
(1972) 12 AHC CK 0019

Allahabad High Court

Case No: Special Appeal No. 2573 of 1965

Haji Kutubuddin

APPELLANT

Vs

Allah Banda

RESPONDENT

Date of Decision: Dec. 8, 1972

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 10

Citation: AIR 1973 All 235 : (1973) 43 AWR 211

Hon'ble Judges: K.B. Asthana, J

Bench: Single Bench

Advocate: S.C. Asthana, for the Appellant; N.C. Rajvanshi, for the Respondent

Final Decision: Dismissed

Judgement

K.B. Asthana, J.

This appeal is concluded by a finding of fact. The only argument raised in support of the appeal by the learned counsel for the plaintiff appellant was that the court below erroneously rejected from consideration the report of the Commissioner which was relied upon by the court of first instance. The plaintiff had sued for recovery of a sum of Rs. 1,100/- as damages for breach of contract committed by the defendant. Timber of twenty eight mango trees including the roots was sold by the defendant to the plaintiff. It was further agreed that the defendant will uproot the trees and make available the timber and roots on payment of agreed price plus the labour charges and the plaintiff would transport the same in truck in specified lots. It was also agreed that in case the specified lots were not ready to be transported at any time when the trucks of the plaintiff came to the spot, then the defendant would be liable for the truck hire also. It was alleged by the plaintiff in his plaint that the defendant only felled down twenty five trees, kept back the roots of five trees and did not keep the specified quantity of timber ready for transport when the plaintiff's truck reached the spot. On this account the plaintiff claimed Rs. 1,100/- as damages, namely, price of uncut trees, five roots and hire charges for the truck. The plaint was presented in court on 26-11-1962. A lawyer Commissioner was appointed on

28-11-1962 to go to the spot and make a local inspection. On 1-12-1962 the Commissioner filed a report to the effect that twenty five trees had been cut, roots of five trees had not been taken out and three trees were still standing. The Commissioner also noted in his report that the defendant was present when he went for local inspection. On 9-2-1963 the defendant filed a written statement and also filed an objection to the Commissioner's report. It was alleged by the defendant that he was not present at the spot when the Commissioner went for local inspection. This objection was not supported by any affidavit. The learned Munsif directed that the objection would be considered at the time of final hearing. Witnesses were examined on behalf of the parties. The learned Munsif without deciding the objection and relying implicitly on Commissioner's report as corroborating the plaintiff's version and disbelieving the defendant's evidence, decreed the plaintiff's suit. On appeal by the defendant the learned Judge of the lower appellate court discarded the Commissioner's report on the ground that the contents thereof would not be legal evidence as the objection had remained undecided and the defendant had no opportunity to controvert the report the Commissioner not having been examined. Then relying on the evidence of the defendant allowed the appeal, set aside, the judgment and decree of the trial court and dismissed the plaintiff's suit. The plaintiff has now come up in second appeal.

2. It was submitted by the learned counsel for the plaintiff appellant that the objection to the Commissioner's report not having been supported by an affidavit was of no avail and the Commissioner's report was legal evidence on the basis of which findings ought to have been recorded by the court below. The contention was that the finding of fact recorded by the lower appellate court was vitiated by omitting to take into consideration the evidence furnished by Commissioner's report. Reliance was placed on the case of [Shiv Sahai and Others Vs. Har Nandan and Others](#), . In that case the learned Single Judge held that where, the commissioner, a member of the court, had stated in his report that he had made the inspection in the presence of the parties, but the defendants alleged in their objection without supporting their allegation by an affidavit, that this statement was not true, the court would be acting improperly in accepting the bare words of an interested litigant against that of a lawyer executing a commission on behalf of the Court and in doing so the Court would depart from the well established tradition of the Courts to believe the word of a member of the Court who had executed a commission on behalf of the Court unless there is cogent evidence against it. A reference was also made to a decision of the Privy Council in AIR 1940 3 (Privy Council) wherein the Judicial Committee observed: "Interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated." I do not think the cases relied upon by the learned counsel for the plaintiff appellant lay down any rule of law. I am not aware of any rule of law that in every case a court is bound by the report of the local investigation made by a lawyer Commissioner and that an objection to the report of the Commissioner must always be supported by an affidavit. I think it is for the court to take into consideration the report of the Commissioner or not to take that report into consideration in respect of a disputed fact. It will depend upon the facts and

circumstances of each case. No hard and fast rule of law can be laid down in this regard, Here on facts of the instant case the commission having been issued immediately after the presentation of the plaint and no notice having been issued to the defendant, it cannot be presumed that the defendant was informed of the visit of the Commissioner. The Commissioner in his report does not say who identified before him Allah Banda, the defendant. It is not the case of any party that the Commissioner knew the defendant Allah Banda from before. Moreover, the learned Munsif himself entertained the objection and did not reject it on the ground that it was not supported by an affidavit. He had directed that the objection would be considered at the time of the final hearing after the evidence had been brought on record. I do not find any order, whatsoever, passed on the objection by the learned Munsif. The objection was not founded only upon the allegation that the defendant was not present at the time of the local inspection by the Commissioner but on many other grounds also which required consideration. In those circumstances if the learned Judge of the lower appellate court held that the trial court ought not to have implicitly relied upon the material obtained in the commissioner"s report, I do not think he fell into any legal or procedural error. It is not the law as I am aware of that a report of the commissioner is substantive evidence in the case. It may become substantive evidence only when the Commissioner is examined as a witness. Of course it is open to a court to take the report into consideration after objection against it had been disposed of, in order to assess the substantive evidence produced by the parties in a case. The learned judge of the lower appellate court assessed the evidence of the parties and fully scrutinised it before arriving at his finding. Since I do not find that in doing so the learned Judge fell into any legal error or procedural error, the finding recorded by him would be binding in second appeal.

3. I, therefore, dismiss this appeal with costs.