

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

116

RSA-4925-2016 (O&M)

Date of decision: 22.03.2024

SARDHA RAM AND ORS.

..Appellants

Versus

BANARSI DASS (DECEASED) THROUGH LRS & ORS.

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Rajinder Goel, Advocate
for the appellants.Mr. P.C. Chaudhary, Advocate
for respondents.ANIL KSHETARPAL, J(Oral)

1. On 13.12.2023, after hearing the learned counsel representing the parties, the following order was passed:-

“1. In this regular second appeal, the defendants pray for setting aside the judgment and decree passed by the First Appellate Court. The plaintiff filed a suit for grant of decree of possession with respect to 104 square yard plot out of land comprised in Khasra No.122. It was claimed that the defendants are co-sharers in the land comprised in Khasra No.123, which is adjacent. Defendants while contesting the suit claimed that the house was constructed in May, 1955, and there is no encroachment on the aforementioned house. The plaintiff in order to prove his case relied upon a report submitted by Naib Sadar Kanungo dated 21.12.2005, after demarcating the area. The revenue official was examined as PW-2, however, the trial Court found that the aforesaid report is not reliable on account of the various defects. Thus, the trial Court dismissed the suit. In the first appeal, the plaintiff filed an application for appointment of a local commissioner to demarcate the suit land, which was dismissed. However, while deciding the revision petition, the First Appellate Court was directed to appoint a local commissioner to demarcate the area in dispute. Pursuant to the directions of the Court, a local commissioner/Naib Tehsildar from Mustfabad was appointed as a local commissioner to

demarcate the area, who submitted his report on 08.12.2015. In the aforesaid report, it was found that the defendants had encroached upon 182.71 square yard plot. On receipt of the report, the appellants (defendants) filed the objection petition against the report of the local commissioner, which was dismissed vide order dated 04.04.2016. Thereafter, the defendants (appellants herein) filed an application on 28.07.2016, for calling the local commissioner as a witness and permitting them to cross-examine him. The aforesaid application was also dismissed by the First Appellate Court on 04.08.2016.

2. Ultimately, the first appeal was accepted and the suit filed by the plaintiff was decreed, against which the present appeal has been filed.

3. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paperbook along with the requisitioned record.

4. The learned counsel representing the appellants contends that may be the objections were not maintainable against the report of the local commissioner, however, in accordance with provisions of Order XXVI Rule 10, Sub Rule 2 of the Code of Civil Procedure, 1908, the local commissioner can be examined by the Court or by any of the parties to dispute with the permission of the Court. He relies upon the judgment passed by the Division Bench in **Balbir Dewan Cold Storage and General Mills Vs. Naveen Chander, 1989(1) PLR 677.**

5. On the other hand, the learned counsel representing the respondents submits that the objection petitions filed by the appellants were dismissed on merits and therefore, the defendants (appellants herein) could not have been permitted to cross-examine the local commissioner. He relies upon the judgment passed in **Umrao Vs. Smt. Minu @ Manju Sangi, 2000(2) PLR 96.**

6. This Court has considered the submissions and analyzed the arguments of the learned counsel representing the parties.

7. In fact, the matter in issue is covered by a judgment passed by the Division Bench in **Balbir Dewan Cold Storage and General Mills case (supra).** The Division Bench after examining the provisions of Order XXVI Rule 10 of the Code of Civil Procedure, 1908, held as under:-

“The only provisions under sub rule 2 of Rule 10 of Order 26 of the Code is to examine the Commissioners 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.”

8. *In this case, the local commissioner was appointed during the pendency of the appeal. At the first stage, the appellants (defendants) filed an objection petition, which was dismissed by the Executing Court. Forced by the circumstances, they filed an application to permit them to cross-examine the local commissioner, however, the same was also declined by the First Appellate Court without recording any cogent reasons.*

9. *The judgment relied upon by the learned counsel representing the respondents in Umrao’s case (supra) is not applicable to the facts of the present case because in the aforesaid case, the Court after observing that once the objections have been rejected as filed by a party, in that event, the party could only lead evidence to show that what is being urged is not correct. However, the aspect of permitting the party to cross-examine the local commissioner has not been examined by the Court*

10. *Keeping in view the aforesaid facts, this Court is left with no choice but to direct the First Appellate Court to send a report after permitting the appellants to cross-examine the local commissioner. The plaintiff shall also be given an opportunity to ask questions to the local commissioner when he steps into the witness box. The report shall be submitted within a period of two months, from today, positively.*

11. *The parties through their learned counsel are directed to appear before the First Appellate Court on 05.01.2024.*

12. *List the appeal for hearing on 22.03.2024, in the urgent list.”*

2. Pursuant to the order passed by this Court, the deposition of Sh. Harish Kalra, retired Tehsildar, has been recorded. The learned counsel representing the appellant has been granted opportunity to cross-examine the witness.

3. Once again, the learned counsel representing the parties have been heard.

4. The learned counsel representing the appellant submits that the plaintiff while filing the suit had claimed encroachment on specific portion giving its demarcation. He submits that as per the report, there is variation in the size of encroachment. He further submits that in the report of the local commissioner, the details as to how the local commissioner came to a conclusion that the encroachment subsist has not been given.

5. This Court has considered the submissions of the learned counsel representing the parties.

6. The plaintiff while filing the suit has claimed encroachment of his property at the hands of the defendants. He filed the suit on the basis of a demarcation report. Subsequently, during the pendency of the appeal, on the directions of the High Court, fresh local commissioner was appointed. He carried out demarcation with the help of a Total Survey Machine, which is Global Positioning System (GPS) enabled. After using latest technology, the demarcation has been carried out.

7. Such machine permits the local commissioner to exactly find out the area, which has been encroached upon. Hence, the suit filed by the plaintiff cannot be dismissed only on the ground that in the demarcation some additional area has been found to have been encroached upon.

8. As far as the next submission, it may be noted here that the report of the local commissioner is in detail. He has ensured that from three different directions '*pacca*' points in the form of pillars of rectangles are identified. From three different directions, the demarcation has been carried out and ultimately, the land in dispute and the area encroached upon has

been identified. The demarcation report is accompanied by a detailed layout plan showing the distance and the encroachment of each plot.

- 9. Keeping in view the aforesaid facts, no ground to interfere is made out.
- 10. Dismissed accordingly.
- 11. All the pending miscellaneous applications, if any, are also disposed of.

March 22nd, 2024
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No