

(2016) 06 CHH CK 0013

CHHATTISGARH HIGH COURT

Case No: Second Appeal No. 165 OF 2015.

Korbiha S/o Maniram, aged
about 52 years - Appellants
@HASH Sammelal S/o Moharsai,
aged about 53 years, R/o village
Keshla, Tahsil Pamgarh, Police
Station Pamgarh, District
Janjgir-Champa (C.G.)

APPELLANT

Vs

RESPONDENT

Date of Decision: June 15, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 10(2), Section 100

Citation: (2016) AIRCC 3124

Hon'ble Judges: Shri Sanjay K. Agrawal, J.

Bench: Single Bench

Advocate: Mr. Pushpendra Kumar Patel, Advocate, for the Appellants; Ms. Neha Verma, Advocate, for the Respondent Nos.1 and 2; Mr. S.C. Khakhariya, Deputy Advocate General, for the Respondent No.3/State

Final Decision: Dismissed

Judgement

Shri Sanjay K. Agrawal, J. - This is defendants"/appellants" second appeal under Section 100 of the Code of Civil Procedure, 1908 (in short "CPC"). Respondent No.1/plaintiff filed a civil suit for recovery of possession based on title with regard to Khasra No. 518/2, area 0.13 acres of land, situated at village Keshla, Tahsil Pamgarh, District Janjgir-Champa (C.G.). The trial Court by its judgment and decree dated 03/09/2014 dismissed the suit.

2. Feeling aggrieved by the judgment and decree of the trial Court dismissing the suit, the plaintiff filed first appeal before the First Appellate Court under Section 96 of the C.P.C. The First Appellate Court by its judgment, decreed the suit by relying

upon the Commissioner's report dated 10/08/2004 and held that the defendants/appellants are unauthorisedly in possession of the suit land bearing Khasra No. 518/2, area 0.13 acres, against which, instant second appeal under Section 100 of the C.P.C. has been filed by the defendants/appellants.

3. Learned counsel for the appellants would submit that the First Appellate Court has erred in relying upon the report of the Commissioner with regard to the identity of land, as it has not been proved and defendants have not been granted opportunity to cross-examine the Commissioner on the said report and it raises a substantial question of law for determination of this second appeal.

4. I have heard learned counsel for the appellants/defendants on the question of admission of appeal.

5. Admittedly, the plaintiff has purchased the suit land by registered sale deed dated 11/04/1985 vide Exhibit P-2 and sold 0.37 acres of land on 18/01/1993 to one Mohana vide Exhibit D-1. The case of the plaintiff is that 0.13 acres of land has been encroached by the defendants. The trial Court finding the dispute as to identity of land between the parties, appointed the Revenue Commissioner and also called for the report, which was submitted on 11/08/2004.

6. Learned Commissioner submitted its report dated 10/08/2004, which is a part of record. The report of the Commissioner states as under:-

"ekSdk tkap ds le; oknh ,oa izfroknh us [k0u0 518@7 jdck 0-13 ,dM+ Hkwfe dks okn Hkwfe crk;k x;k ftdk utjh Ldsp fups esa iznf" kZr fd;k x;k gS ;s esa "kk0 Hkwfe [k0u0 568 /kjl kHk "kkfey gSA"

1-90

0-40

1-50

0-70

568

0-74

518@2&7

0-76

0-35

1-35

1-90

utjh uD"kk esa iznf" kZr Hkwfe [k0u0 518@2&7 gS ftesa izfroknh dksjfcgk firk euhjke us 518@7 jdck 0-13 ,dM+ Hkwfe ekudj dk"r dkfct gS ftls izfroknh us iSf=d Hkwfe crk;kA

oknh lesyky firk eksqj lk; dqehZ us izfroknh ds ikfjokfid lnL; lgnso o j?kqukFk lw;Zoa"kh }kjk [k0u0 518@2 jdck 0-50 ,dM+ Hkwfe 22@7@71 dks egs"oj firk }kfjdk czkEg.k ls fcdzh fd;k x;k FkkA ls oknh us 11@4@85 dks dz; fd;k tk dj dCtk Fkk ftesa izfroknhx.k tcfj;k dCtk fd;k gS izfroknh i{k dk uke =qfVo" k vfHkys[k esa ntZ gS ogh Hkwfe 518@2 ls vkxs 518@7 ntZ gSA"

7. The above stated report would show that the defendants are in possession of the suit land treating it as part of their land being Khasra No. 518/07, whereas that land is plaintiff's land Khasra No. 518/2 area 0.13 acres. The defendants' objection on the Commissioner report was rejected by the trial Court on 08/01/2006 holding that the defendants are free to examine the Commissioner by calling him in the witness box or can produce separate inspection report. Admittedly, the defendants have neither examined the Commissioner nor submitted any such inspection report.

8. At this stage, it would be appropriate to notice Order 26, Rule 10 (2) & (3) of the C.P.C.:-

"10. Procedure of Commissioner.- (1)

(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."

9. A critical analysis of sub-Rule 10(2) of Order 26 of the C.P.C. would show that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record and it need not be proved. It is evidence in the suit by virtue of provisions contained in the Code itself and therefore, the submission of learned counsel for the appellants/defendants that the Commissioner's report has not been proved by examining the Commissioner, deserves to be rejected.

10. In the matter of **South Eastern Coalfields Limited v. State of C.G. and another 2010(3) C.G.L.J. 64**, Division Bench of this Court struck a similar proposition as under:-

"17. Report and depositions of the Commissioner shall be evidence in the suit and shall form part of record, in accordance with sub-rule (2) of Rule 10 Order 26 of the Code, 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."

11. In the matter of **Subhaga and others v. Shobha and others (2006) 5 SCC 466**, the Supreme Court has held that Commissioner's report can be relied upon for the purpose of identification of suit land. It was held as under:-

"6. The High Court has also upheld the title claimed by the plaintiff over the plot, Plot No. 1301/1 Ba. Once we accept the identification made by the Commissioner as was done by the first appellate court, it is clear that the plaintiff has the right to have the disputed construction removed and the well filled up. That a property can be identified either by boundary or by any other specific description is well established. Here the attempt had been to identify the suit property with reference to the boundaries and the Commissioner has identified that property with reference to such boundaries. Even if there was any discrepancy, normally, the boundaries should prevail. There was no occasion to spin a theory that it was necessary in this suit to survey all the adjacent lands to find out whether an encroachment was made in the land belonging to the plaintiff. In this situation, we are satisfied that the judgment and decree of the High Court calls for interference. We are also satisfied that the lower appellate court was justified in affirming the decree granted in favour of the plaintiff on the pleadings and the evidence in the case."

7. We, therefore, allow this appeal and setting aside the judgment and decree of the High Court in S.A. No. 1782 of 1976, restore the judgment and decree of the trial court in O.S. No. 1326 of 1957 as affirmed in Civil Appeal No. 112 of 1973 on the file of the Additional Civil Judges Court, Azamgarh. We make no order as to costs in this Appeal but the appellants would be entitled to their costs in the courts below."

12. The First Appellate Court has rightly accepted the report of the Commissioner in absence of challenge by the defendants and rightly granted decree in favour of the plaintiff. I do not find any substantial question of law to be formulated in this second appeal. The finding of First Appellate Court is finding of fact based on evidence. The second appeal deserves to be and is accordingly dismissed at the stage of admission itself leaving the parties to bear their own cost(s).