.

The appellant-defendant contested the suit on the premise that he had been in possession of khasra no.109//9/1/3(7-10) and there were several other co-sharers in the aforementioned land. In the absence of any pleadings, the suit was not maintainable. It was pleaded that defendant purchased the constructed building at the spot and was running a Dharamkanta (weighing scale of the vehicles). The possession of his share was 02 kanals which was purchased as per the registered sale deed.

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

- “1. Whether the plaintiffs are entitled for a decree for possession as alleged?OPP*
- 2. Whether the suit is not maintainable?OPD*
- 3. Whether the suit is not properly stamped for the purposes of Court fees and jurisdiction?OPD*
- 4. Whether the suit is bad for mis-joinder and non-joinder of necessary parties?OPD*
- 5. Whether the plaintiffs are estopped by their own act and conduct from filing the present suit?OPD*
- 6. Whether the suit is time barred?OPD*
- 7. Whether the suit is based on wrong facts as alleged?OPD*
- 8. Relief.”*

The plaintiffs in support of the aforementioned pleadings

despite examination of 10 witnesses brought on record the following documents:-

Ex.P1	copy of sale deed No.4963
Ex.P2	copy of demarcation report
Ex.P3	copy of General Power of Attorney No.832
Ex.P4	copy of sale deed No.4790
Ex.P5	copy of lease deed No.1285
Ex.P6	copy of jamabandi for the year 2003-04
Ex.P7	copy aks-shijra and jamabandi for the year 1998-99
Ex.P8	copy of mutation no.4736
Ex.P9	copy of mutation no.2877
Ex.P10	copy of mutation no. 4076
Ex.P11	copy of mutation no.5955
Ex.P12	copy of order dated 22.03.2010
Ex.P13	copy of judgment dated 13.05.2011
Ex.P14	copy of judgment dated 24.03.2012
Ex.P15	copy of judgment dated 31.01.2013
Mark A	site plan.

On the other hand, defendant examined as many as 07 witnesses and brought on record following documentary evidence:-

“Ex.D1	site plan
Ex.D2	copy of sale deed No.7922
Ex.D3	copy of sale deed No.2559
Ex.DW-3/1	electricity bill

Ex.DW-3/2	acknowledgment of electricity board
Ex.DW-3/3	electricity bill
Ex.D4	copy of sale deed No.1729
Ex.D5 & D6	photographs
Ex.DW6/2	account statement
Ex.DW7/1	copy of register of Vasika Nawis.”

The trial Court on the basis of demarcation report Ex.P2 proved through the testimony of PW9-Chhabil Dass, Kanungo decreed the suit finding the encroachment by the defendants on the land owned by the plaintiff. The Lower Appellate Court in appeal filed by the defendant remitted the matter on the basis of following findings:-

“19. Learned trial Court has blindly relied upon demarcation report Ex.P2. This is settled proposition of law that before making demarcation, LC should affix his two points or more so that accurate demarcation could be conducted and existence of properties could be ascertained. There is no dispute on the issue of proposition of law on this aspect. From perusal of Ex.P2, it is evident that late Naib Tehsildar Sh. Bhup Singh did not affix three points as per direction of F.C and proposition of law laid down by the Hon'ble High Court in various judicial pronouncements. In report, it is stated that revenue record w.e.f. 1974-75 to till date of land bearing khasra no.109, killa No.9/1/3 killa no.9/2(1-7) was seen. For conducting demarcation of the above land, two points were affixed from

the permanent houses and mirzapur road and by making measurement by 100 feet scale demarcation was done by installing flags. Thus, from very perusal of demarcation report, it is very much evident that learned trial Court wrongly relied upon the demarcation report, which is incomplete and insufficient for reaching at conclusion that defendant had encroached infact over the property of plaintiffs. The findings of other civil suits referred above are not binding upon the defendant because findings of each case are based on evidence available on the file.

20. Thus, in these circumstances, I deem it expedient and proper for serving the interest of justice that demarcation be conducted by competent revenue office at the costs of both parties and after coming of that demarcation report, the learned trial Court should decide the matter afresh. Therefore, for the reasons discussed above, the present appeal is hereby remanded to the learned trial Court with direction to get demarcated the disputed property as encroached land from competent revenue officer at the costs of both the parties and thereafter the learned trial Court shall decide the matter in controversy afresh. The case is remanded back to the learned trial Court with direction to dispose of same matter afresh on getting demarcation report preferably within three months from today. Both the parties are directed to appear before the

learned trial Court/successor Court on 21.05.2015.”

Mr. N.C.Kinra, learned counsel appearing on behalf of the appellant submitted that the Lower Appellate Court ought not to have remitted the matter as the demarcation report proved through the testimony of PW9 -Chhabil Dass was not sufficing the requirement of law as it was wanting compliance of fixing the permanent points. While remitting the matter, fresh opportunity had been granted to the plaintiff to lead evidence which is not scope of law. In other words, he submitted that the plaintiff cannot be permitted to fill up the lacunae as he failed to discharge the onus. If at all, there was some dispute, the Court could have resorted to the provisions of Order 41 Rules 24 and 25 of Code of Civil Procedure after resettlement of the issues, if necessary, but not decided, that the judgment of the Court against whose decree the appeal preferred was based upon some grounds other than that on which the Appellate Court had proceeded. The evidence on record was sufficient to resolve the controversy . The Lower Appellate Court remained oblivious of the fact that suit was pending for almost 06 (six) years. While remitting the matter, the Lower Appellate Court has not set aside the judgment and decree of the trial Court.

Mr. C.R.Dahiya, learned counsel appearing on behalf of the respondents No.1 to 6 before commencing the arguments drew the attention of this Court to the order 13.07.2015 to contend that while issuing notice of motion, this Court had issued interim direction to the trial Court to get the demarcation afresh but restrained it from taking any final decision. In pursuance to the aforementioned order, demarcation report has already

come which is in tandem/terms of the previous demarcation report. The appellant-defendant had already filed the objections to that, therefore, no useful purpose would be served in keeping the appeal pending. Further submitted that he is not averse that even the fresh demarcation report can also be looked into by the Lower Appellate Court. On merit, he submitted that demarcation report, Ex.P2 was in accordance with High Court Rules and Regulations. The appellant-defendant had failed to substantiate his possession on the land owned by them. On the contrary, it has been found that land owned by the plaintiffs had been encroached and the present appeal has been filed only to delay the adjudication of the lis.

I have heard the learned counsel for the parties appraised the judgments and decrees of the Courts below.

It would be apt to reproduce the order dated 13.07.2015 which reads thus:-

“Counsel for the appellant-defendant has inter alia argued that the lower Appellate Court has remanded the case after setting aside the decree in favour of the plaintiff-respondents with a direction that demarcation of the disputed property be conducted again.

It is contended that the said exercise could have been undertaken by the lower Appellate Court instead of remanding the case.

Notice of motion to the respondents for 18.09.2015.

Meanwhile, interim direction is issued that it will be open to

the trial Court to get the demarcation report afresh, however, no final decision will be taken by the trial Court till the next date of hearing. Fresh demarcation report, if obtained, by the next date of hearing, will be made available by the parties before this Court on the next date of hearing.”

Mr. Kinra, has not denied the fact that fresh demarcation report in pursuance to the directions, *ibid*, has already come on record and objections have been filed.

In my view, the Lower Appellate Court should not have remitted the matter in entirety and ought to have sought the report as per Order 41 Rule 25 CPC. The Division Bench of this Court in **Balbir Dewan Cold Storage and General Mills Vs. Naveen Chander 1989 (1) PLR 677** while referring to the provisions of Order 26 Rule 9 CPC has held that there is no provision in the Act for inviting the objections to the report of Local Commissioner appointed under Rule 9. In case, any objections are filed, neither of the parties is entitled to raise any issue with respect to the report, the objections can be considered after the cross-examination, if any, of the Local Commissioner by the Court under Rule 10 Order 26 of the Code of Civil Procedure and that too along with other evidence at the time of final hearing. For the sake of brevity, paragraph 5 of the aforementioned judgment reads 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 I observed therein that "itis 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 Ashutosn's case (supra) the Patna High Court in para 5 of the judgment observed, "Ido 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.”

Filing of the objections on behalf of the defendant apparently shows that demarcation report has also come in favour of the plaintiffs but I would be refraining myself to comment further as report has not been relied upon or referred to during the course of hearing.

In such circumstances, I am of the view that judgment and decree of the Lower Appellate Court is liable to be modified, in essence, the it shall not be construed in setting aside the entire judgment and decree of the trial Court but in view of the interim order, the present appeal is disposed of in the following manner:-

The trial Court shall gave the final verdict on the report received, in pursuance to the interim directions and thereafter, the Lower Appellate Court shall decide the appeal preferred by the appellant in accordance with law.

Disposed of.

(AMIT RAWAL)
JUDGE

August 29, 2018
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No