

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.103 of 2007

Budhram, aged about 50 years, S/o Shri Manglu, Caste Gond, R/o Village Chawargaon, P.H. No.2, Post Marri, Police Station and Tahsil Ambagarh Chowki, District Rajnandgaon (C.G.)

(Plaintiff)
---- Appellant

Versus

1. Jagdev, aged about 65 years, S/o Late Shri Naval Sai;
2. Birbal, aged about 32 years, S/o Shri Jagdev;
3. Durgu, aged about 37 years, S/o Shri Jagdev;

All R/o Village Chawargaon, P.H. No.2, Post Marri, Police Station and Tahsil Ambagarh Chowki, District Rajnandgaon (C.G.)

4. State of Chhattisgarh, Through the Collector, Rajnandgaon, District Rajnandgaon (C.G.)

(Defendants)
---- Respondents

For Appellant: Mr. Rakesh Thakur, Advocate.

For Respondents No.1 to 3: -

None present.

For Respondent No.4 / State: -

Mr. Ravi Kumar Bhagat, Deputy Government Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

14/01/2020

1. This appeal preferred by the plaintiff (appellant) was admitted on the following substantial questions of law: -

“i. Whether both the learned Courts below failed to consider the fact of Commissioner's report dated 11-1-2000 in its right perspective?

ii. Whether the learned first Appellate Court was justified in dismissing the suit only on the ground that the plaintiff failed to prove date of dispossession?”

(For the sake of convenience, parties would be referred hereinafter as per their status shown in the plaint before the trial Court.)

2. The plaintiff filed suit for recovery of possession, declaration and permanent injunction stating inter alia that he is owner of Khasra Nos.54/1 and 55/3, total area ad-measuring 0.14 decimal, upon which defendants No.1 to 3 have encroached and he is entitled for decree of possession of the encroached area which was opposed by defendants No.1 to 3 by filing written statement. During the course of trial, an application under Order 26 Rule 9 of the CPC was filed which was granted and Commissioner was appointed to make survey of encroachment and submit report which he submitted on 11-1-2000. During the course of trial, the plaintiff examined two witnesses on 30-6-1999 and thereafter, the matter was adjourned from time to time, but on 4-7-2003, though the plaintiff was present, but he could not be examined and his opportunity to lead evidence was closed and thereafter, defendant No.1 examined himself and ultimately, the suit was dismissed on the ground that the demarcation report has not been proved and the plaintiff has not proved the documents filed by him. On appeal being preferred by the plaintiff, the first appellate Court also dismissed the first appeal against which this second appeal has been preferred by the plaintiff in which substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.
3. Mr. Rakesh Thakur, learned counsel appearing for the appellant herein / plaintiff, would submit that the plaintiff was present on 4-7-2003 and his two witnesses had already been examined on 30-6-1999, therefore, the trial Court ought to have examined the plaintiff and could have thereafter, proceeded further. He would further submit that the trial Court has committed legal error in closing the opportunity of the plaintiff and thereby he could not prove the Commissioner's

report.

4. None present for respondents No.1 to 3 herein / defendants No.1 to 3 though served.
5. I have heard learned counsel for the plaintiff and considered his submissions and also went through the record with utmost circumspection.
6. It is correct to say that the plaintiff's two witnesses were examined on 30-6-1999 and the plaintiff was present in person on 4-7-2003, but his Advocate was not present, however, the trial Court instead of examining the plaintiff himself closed his opportunity to lead evidence which is absolutely an error apparent on the face of it, if his counsel was not present and the plaintiff himself was present, he could have been examined unless the plaintiff expresses his unwillingness to be examined in absence of his counsel, but there is nothing recorded in the order sheet to that effect, however, in contrary to that, in order dated 4-7-2003, it was recorded that the plaintiff expressed his unwillingness to be examined personally which was not reflected in the order sheet dated 4-7-2003 and on account of that, he could not prove the Commissioner's report dated 11-1-2000 and other documents and the Court dismissed the suit holding that the plaintiff has failed to lead oral and documentary evidence and to examine himself.
7. The Supreme Court in the matter of Misrilal Ramratan and others Mansukhlal and others v. A.S. Shaik Fathimal (Dead) by LRs. and others¹ has held that the report of the Commissioner cannot be overlooked or rejected on spacious plea of non-examination of the Commissioner as a witness since it is part of the record of the case.

1 1995 Supp (4) SCC 600

8. In the present case, this Court is of the opinion that the plaintiff has failed to prove other documents including the Commissioner's report dated 11-1-2000 in view of the closure of evidence of the plaintiff on 4-7-2003 by the trial Court, though the plaintiff was present in the court and he did not declare his opportunity to lead evidence as closed. Therefore, the order dated 4-7-2003 is hereby set-aside and consequently, judgment & decree of the trial Court and the first appellate Court are also set-aside. The matter is remitted to the trial Court for examining the plaintiff only, as his two witnesses had already been examined. The plaintiff to examine himself and the Commissioner, if any. The suit shall be decided within three months after noticing the defendants and the defendants are at liberty to lead evidence in rebuttal. The District Judge, Rajnandgaon is directed to ensure that within three months the suit is decided finally, and if any appeal is preferred thereafter against the judgment & decree of the trial Court, the District Judge will see that the appeal is decided within a further period of two months thereafter. The District Judge, Rajnandgaon shall inform the Registry about the timely disposal of suit and appeal.
9. The substantial questions of law are answered accordingly.
10. With the aforesaid observation, the second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge