

(2012) 04 PAT CK 0109
In the Patna High Court
Case No : CWJC No. 19413 of 2011

Bal Manohar Jalan and Another	Vs	APPELLANT
Dr. Braj Nandan Sahay and Others		RESPONDENT

Date of Decision : 03-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10A, Order 26 Rule 9, 151

Citation : (2012) 3 PLJR 221

Hon'ble Judges : Shivaji Pandey, J

Bench : Single Bench

Advocate : Mrigank Mauli. Vinay Mistry, Samir Singh and Kundan Mishra, for the Appellant; Dharmeshwar Mishra, Sanjay Kumar Srivastava, Ranjeet Kumar and Dilip Kumar, for the Respondent

Final Decision : Allowed

Judgement

Shivaji Pandey, J.—Heard learned counsel for the petitioners and learned counsel for the respondents. The petitioners have challenged the order dated 13.6.2007 passed by the Sub-Judge-IV, Patna in Title Suit No. 273 of 1996, whereby and whereunder the court below has refused to appoint Survey Knowing Pleader Commissioner to make proper scientific measurement of the suit land on two grounds i.e. (i) earlier the petition filed by the petitioners was rejected which was not challenged by them before the higher court, and (ii) on the ground of delay as the petition has been filed at argument stage.

2. As it appears from the record that the original landholder was one Dr. Dilip Kumar Pal and in whose name plot no. 135, total area of 17 Kathas and 14 Dhurs of land had been recorded in the cadastral survey. The dimension of plot was 94".4" on the North, 103".0" on South, 276".6" on East and 234".4" on West. Dr. Dilip Kumar Pal sold 3 Kathas and 8 Dhurs of land having dimension of 46".0" on the northern side from East to West, 50".4" on the Southern side from East to West, 100".9" both on Eastern and Western side in favour of Dr. Braj Nandan Sahay defendant 1st set and Ahilya Sahay. On the same day Dr. Pal had also

executed the sale deed to Tetar Devi, the ancestors of defendants 2nd party having dimension of 48".6" on the Northern side from East to West, 44".2" on the southern side from East to West side and 109".9" both on East and West and later on Dr. Pal had entered into an agreement to sale for 10 Kathas and 14 Dhurs of land with Manju Jalan and Sangeeta Devi Tibrawalla on 11.9.1989. The plaintiffs are attorney holder from Dr. Pal with respect to the suit land for various purposes. The dispute arose with regard to occupation of land as from the side of the petitioners it was stated that the land was encroached by the defendants side which was disputed by them.

3. In this case only limited issue has been raised with regard to appointment of Survey Knowing Pleader Commissioner to make proper scientific measurement of the suit land with regard to the alleged encroachment by the defendants.

4. For the first time the petitioners had filed a petition for appointment of Survey Knowing Pleader Commissioner for physical verification of the land which was rejected vide order dated 9.2.2001 and the court has held that at the present stage it would not be proper to make scientific measurement by appointing Survey Knowing Pleader Commissioner. That was stage of taking evidences of respective parties.

5. After closure of evidence from both sides at the argument stage an application dated 28.5.2007 was filed under Order XXVI, Rule 10(A) read with Section 151 of the CPC for appointment of Survey Knowing Pleader Commissioner with regard to make proper scientific measurement of the suit land on the ground that there was illegal encroachment by the defendants. The court below has rejected the claim of the petitioners on the first ground that he has not challenged the earlier order and at the same time it has been filed at a very belated stage.

6. Learned counsel for the petitioners submits that the court has rightly rejected the petition on 9.2.2001 as it was not a proper stage for the appointment of the Pleader Commissioner as at the relevant time the evidences was yet to be recorded from both sides and wrongly refused to exercise in appointing Survey Knowing Pleader Commissioner for that he has relied on the following judgments: --

(i) Payani Achuthan Vs. Chamballikundu Harijan Fisheries Development Co-operative Society and Others, .

(ii) Vaithinattar and Janardhanan Vs. Sakkubai Ammal, .

(iii) Pormusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam, .

(iv) AIR 1952 Kar 233.

(v) Vencu Gopal Tari and Others vs. Nilconta S. Xete and Others, AIR 1975 Goa, Daman and Diu 32.

(vi) Mt. Saraswati Bahuria Vs. Suraj Narain Chaudhuri, .

(vi) Deb Narain Kundu Vs. Amrita Lal Sil, .

(vii) K. Raghunath Rao Vs. Smt. Tumula Jailaxmi, .

(viii) Bali Ram Vs. Mela Ram and Another, .

The aforesaid judgments have been cited on the proposition that if there is dispute with regard to encroachment or there is dispute that other side has wrongly occupied the land of the plaintiffs. In that circumstances the best evidence could be to get the report from the Pleader Commissioner and for the proposition that even if the petition is rejected before completion of evidence there is no bar for the court to appoint Survey Knowing Pleader Commissioner to get a measurement of the suit land for the purposes of clarification and on point of "at this stage" he has relied on the judgment in the case of Rajesh Kumar Gautam vs. Maha Mandleshwar Vedabayasanad Geeta Ashram, AIR 2004 Utt 30 (Paragraph 8).

7. He further submits that the court below has fallen in error in rejecting the petition as earlier the issue was not decided by the court below with regard to appointment of Pleader Commissioner on

The ground that it was not the proper stage and now petition has been filed for the appointment of Pleader Commissioner at subsequent stage. The court below instead of deciding the issue of appointment of Pleader Commissioner on merit he has wrongly rejected the same on technical ground of delay. The purpose of getting the report from Pleader Commissioner to find out the present physical position of land in dispute and to find out actual (sic) affairs in between the parties and the appointment of Pleader Commissioner for that purpose will not amount to collecting [he evidence rather it will be elucidating the matter in dispute. Of course there is a bar for collecting the evidence on behalf of the parties but there is no bar for explaining the situation and elucidating the disputed position of the land, that too in a situation where the party is claiming of encroachment of land by other side.

8. Learned counsel for the respondents has controverted the submissions of learned counsel for the petitioners on two grounds. First the plea of res judicata by defendants 1st set where as defendants 2nd set has submitted that as it appears from the plaint and relief the dispute is with regard to declaration of title and recovery of possession of the land and for getting report of Advocate Commissioner on possession of party amounts to collecting evidence is prohibited under the law as it will not amounts to elucidate the matter in dispute and for that proposition he has relied on the judgment delivered on 30.1.2012 in C.W.J.C. No. 4180 of 2005 and in the case of Jyanti Kuer & Ors. vs. Laxmichand Upadhyay, 2000 (1) P.L.J.R. 231 and in the case of Puttappa vs. Ramappa, reported in AIR 1.996 Kar 257.

9. In order to ascertain the position of law the Court has to first decide the issue with regard to applicability of the res judicata as defendant 1st set has taken the

aforesaid plea and in this context he have relied on the following judgments (I) Y.B. Patil and Others Vs. Y.L. Patil, . (ii) Prabhat Singh vs. Col. Sakhdeo Singh. 1987 (8) SCC 727.

10. To decide as to whether it is barred by the res judicata it has to be seen whether the court below had adjudicated the issue on merit. If the court below would have rejected the claim of the potitioners for appointment of Pleader Commissioner on merit then certainly it would have been a good ground for defendants 1st set but here the court has refused to decide the issue of appointment of Pleader Commissioner stating the fact that at present it will not be proper to make scientific measurement of land by Survey Knowing Pleader Commissioner meaning thereby the court was of the view that Survey Knowing Pleader Commissioner would he appointed at a Subsequent stage and as such the point raised by the defendants 1st set with regard to res judicata is not applicable to the present case.

11. Learned counsel for the petitioners submits that the court below has rightly refused to decide the issue of appointment of Pleader Commissioner as at the relevant point of time the parties had still to examine the witnesses. He has further submitted that the proper time for appointment of Pleader Commissioner would be when the parties have led evidences and it requires to clarification of the situation and physical possession of land only, in that circumstances the court may exercise jurisdiction by appointing the Pleader Commissioner. He further submits that the purpose is to obtain evidence due to its peculiar nature dispute of encroachment and such evidence would enable the Court to properly and correctly understand and assess the evidence on record already recorded. It would clarify or explain any point which has been left doubtful on the evidence on record. The appointment of Pleader Commissioner will help the court to come to a correct and actual position of disputed property. In that context he has relied on paragraph-9 of the judgment in the case of K. Raghunath Rao (supra) where it has been held that: --

.....Therefore, normally writ is to be issued to a Commissioner for local investigation to appreciate the evidence already recorded. There may be departures form the normal rule for issue a commission also. For illustration: Where evidence is necessary to know the depth of water in a particular season a Commissioner can be deputed even though evidence has not been recorded. Where it is to be found as to on which plot the disputed land lies, a writ can be issued to any person to relay the same even though no evidence is required if the Court finds that the parties themselves cannot produce evidence to that effect. Since issue a writ to a person for local investigation would depend upon the facts and circumstances of each case, no hard and fast rule can be laid down. This much can be said that the basic prerequisite for issue of such a writ is the satisfaction of the Court that a local investigation is requisite or proper. This satisfaction is to be judicial satisfaction based on reason.

12. From the aforesaid judgment it is clear that normally the Commissioner for

local investigation is appointed to appreciate the evidence already recorded. It has been held by the court to find out the actual physical position of the land which is not in a very clear picture. In this case defendants have claimed the right through sale deed and the petitioners are claiming the right which is not the subject matter before this Court is being decided at present, as the right and title has been claimed through a registered deed of agreement. The case of the plaintiffs is that the defendants side encroached upon the land which they have purchased, has been disputed by the defendants. It is an urban land and encroachment of land is not a very big area though it is a small area but having very high cost is the cause of litigation. As per plaintiff-petitioner issue of encroachment can only be verified by a clear picture from a report of the Pleader Commissioner. Now it is better to consider whether it is a fit case where the court ought to have exercised the jurisdiction in appointing the Pleader Commissioner or not. So it is better to quote Order 26 Rule 9 of the Code of Civil Procedure: --

9. Commissions to make local investigations. -- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10-A. Commission for scientific investigation. -- (1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.

(2) The provisions of Rule 10 of this Order shall, as far as may be apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.

The issue of appointment of Survey Knowing Commissioner comes into consideration on different occasion at different stages. In Order to come to right conclusion, it would be desirable to examined judgment cited by both sides.

13. In the case of Ponnusamy Pandaram (supra) the Madras High Court had considered the issue of appointment of Pleader Commissioner where the suit for permanent injunction was filed making prayer for restraining the defendants and their men from in any manner interfering with the plaintiff's peaceful possession and enjoyment of the suit properties by way of digging foundations. In that case moot question was raised as to whether the foundation has been laid in his own land or encroached upon the land of plaintiff. In that circumstances the Court has held that the object of local investigation under O. XXVI, R. 9 of the Code is to be

looked into. Its object is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in court but could be taken only from its peculiar nature on the spot. This evidence will elucidate a point which may otherwise be left in doubt or ambiguity on record. The Court has held as follows in paragraph 6 of the judgment: --

The object of local investigation under O. XXVI, R. 9 of the Code cannot be littled. Its object is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in court but could be taken only from its peculiar nature, on the spot. This evidence will elucidate a point which may otherwise be left in doubt or ambiguity on record. The Commissioner, in effect, is a projection of the Court, appointed for a particular purpose. In this regard, the implication of O. XXVI, R.10 cannot be lost sight of when it says 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. We are not very much concerned with the possessive value of the report of the Commissioner. But the party has got a right to place evidence which he could require to substantiate his case before the Court and, of course, subject to the law of evidence and the Code, and it is the duty of the Court to receive such evidence unless there are other justifiable factors in law to decline to receive such evidence. The law of evidence enjoins upon the party to prove the fact which he relies on and in that sense, an obligation is cast upon the party and if he fails to discharge that obligation, adverse consequence will follow and he will have to face the repercussions of the same.

14. In the case of Payani Achuthan (*supra*) the main controversy was as to whether the defendants was in possession of 105 acres of land by encroaching into the land of the plaintiff and a suit for permanent injunction was filed to restrain the defendants from interfering with the possession by encroachment to the land of the plaintiff. The Court has held that the object for appointment of local investigation under Order 26 Rule 9 of the CPC to bring the best evidence if such evidence can be gathered with the help of the Commissioner. Refusal of the request of the party to appoint Pleader Commissioner under Order 26 Rule 9 of the CPC to make a local investigation in an appropriate case amounts to failure of exercise of jurisdiction vested in it. Accordingly the court below was directed to appoint Pleader Commissioner. The Kerala High Court followed the judgment of Madras High Court in Ponnusamy case (*supra*).

15. Similar view has been taken in the case of Vaithinattar (*supra*). In this case also the claim of the parties that other side has encroached upon the land tried to dig up foundation pit and to put up construction and for that a suit was filed for permanent injunction where the Court has considered and has held, the appointment of Pleader Commissioner is essential in a situation where the plaintiff had claimed the suit property which was lawfully belonged to her was encroached upon by the defendants and annexed to their lands in such situation any party should have filed an application for the appointment of Pleader

Commissioner to measure the property and submit a report with sketch. In consideration of that the Court has recorded that only the report by appointment of a Pleader Commissioner would be best evidence for ascertainment of the extent of lands in possession and enjoyment of each party to the contest and since this legal necessity of getting report by Commissioner was not complied with and as such the court has remanded back the case to the trial court with a direction for the purpose of appointment of Pleader Commissioner to collect the best evidence.

16. In another judgment in the case of B. Jagannath vs. N.C. Narayanappa and Another, reported in AIR 1982 Kar 233 in which trial Court refused to appoint Pleader Commissioner where the Court has held that under Order 26 Rule 9 of the CPC power is conferred on the Court for appointment of Pleader Commissioner for local inspection would arise only after parties led their evidences in order to better appreciate the evidence which was already on record. Only when the parties agree that a report of the Commissioner so appointed to discover the existence or nonexistence of a fact will bind both the parties that the Court shall appoint a Commissioner and the liberty was given to the defendants also to make prayer for the appointment of the Commissioner if evidence on record does not clarify the issues before the Court.

17. Learned counsel for the petitioner has relied on another judgment in the case of Mt. Saraswati Bahuria (supra) and has submitted that this Court has criticized the order of Subordinate Judge who has acted upon the evidence recorded by the Pleader Commissioner where the Court has held that it was not within the scope of the Commissioner's duty to decide the question of possession nor of the learned Subordinate Judge to delegate its power in respect thereof to the Commissioner. The Commissioner was not competent to take evidence on this point nor was the learned Subordinate Judge competent to act upon the evidence taken by the Commissioner on this point and accordingly the findings recorded by the Subordinate Judge with regard to possession was declared to ultra vires and illegal. In this case question was there the suit land was sold in revenue sale which was purchased by the respondent and when the original owner filed a suit that was set aside and he got recovery of possession. When the appeal was filed by the purchaser the judgment and decree of the trial court was set aside and he was restored to the possession and thereafter he sought restitution with regard to the period during which he was out of possession and on that account a Commissioner was appointed to ascertain the amount of mesne profits and in its ascertaining the fact when he was brought into actual possession. The Court has held that with regard to possession the Commissioner is not competent to take evidence nor the Court was to act upon that report.

18. Learned counsel for the petitioners has brought another judgment to the notice of this Court in the case of Deb Narain Kundu (supra) where the issue was raised about the encroachment by the parties. There the question arose with regard to ascertainment of identity of the disputed land in which the plaintiff

prayed for local investigation by a Survey Knowing Commissioner and the Court has held that when there is dispute of identity of the disputed land in that circumstances it was the duty of the court to appoint a Pleader Commissioner to make a local investigation which was essentially necessary in order to determine the identity of the land and the Court has held as follows: --

.....It is true that a Court when it rejects a Commissioner's report is not bound to issue a fresh commission if the other evidence on the record is sufficient for the disposal of the case. In the present case a local investigation was essentially necessary in order to determine the identity of the land. The Commissioner's map was an important piece of evidence in support of the plaintiff's case and the learned Subordinate Judge when he rejected the map and report should have in the exercise of his judicial discretion, issued a fresh commission.

19. The Court has also held that the report of Commissioner was an important piece of evidence in support of plaintiff's case. So from this judgment itself shows that when there is dispute of identity of land and there is allegation of encroachment the best evidence is to get report by appointing Pleader Commissioner and in this case the Court has held that in such a situation the best way is to get the report from the Pleader Commissioner.

20. Learned counsel for the petitioners has relied on another judgment in the case of Vencu Gopal Tari (supra) where the court has held that when there is dispute with regard to identity of the suit property allegedly bearing two different registration numbers, the trial court should appoint a Commissioner preferably a trained surveyor to examine whether the property bearing two different numbers is in fact the same. This judgment also gives a guideline that when there is confusion with regard to identity of the suit property in that circumstances the evidence which has been brought during trial are not sufficiently clear. In that circumstances the best way to get a report from the Pleader Commissioner so that the confusion with regard to identity of the property can be clarified.

21. In another judgment cited by the learned counsel for the petitioners in the case of Bali Ram (supra) where the Court has held that though the object of local investigation is not to collect evidence which can be taken in the Court, but the purpose is to obtain such evidence, which form its peculiar nature, can only be had on the spot with a view to elucidate any point which is left doubtful on the evidence produced before the Court. The Court has further held that the Court can issue local commission suo motu, if, in the facts and circumstances of the case, it is deemed necessary that a local investigation is required and is proper for the purpose of elucidating any matter in dispute. Though exercise of these powers is discretionary with the Court, but in case the local investigation is requisite and proper in the facts and circumstances of the case, it should be exercised so that a final and just decision is rendered in the case. So this judgment also makes it clear that when evidence that has been brought during trial are not sufficient giving a clear picture of identity of the suit land, and for proper identification and clear the confusion the evidences are not before the

Court to identify the suit land in that circumstances the court can exercise the power and appoint Pleader Commissioner to get a report on that subject.

22. He has further relied on the judgment in the case of Rajesh Kumar Gautam (supra) on the point that his application for appointment of Commissioner was rejected stating therein that petition is dismissed at this stage. He submits that in this case also earlier the petition for appointment of Pleader Commissioner was rejected stating that the Court has opined for not appointing the Commissioner at this stage but liberty was given to the petitioner to make prayer for the appointment of Commissioner. In this case also the Court has held that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market value of any property, or the amount of any mesne Profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court. This judgment has been cited only for the purposes to show even at earlier stage without deciding the issue on merit with regard to appointment of Pleader Commissioner was rejected, at later stage an application can be filed with a prayer to appoint Pleader Commissioner. It was decided that earlier refusal by the court in not appointing the Commissioner will not act as *res judicata*.

23. Learned counsel for the respondents has disputed the argument made on behalf of the petitioners and has submitted that basically the relief sought for is related to possession of the property. This Court on different occasion has held that when the question of appointment of Pleader Commissioner will come to find out the possession of the property the Court will refuse the appointment of the Commissioner. He has relied on the judgment in the case of Jayanti Kuer (supra) where the Court has held in paragraph 5 of the judgment that it is well settled that a Commissioner will not be in a position to determine the question as to who is in possession of the property when there is dispute between the parties with regard to possession. It is the court, who has to decide the matter on the basis of evidence to be adduced by the parties. It is. not the function of the Commissioner to report to the court as to who is in possession of the same.

24. Learned counsel for the respondent has cited a recent order dated 30.1.2012 passed in C.W.J.C. No. 4180 of 2005 where this Court has held in following term:

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....Of course there is a dispute with regard to the title and possession of the respective parties. Those being the main issues to be decided in the suit, it would be proper for the Court to decide the issue of possession on the basis of evidence led on behalf of the parties. It should not have passed any order appointing Advocate Commissioner to submit a report with regard to possession of a particular party as the same would amount to collecting evidence other than those led by the parties for reaching to a conclusion."

25. Now, on the basis of the judgment aforesaid it has to be tested with the

guidelines which has been given in the earlier judgment, following the principle emerges, if there is dispute about the possession of the property and the parties are claiming possession of a particular property in that circumstances the appointment of the Commissioner is not permissible as it will not be elucidating but it amounts to collecting the evidence. But in a situation when there is no dispute with regard to possession of the respective property by parties but claiming that certain part of land had been encroached upon by others, in that circumstances it is not the case of possession rather it is a case of find out actual fact of encroachment on the land by one party to other and in that circumstances the ascertainment of the disputed claim of encroachment on the property has to be find out. As it appears from the judgment in the case of K. Raghunath Rao (supra) that the proper stage would be when the parties have led respective evidences and the court below is not in position to ascertain about encroachment of the disputed property in that circumstances in order to verify the identity of the land in dispute it will be desirable to get the report of the Pleader Commissioner and on the basis of the report the Court will be able to decide the issue of encroachment. This Court in 1934 has endorsed the aforesaid view and has given the opinion when there is confusion in the identity of disputed land and claim is of encroachment by the other side, the best way is to get the report by appointing a Pleader Commissioner and that view has been re-affirmed in other judgments of the different High Courts.

26. In the present case also, there is a dispute of encroachment of property, the Court has refused to decide the issue of appointment of the Pleader Commissioner on two grounds, one is earlier rejection and another is delay. The Court has not decided the case on merit and as such the impugned order" dated 13.6.2007 is set aside and direction is given to the court below to decide the issue as to whether the evidences recorded during trial are sufficient for deciding the issue raised therein and thereafter the court below will decide the issue of appointment of a Pleader Commissioner in accordance with law as explained hereinabove. Accordingly this writ petition is allowed to the extent hereinabove.