

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.393 of 2008

1. Ramcharan, S/o Mangna, aged 45 years, Occupation Farmer, Caste Gond
2. Charnu, S/o Mangna, aged 43 yrs, Caste Gond, Occupation Farmer
3. Bajru, S/o Mangna, aged 41 yrs, Caste Gond, Occupation Farmer
4. Lakhan, S/o Mangna, aged 39 yrs, Caste Gond, Occupation Farmer
5. Vridha Bai, W/o Mangna, aged 65 yrs, Caste Gond, Occupation Farmer

All R/o Village Sindhari, P.H.No.2, District Kabirdham (C.G.)

(Plaintiffs)

(App. In 1st Appellate Court)

---- Appellants

Versus

1. Jodhan, S/o Tijau Mochi, aged 45 yrs, Occupation Cycle Store and Repairing Shoes, R/o Village Bagharra, Sindhari, P.H.No.2, Rev Ni Mandal Bodla, Distt. Kabirdham

2. State of C.G., through the Collector, Kabirdham (C.G.)

(Defendants)

(Res. In 1st Appellate Court)

---- Respondents

For Appellants: Mr. Rajeev Shrivastava and Mr. Malay Shrivastava,
Advocates.

For Respondent No.1: Mr. Vaibhav A. Goverdhan, Advocate.

For Respondent No.2 / State: -

Mr. Ravi Kumar Bhagat, Deputy Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

05/02/2020

1. This second appeal preferred by the plaintiffs under Section 100 of

the CPC has been admitted by formulating the following substantial question of law for determination:

“Whether both the Courts below were justified in dismissing the suit of the plaintiffs after holding that plaintiffs are title-holders of the suit land by recording a finding which is not only perverse but also contrary to the record?”

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

2. The plaintiffs filed a suit for declaration of title and possession and for declaring the order dated 26-6-1999 passed by the Naib Tahsildar, Bodla, duly affirmed by the Sub-Divisional Officer (Revenue) on 31-5-2000, to be not binding upon the plaintiffs, stating inter alia that the subject land bearing Khasra No.116/1, area 4.70 acres, was given on lease to the grand-father of plaintiffs No.1 to 4 namely, Haniya which defendant No.1 has encroached over 3.80 acres and as such, the plaintiffs are entitled for declaration and possession, as the application for restoration of possession filed under Section 250 of the Chhattisgarh Land Revenue Code, 1959 by the plaintiffs has been rejected by the Naib Tahsildar on 26-6-1999 which was duly affirmed by the Sub-Divisional Officer (Revenue) on 31-5-2000. The suit was filed on 28-8-2006. Defendant No.1 filed written statement stating inter alia that lease was granted by the State on the land bearing Khasra No.116/2, area 3.10 acres and Khasra No.116/3, area 1.40 acres and he is in possession of the aforesaid land and he is not in possession of the plaintiffs' land.

3. The trial Court held that the plaintiffs are title-holders of Khasra No.116/1, but dismissed the suit holding that the plaintiffs have failed to prove encroachment by defendant No.1 and in the appeal filed by the plaintiffs, it has been maintained by the first appellate Court against which this second appeal has been preferred in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.
4. Mr. Malay Shrivastava, learned counsel appearing for the appellants herein / plaintiffs, would submit that both the Courts below have concurrently erred in holding that the plaintiffs have failed to prove encroachment by defendant No.1 ignoring the demarcation report (Ex.P-11) dated 11-2-1999. As the issue was not framed and the demarcation report was not disputed and it is evidence within the meaning of Order 26 Rule 10(2) of the CPC, as such, by relying upon the demarcation report, suit ought to have been decreed in toto. He would rely upon the decision of this Court in the matter of Manharan Lal Pandey (since deceased) through LRs and others v. Ashok Kumar Jain and another¹ to buttress his submission. Therefore, judgments & decrees of both the Courts below deserve to be set-aside by allowing this second appeal.
5. Mr. Vaibhav A. Goverdhan, learned counsel appearing for defendant No.1 / respondent No.1 herein, would submit that the alleged demarcation was made on 11-2-1999 and the suit was filed on 28-8-2006 and that demarcation report was relied upon and the revenue

¹ S.A.No.313/2005, decided on 23-7-2019

officer who conducted the demarcation allegedly was not examined. He would rely upon the decision of this Court in the matter of Radhey Shyam v. Shankar Lal Gupta and another² to buttress his submission that without examination of the revenue officer who conducted demarcation, demarcation report cannot be relied upon. He would further submit that since it was not the demarcation made by the order of the Court under Order 26 Rule 9 of the CPC, therefore, that report is not evidence within the meaning of Order 26 Rule 10 of the CPC.

6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the entire records with utmost circumspection.
7. The plaintiffs' case is that they are owners and title-holders of Khasra No.116/1, area 4.70 acres, whereas, defendant No.1 has encroached upon 3.80 acres of land. It is the case of defendant No.1 that he is owner and title-holder of land bearing Khasra No.116/2, area 3.10 acres and Khasra No.116/3, area 1.40 acres. As such, it is the case of the plaintiffs that defendant No.1 has encroached upon their land.
8. In order to prove encroachment so made, the plaintiffs relied upon the demarcation report (Ex.P-11) conducted on 11-2-1999 in the suit filed on 28-8-2006, but admittedly, the revenue officer who conducted the demarcation and gave demarcation report has held in the said report that defendant No.1 has encroached, however, the

² S.A.No.726/2003, decided on 25-1-2019

said revenue officer was not examined.

9. In the matter of Laxman Singh v. Jagannath³, it has been held by the M.P. High Court that in order to prove the demarcation report, examination of the officer who has demarcated the land is necessary and rejected the plaint at the second appeal stage. It was observed as under: -

“12. The plaintiff alone has entered the witness box. In his deposition, he has not specified the specific portion encroached upon by the defendant. He has submitted a document Ex. P-1 which is a certified copy of demarcation of the lands at village Bamuliya-Uda sent by the Office of Revenue Inspector to the Naib-Tahsildar. Ex. P-2 is a certified copy of Panchanama. Original documents and records were not called from the Revenue Courts. The Revenue Officers, who measured the land were also examined. The plaintiff in his deposition has stated that he does not remember the survey number of suit land and has stated that it must be recorded in the map. In the plaint, sufficient specifications of the land encroached is not mentioned and no map is furnished.”

10. The aforesaid decision of the M.P. High Court in Laxman Singh (supra) has been followed by this Court in Radhey Shyam (supra).
11. From the aforesaid principle of law, it is quite vivid that the document Ex.P-11, which is the demarcation report showing encroachment by defendant No.1, has only been marked as exhibit at the instance of the plaintiffs and it has not been accepted by both the Courts below principally on the ground that it has not been proved in accordance with law by calling and examining the revenue officer who made demarcation and thereafter prepared and signed the report. As such, defendant No.1 has been deprived of the opportunity to cross-examine and question the demarcation report (Ex.P-11) submitted by

the plaintiffs. The revenue officer who has made demarcation report ought to have been summoned and examined to prove the fact of encroachment by defendant No.1 upon the land owned by the plaintiffs, if any. In absence of examination of the revenue officer demarcating the subject land much before the filing of civil suit, it cannot be held that the plaintiffs have succeeded in proving the encroachment made by defendant No.1.

12. Now, the next submission of Mr. Malay Shrivastava, learned counsel for the plaintiffs, is that the demarcation report should have made part of the evidence, though it has been conducted on 11-2-1999 and the suit was filed on 28-8-2006, but still it will be the part of record and evidence by virtue of Order 26 Rule 10 of the CPC. Order 26 of the CPC also provides for Commissions of local investigation. Order 26 Rule 9 of the CPC provides for Commissions to make local investigations by appointment of Commissioner and Order 26 Rule 10 provides of procedure of Commissioner. Rule 10 of Order 26 states as follows: -

“10. Procedure for 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.”

13. A careful perusal of the aforesaid provision would show that the report of the Commissioner and evidence taken by him under Order 26 Rule 10(1) of the CPC shall be evidence in the suit and shall form a part of the record. The Court as well as 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 the manner in which he has made the investigation.

14. In the matter of Misrilal Ramratan and others Mansukhlal and others v. A.S. Shaik Fathimal (Dead) by LRs. and others⁴, the Supreme Court with regard to non-examination of the Commissioner as a witness, held as under: -

“3. ... It is now settled law that the report of the Commissioner is part of the record and that therefore the report 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. ...”

15. Acceptance of a commissioner’s report at that stage means that the report is considered to be a part of record and to be considered along with other evidence at the time of the final hearing. The report of the commissioner appointed to inspect the spot and to make investigation together with the evidence enclosed therewith is substantive evidence in the suit. This is clear from the language of

sub-rule (2) of Rule 10 of Order 26 of the CPC.

16. But, in the instant case, no request was made to appoint Commissioner under Order 26 Rule 9 of the CPC and consequently, it is not report of the Commissioner under Order 26 Rule 10(1) of the CPC. Therefore, it cannot be evidence in the suit by virtue Order 26 Rule 10(2) of the CPC, as the alleged demarcation is eight years prior to the date of institution of suit. As such, the submission raised by learned counsel for the appellants herein / plaintiffs that it would be evidence within the meaning of Order 26 Rule 10(2) of the CPC deserves to be noticed only and only for rejection and the alleged demarcation report (Ex.P-11), which was conducted eight years prior to the date of filing of suit, cannot be, at any stretch of imagination, held to be evidence within the meaning of Order 26 Rule 10(2) of the CPC. Accordingly, this argument deserves to be rejected and is hereby rejected.

17. The grievance raised with regard to the issues is not involved in this second appeal, as such issues have been framed in presence of parties and no grievance can be raised at the second appellate stage with regard to the issues.

18. For the foregoing reasons, the second appeal deserves to be and is accordingly dismissed. The substantial question of law is answered accordingly. No order as to cost(s).

19. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge