

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 512 of 2003**

- Khilendra Kumar S/o Keshav Ram Sahu Aged About 49 Years R/o Village Pachpedi Tahsil Kurud, District Dhamtari, Chhattisgarh

---- Appellant**Versus**

1. Tarachand Jain (Died) Through LRs
 - 1.1 - 1. (A) Shanti Bai Jain Wd/o Late Tarachand Jain Aged About 71 Years R/o Village Pachpedi, P.S. Bhakara, Tehsil Kurud, District Dhamtari, Chhattisgarh
 - 1.2 - (B). Devichand Jain S/o Late Tarachand Jain Aged About 53 Years R/o Village Pachpedi, P. S. Bhakara, Tehsil Kurud, District Dhamtari, Chhattisgarh
 - 1.3 - (C). Anil Jain S/o Late Tarachand Jain Aged About 50 Years R/o Village Pachpedi, P. S. Bhakara, Tehsil Kurud, District Dhamtari, Chhattisgarh
 - 1.4 - (D). Satish Jain S/o Late Tarachand Jain Aged About 43 Years R/o Village Pachpedi, P. S. Bhakara, Tehsil Kurud, District Dhamtari, Chhattisgarh
 - 1.5 - (E). Anita Jain D/o Late Tarachand Jain Aged About 48 Years W/o Rajendra Jain Aged About 48 Years. R/o Ganj Mandipara, Durg, Chhattisgarh
 - 1.6 - (F). Kavita Jain D/o Late Tarachand Jain Aged About 46 Years Care Of Shanti Bai Jain, R/o Village Pachpedi, P. S. Bhakara, Tehsil Kurud, District Dhamtari, Chhattisgarh
 - 1.7 - (G). Ritu Jain D/o Late Tarachand Jain Aged About 46 Years Care Of Shanti Bai Jain, R/o Village Pachpedi, P. S. Bhakara, Tehsil Kurud, District Dhamtari, Chhattisgarh
2. Deepchand S/o Lalchand Jain Aged About 49 Years R/o Village Pachpedi, P. C. No. 36, Ra. Ni. Ma. Bhothli, Tahsil Kurud, District Dhamtari, Chhattisgarh
3. Jhumarlal Jain S/o Lalchand Jain Aged About 34 Years R/o Village Pachpedi, P. C. No. 36, Ra. Ni. Ma. Bhothli, Tahsil Kurud, District Dhamtari, Chhattisgarh
4. State Of Chhattisgarh Through Collector Dhamtari District-Dhamtari, Chhattisgarh

---- Respondents

For Appellant	:	Shri Bhaskar Payashi, Advocate
For Respondents 2 and 3	:	Shri Palash Agrawal, Advocate under instructions from Shri R.S.Patel, Advocate
For State	:	Shri Sanjay Kumar Agrawal, Govt. Advocate

S.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava

Order On Board

12/09/2019

This appeal is directed against impugned judgment and decree dated 02/08/2003 passed by the Additional District Judge, Dhamtari in Civil Appeal No.50-A/2002 whereby the judgment and decree dated 09/08/2000 passed by the Trial Court in Civil Suit No.1-A/96 has been reversed and plaintiff's suit has been dismissed.

2. The appellant / plaintiff filed a suit seeking decree of permanent injunction on the pleadings *inter alia* that the defendants have been interfering with the peaceful enjoyment of possession of the plaintiff over the disputed land held in ownership and title of the plaintiff which the appellant / plaintiff had purchased on 31/03/1983 vide registered sale deed (Ex.P/2) and since then, enjoying the possession. According to the plaintiff, the defendants had not only encroached upon the conservancy lane which is of common use to the parties but also encroached upon a parcel of land owned by the plaintiff and started laying foundation for construction of boundary. The allegation that on the part of land, the defendants had started construction by laying foundation was added by way of subsequent amendment in the relief clause seeking relief of possession on that part which was allegedly encroached upon by the defendants.

3. The defendants denied plaintiff allegations and stated that they had not encroached upon any of the land belonging to the plaintiff. According to the defendants, whatever constructions were being raised, were on defendant's own land and no part of plaintiff's land was encroached upon. Further case of the defendants was that the conservancy lane did not belong to the common use but it

belonged to defendants only.

4. Learned Trial Court framed as many as four issues which included an issue as to whether the plaintiff is the title holder and in possession of the land described in अ,ब,स,द in the map appended to the plaint and also whether the stretch of land marked as red in the map is a conservancy lane of common use of the parties. Learned Trial Court also framed an issue as to whether defendants 1 to 3 have encroached upon the land owned and in possession of the plaintiff and illegally raising construction. An issue was also framed as to whether the defendants have encroached upon the conservancy lane.

Taking into consideration the nature of dispute between the parties and that the main issue arising for consideration as per issue no.3-A was whether any encroachment has taken place on the land of the plaintiff by the defendants, the learned Trial Court appointed Commissioner, who submitted its report in Ex.P/5 dated 20/03/1993.

5. On the first issue, learned Trial Court recorded a finding that not the entire land, as claimed by the plaintiff, but land admeasuring 45 x 30 ft on the east part of Karma Maata Mandir is held in title and possession of the plaintiff. Learned Trial Court also held that, though, there exists a drainage, the plaintiff failed to prove that the said drainage is of common use. Relying heavily upon the report of the Commissioner, learned Trial Court decided issue No.3-A in favour of the plaintiff and against the defendants that the defendants have illegally encroached upon the part of the land of the plaintiff as shown in Map-B of the plaint. On such findings, learned Trial Court partly decreed the suit and restrained the defendants from interfering with plaintiff's possession over the land which was found in title and possession of the plaintiff. Learned Trial Court also granted a decree of possession in favour of the

plaintiff in respect of that land which was alleged to be encroached upon by the defendants.

6. Aggrieved by the judgment and decree of the Trial Court, defendants preferred an appeal. Learned lower Appellate Court, while re-appreciating the oral evidence on record, disbelieved the spot inspection report of the Commissioner and reversed the judgment and decree of the Trial Court thereby dismissing plaintiff's suit.

7. This appeal was admitted on following substantial question of law -

“Whether the first Appellate Court is justified in reversing the finding of the Trial Court and thereby dismissing the suit by discarding the Commissioner's report Ex.P/5 by recorded a finding which is perverse and contrary to record and by discarding the report submitted by the Commissioner appointed by the Court?”

8. Learned counsel for the appellant raises pointed submission that the Commissioner was appointed by the learned Trial Court to make spot inspection and submit a report. This report in Ex.P/5 was not objected to by any of the parties. The defendants, in their evidence, did not raise any objection nor did they come out with any clinching evidence so as to reject Commissioner's report. The defendants did not even make any application seeking to examine the Commissioner who had prepared the report. However, learned lower Appellate Court, without any objection, raised to the report of the Commissioner by either of the parties, disbelieved the report on untenable reasons and is therefore, completely perverse. The entire case of the plaintiff rests on the pleadings that the plaintiff is the owner in title of the possession of the property in dispute by registered sale deed dated 31/03/1983 (Ex.P/2). This assertion of title in respect of the property which is subject matter of

sale deed (Ex.P/2) has not been disputed by the defendants. The defendants' case is that he has not encroached upon any of the part of land of the plaintiff. As the dispute essentially related to encroachment by the defendants over plaintiff's land, learned Trial Court appointed Commissioner in exercise of powers under Order 26 Rule 9 CPC. The Commissioner, after having carrying out spot inspection and measurement in presence of the parties, submitted a report in Ex.P/5 before the learned Trial Court. None of the parties, much less defendants, have raised any objection to the report of the Commissioner nor did they file specific objection in writing or any report of any other authority contrary to the report submitted by the Commissioner. The defendants did not even insist on examination of the Commissioner.

9. Shri Palash Agrawal, Advocate for respondents 2 and 3 pleads no instructions.

10. Defendant No.2 – Deepchand examined himself as the first witness of the defendant. In para 4 of his cross-examination, he admits that the plaintiff's house has been constructed over an area admeasuring 45 x 30 ft. He also stated that demarcation made by the Commissioner with regard to the location of the house and boundary of the plaintiff is correct. In his entire evidence, he has not stated why the report of the Commissioner was liable to be disbelieved. There was nothing in his evidence to show that while carrying out spot inspection, measurement and demarcation, the Commissioner did not establish specific points as to wherefrom the measurements were to be made.

11. Another witness of the defendant, Tarachand S/o. Lalchand (DW2) also stated in para 8 of his cross-examination that they have not raised any objection to the report of the Commissioner and the Commissioner's report that the distance from

A to B is 56 ft, is also correct. Though defendants examined many other witnesses, none of those witnesses stated anything to dispute the correctness of the report of the Commissioner.

12. Learned lower Appellate Court, however, of its own and without having any objection to the report of Commissioner either by filing any objection in writing or in their oral evidence, held that the report of the Commissioner is not clear because it does not show from which point, measurement was made. The other reason assigned to disbelieve Commissioner's report is that the report does not specifically states whether measurement nearby revenue and *abaadi* land was done by Revenue Officers. Not only this, report dated 12/02/1997 of Tahsildar, Kurud has also been referred to hold that the Commissioner's report is not clear.

All the three reasons assigned by learned lower Appellate Court to disbelieve Commissioner's report, are untenable in law. Learned lower Appellate Court ignored that the Commissioner had submitted report pursuant to the order passed by the Court and he was not witness of any of the parties and conclusion of evidence with regard to encroachment was not at the instance of any of the parties. Further, the Commissioner's report was not objected to by the defendants. Thirdly, the defendants did not call the Commissioner for examination, raising any doubt over the correctness of the report.

Not only this, as has been discussed herein above, the defendants' own witnesses did not dispute the correctness of Commissioner's report and they clearly stated that the Commissioner had correctly carried out measurement and demarcation. As far as reference to memo dated 12/02/1997 of Tahsildar, Kurud is concerned, though not exhibited, but that also shows that encroachment of defendants was found. The Commissioner's report could not be disbelieved and rejected only on the ground that no measurement of nearby lands around the

disputed land, if any, carried out by Revenue Officer was not produced. Thus, all the reasons assigned by the learned lower Appellate Court to reject undisputed Commissioner's report, are clearly perverse.

13. In the result, the question of law is answered in the manner that the learned lower Appellate Court committed perversity in reversing the finding of the Trial Court and disbelieving Commissioner's report (Ex.P/5).

14. Accordingly, the appeal is allowed. The impugned judgment and decree passed by the lower Appellate Court is set aside and that of the Trial Court is restored. Parties to bear their respective costs. Let appellate decree be drawn accordingly.

Sd/-
(**Manindra Mohan Shrivastava**)
Judge