

(2011) 07 GAU CK 0025

In the Gauhati High Court

Case No : Regular Second Appeal No. 13 of 2000 and Re Regular Second Appeal No's. 26 of 2009 and 33 of 2010

Sri Yatra Mohan Sarkar

APPELLANT

Vs

Smt. Mrinalini Dey and Others

RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10, Order 26 Rule 10(1), Order 26 Rule 10(2), Order 26 Rule 10(3), Order 26 Rule 9

Citation : (2011) 4 GLT 151

Hon'ble Judges : A.C. Upadhyay, J

Bench : Single Bench

Advocate : K.N. Bhattacharjee and S. Acharjee, for the Appellant; A.K. Bhowmik and R. Datta, for the Respondent

Final Decision : Dismissed

Judgement

A.C. Upadhyay, J.—Heard Mr. KN Bhattacharjee, learned Senior counsel, assisted by Mr. S. Acharjee, appearing for the Appellant as well as Mr. A.K. Bhowmik, learned Senior counsel assisted by Mr. R. Datta, learned Counsel representing the Respondents.

2. This second appeal is directed against the judgment and appellate decree dated 30.09.1999, passed by the learned Additional District Judge, South Tripura, Udaipur, in Title Appeal No. 12 of 1987, dismissing the appeal preferred by the Defendant Appellant, against the decree passed by the trial court.

3. Facts, leading to the filing of this second appeal, may be narrated, in brief, as follows:

The Plaintiff filed original Title Suit No. 02 of 1971, against the present Defendant and one Smt. Manada Sundari Debi, as Defendant Nos. 1 and 2 respectively, praying for declaration of title, recovery of possession and mesne profit. However, Smt. Manada Sundari Debi, did not contest the suit, and

accordingly, she was not made a party in this second appeal.

4. The suit land originally belonged to one Nanibala Ghosh, who had purchased the same from one Ramkrishna Nama in the year 1938. The Plaintiff Late Harihar Dey, had purchased the suit land from Nanibala Ghosh by registered deed of sale, dated 16.06.1970. The Defendant-Appellant claimed that the suit land did not appertain to old Jote No. 74 and claimed that old Jote No. 72 covered it. The Defendant-Appellant further stated in his written statement that he had purchased the land of Jote No. 72, bearing Khatian No. 204 and since then he has possessed the said land.

5. Both sides produced documentary as well as oral evidences. Survey Commissioner was also appointed and it was reported by the Survey Commissioner that all the above plots except plot No. 651/2079 appertains to old Jote No. 72.

6. The following issues were framed in this suit for just decision of the case:

1. Is the suit properly valued and plaint sufficiently stamped?
2. Is the suit barred by limitation?
3. Does the suit land appertaining to old jote No. 74 or to old jote No. 72 as alleged by the Defendants?
4. Has the Plaintiff any right, title and interest over the disputed land?
5. Is the story of possession and dispossession as alleged by the Plaintiff, true?
6. Is the Plaintiff entitled to get mesne profit?
7. Is the Plaintiff entitled to get recovery of possession?
8. What relief, if any, parties are entitled to?

Additional Issues

9. Is the suit bad for non joinder of necessary parties?
10. Is the Plaintiff entitled to get a declaration of right, title and interest over the suit land?

7. Learned Sub Judge(Trial Court) upon consideration of pleadings, oral evidence and documentary evidence including survey commission reports decided the issues holding that all plots of suit land appertain to old jote No. 74 and that plot No. 651/2079, also belonged to old jote No. 74 and not Jote No. 72, as reported by Survey Commissioner. Learned Trial Court in the judgment aforesaid recorded detailed reasons by appreciating the evidence on record, to take a view contrary to the observation made by the Survey Commissioner. The aforesaid findings are based on due appreciation of all documentary and oral evidence adduced by the respective parties to the litigation.

8. The suit was originally decreed in favour of the Plaintiff by a judgment and decree dated 3.10.1975 by the learned Trial Court. The said judgment and decree was set aside by the first appellate court below by a judgment dated 12.12.1978 in TA 24/75. The suit was remanded for retrial after appointing a survey commission. Thereafter, the learned Sub Judge, appointed survey commissioner and sent the report of the survey commissioner along with findings to the learned First Appellate Court. The learned First Appellate Court(ADJ) by order dated 31.7.85 in TA 13/84(TA 24/75), clarified that on the basis of remand order dated 12.12.78 the Learned Trial Court was required to pass a fresh judgment. Accordingly, learned Sub Judge in view of the above direction passed the judgment and decree dated 29.8.1987 in TS 02/1971, decreed the suit in favour of the Plaintiff, - declared title of the Plaintiff, directed recovery of possession and payment of mesne profit.

9. However, Defendant in the meanwhile, filed TA 12/87, against the judgment and decree dated 29.8.1987 passed by the learned Trial Court in TS 2/71 and the learned First Appellate Court by a judgment dated 22.11.90 remanded the suit to the learned Trial Court, for fresh adjudication in accordance with law. The said appellate judgment was, however, set aside by this Hon''ble High Court in Second Appeal No. 4/91, by an order dated 21.7.95 and the case was remanded to First Appellate Court, which passed the present impugned judgment dated 30.9.99 in TA 12/87 upholding and affirming the judgment and decree passed by the learned trial Court.

10. In the second appeal filed by the Defendant learned Counsel for the Appellant submitted that the Plaintiff had examined the Survey Commissioner, but the trial court did not examine the Survey Commissioner, as provided under Order 26, Rule 10 of Sub-rule (2) and (3) of Code of Code of Civil Procedure, after modification of the report by superimposition by him. Leaned counsel pointed out that order 26 C.P.C, Rule 10(3) of specifically provides for procedure, for such further inquiry by the Commissioner if the Court is not satisfied with the report, but this procedure has not been followed by the trial court. Leaned counsel submitted that after modification of the report did, neither examine the Survey Commissioner, nor gave any opportunity of hearing on this point to the Defendant-Appellant, but delivered the judgment and decree illegally, which is perverse.

11. This second appeal has been admitted for hearing on the following substantial question of law:

Whether the report of the survey commissioner can be modified by the court, by way of super imposition without ordering fresh service of notice?

12. Mr. K.N. Bhattachajee, learned senior counsel submitted that Rule 10 Sub-rule (3) of Code of CPC specifically provides that if for any reason the Court is dissatisfied with the proceeding of the Commissioner, it may direct further inquiry to be made. This rule does not authorize the Court to modify the Commissioner''s

report on his own understanding without examining the Commissioner and without giving an opportunity of hearing to the Defendant against whom the finding of superimposition has been made. Learned Counsel for the Defendant-Appellant relied on the decisions of Orissa High Court reposted in (A) Debendranath Nandi Vs. Natha Bhuiyan, wherein it was held as follows:

A Commissioner for local investigation is deputed under Order 26, Rule 9, Civil P. C when the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or for ascertaining any other matter mentioned in the said rule. The object of local investigation under the above provision is to obtain evidence, which from its peculiar nature can best be had from the spot itself. Such evidence enables the Court to properly and correctly understand and assess the evidence on record already recorded. It clarifies or explains any point which is left doubtful on the evidence on record. The trial Court's decision in the present case to depute a Commissioner for the above purpose is indicative of the fact that in view of the evidence before the Court it considered it necessary to obtain a report from the Commissioner about the correct and actual position of the disputed property. In view of the rival averments made by the parties and in view of the evidence on record, a Commissioner's report of local investigation was necessary in this case. The appellate Court, therefore, was not justified in deciding the matter without directing issue of a fresh commissioner for the aforesaid purpose. The Hon'ble Judges of the Calcutta and Patna High Courts and my learned brother Misra, J. in the above-mentioned reported decisions have said that the proper course under such circumstances is to direct the appointment of another Commissioner calling upon him to submit a fresh report for which local investigation had been directed and made earlier in the case. On the above considerations I am satisfied that the procedure adopted by the Court below in deciding the matter in the manner aforesaid most probably has produced error or defect in the decision of the case on merits. Therefore, this is a fit case which should go back to the trial Court on remand so that the Court can appoint a suitable Commissioner to enquire into the exact matter which was earlier referred to the Commissioner for local investigation by the trial Court On obtaining his report the trial Court shall dispose of the matter afresh in accordance with law.

13. In Mahendranath Parida Vs. Purnananda Parida and Others, it has been observed as follows:

1. When the controversy is as to identification, location or measurement of the land or premise or object, local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and go to trial prepared. The party against whom the report may have gone may choose to adduce evidence in rebuttal. Hence, ordinarily in such type of cases local investigation should not be deferred to a stage after the closure of evidence. I do not mean thereby that in no circumstances can local investigation be sought after the evidence is closed. But ordinarily it should be done before the parties

adduced evidence. Hence, I do not accept the contention of Mr. B. Patnaik that inasmuch as the party has a right to and can adduce evidence of a survey knowing person engaged by him privately with reference to identification of location, it is open to the Court to decline to appoint a commissioner for local investigation under Order 26, Rule 9. In this case the controversy can be resolved by locating the wall upon measurement, that is to say, whether it stood on plot No. 306 or plot No. 307. So, the local investigation is essential. The learned Munsif having failed to exercise jurisdiction vested in him, I interfere and vacate the impugned order. He is directed to appoint a survey knowing, commissioner.

14. Learned Counsel for the Appellant further pointed out that being aggrieved the Defendant-Appellant had filed Title Appeal No. 12 of 1987, in which the Addl. District Judge, South Tripura, delivered his judgment dated 22.11.1990. The Addl. District Judge found that the report of the Survey Commissioner has been made a part of the decree by the trial Court. The report was filed on 28.06.1981. The Addl. District Judge held that the trial court "modified the report of the Survey Commissioner but I am surprised as to how the report of the Survey Commissioner was modified without examining the Survey Commissioner or giving an opportunity to explain the doubt/difference that appeared to the Court in the report of the Survey Commissioner".

15. The Addl. District Judge also found that "it appears from the para-3 of the report of the Survey Commissioner a part of the decree that one Umesh Nath and Narayan Nath are possessing some part of the suit land. If this report is accepted and made a part of the decree then the suit suffers from non-joinder of Narayan Nath and Umesh Nath, who are necessary and proper parties in as much as without their eviction the Plaintiff cannot get back the possession of their suit land. Hence the suit was remanded with direction "to the Trial Court for adjudication after (i) allowing the Plaintiff an opportunity to implead all the necessary and proper party and (ii) after taking evidence from the Survey Commissioner accept the report and in case he refuses the report he should appoint a fresh Survey Commissioner."

16. Per contra, learned Counsel for the Plaintiff-Respondent pointed out that the aforesaid facts relied on by the Appellant is suppression of the fact. Since upon the aforesaid finding of the learned Addl. District Judge, South Tripura in TA 12/87, the Hon"ble High Court in Second Appeal No. 4/1991 had set aside the said judgment dated 22.11.1990 passed by the Learned First Appellate Court in TA/12/1987 and the said finding is irrelevant.

17. Being aggrieved by the said judgment the Plaintiff Respondent, who were successors of Plaintiff Harihar Dey filed Second Appeal No. 04 of 1991 in which by order dated 20.12.1981, two points of substantial question of law were framed- (i) Whether Learned Court erred in law in passing the judgment without shifting the evidence? (ii) Whether the finding of the appellate Court below that the Learned Trial Court has modified the Amin Commissioner's report is

perverse?

18. Learned Counsel for the Appellant submitted that on 27.04.1995, it was ordered to register the petition for condonation of delay as a separate case. By the order dated 21.07.1995, this Court held that only the Defendant-Appellant No. 1, has appeared before the First Appellate Court as Respondent No. 1, but the Respondent No. 2 Manada did not appear and hence this Court did not discuss the substantial question of law stated above nor touched or gave any decision on those points but only after hearing the Defendant-Appellant alone in S.A. No. 04 of 1991, remanded the case to the appellate Court with a direction to implead the legal heirs of the Defendant-Appellant No. 2 Manada and to decide the appeal after giving an opportunity of hearing to them.

19. On remand the appellate Court impleaded the legal heirs of the Defendant-Appellant No. 2 and issued notice upon them but they did not appear, so decided the appeal ex-parte against them, decided the appeal, and delivered the judgment and decree dated 30.09.1999, which is impugned in this R.S.A. No. 13 of 2000.

20. Learned Counsel for the Appellant on the other hand submitted that on the facts available in record and in view of the relevant provisions of law two more substantial questions of law may be formulated in this appeal (1) whether Umesh Nath and Narayan Nath found in possession as per Survey Commissioner report, which is a part of the decree, are necessary and proper parties? (2) Whether the Plaintiff predecessors, the Respondents herein acquired title by paper transaction of sale without delivery of possession, while admittedly his vendor was not in possession at the time of sale? (3) Whether the suit land is covered by Jote No. 74 claimed by the Plaintiff?

21. Learned Counsel for the Appellant points out that the above issues are required to be decided for proper and effective adjudication of the suit. The question of impleadment would arise when the Survey report forms a part of the decree in which two trespassers have been shown and this point did not arise at the time of framing of issue or earlier to making of the survey report a part of the decree.

22. Learned Counsel for the Appellant has prayed for appointing a fresh Survey Commissioner to make local survey investigation to find out whether the suit land is attracted by Jote No. 74 or 72 and after receiving the report to proceed in compliance with the provision of Order 26 Rule 10 of Code of CPC in accepting or rejecting the survey report. Thereafter, the trial court should decide the suit in accordance with law within such time as may be prescribed by the High Court.

23. Learned Counsel for the Appellant submitted that the remand of the suit will not hamper the interest of the Respondents because as their predecessor-Plaintiff purchased the land only in paper and never got possession of the land, knowing fully well that the vendor was not in possession of the land. The Plaintiff had taken a chance to purchase litigation as a gambling so that incase he wins

he gains. In the present situation, as contended on behalf of the Appellant, such a person cannot claim equity to recover possession by driving out a person who has been in possession since his purchase from Jibanananda on 10.04.1962 and before that his vendor was in possession for about 25 years without interference vide para 17(a) of the written statement.

24. Learned Counsel for the Appellant submitted that it is essential that the impugned judgment and decree may be set aside and the case may be remanded to the trial court with a direction to frame additional issues (1) whether the suit is bad for non-joinder of Umesh Nath and Narayan Nath? (2) Whether the Plaintiff acquired title by paper transaction by purchase from the dispossessed vendor without getting delivery of possession? (3) whether the suit land is attracted by Jote No. 74 or Jote No. 72?

25. All the aforesaid issues sought to be projected by the learned Counsel for the Appellant are issues of facts, as a matter of fact issues on facts have already decided by the learned trial court and the first appellate court, on the basis of the pleadings of the parties. Therefore, in my considered view there is no reason to broach some new redundant issues as aforesaid, for decision, at this stage of the proceeding.

26. The reliance by the learned Counsel for the Appellant on the judgment of Debendra Nath Nandi (supra) and Mahendra Nath Parida (supra), in my view are misplaced. In view of the facts and circumstances of the case, as in the present case both the Courts below have held that the modification of the survey commission report, carried out by the trial Court, as far back as on 30.06.83 by passing a specific order, on appreciation of evidence on record, in presence of the parties, after giving them opportunity of being heard, was not disputed by either of the parties.

27. Mr. A.K. Bhowmik, learned senior counsel in reply to the above submission contended that this Second Appeal u/s 100 Code of CPC has been filed against concurrent findings arrived at by the learned Trial Court, as well as by the Learned First Appellate Court, on the purported ground that the finding of fact to the effect that Plaintiff Respondents acquired right and title in the suit land was not correct. The First Appellate Court being the final authority to decide in respect of facts, the Appellant failed to raise any point of law not to speak of any substantial question of law and as such the appeal is wholly devoid of merit and not maintainable.

28. Learned Counsel for the Plaintiff Respondent submitted that the purported substantial question of law tentatively framed while admitting the appeal to the effect that whether learned Court erred in law in passing the judgment without sifting the evidence is too vague and on the face of the record it would be found that both the learned Trial Court, as well as the First Appellate court, after thorough and detailed consideration of the evidence on record passed the respective judgments.

29. Learned Counsel for the Respondents pointed out that the purported substantial question of law now projected by the Appellants, "as to whether the finding of the learned First Appellate Court that the learned Trial Court has modified the Commissioner's report is perverse", is also a question of fact. Basically the only fact involved in the suit for determination is whether the Plaintiff acquired title in the suit land and as to whether the suit land appertains to jote No. 74 of the Plaintiff or whether it was attracted by jote No. 72 as claimed by the Defendant. This is a question of fact. The learned Trial Court on the basis of the oral and documentary evidence including the report of the survey commissioner decided that the suit land appertains to jote N.74 of the Plaintiff and the said finding of fact by the learned Trial Court, was affirmed by the learned First Appellate Court and such finding of fact based on material to support it, can not be said to be perverse finding of fact. However, the said finding admittedly having been based on evidence there is no question of perversity.

30. As a matter of fact, the report of the survey commissioner, is a piece of evidence like any other evidence on record. It is the court, which will consider the report of the survey commissioner, scrutinize it as a piece of evidence, along with other oral and documentary evidence on record. The Court has a duty as well as power to appreciate all such evidence on record, including the report of the survey commissioner. The Court has the right to differ with the survey commissioner and also appreciate it. Learned Counsel pointed out that a Court has the right either to accept a part of the report or reject any other part of the report and it may accept the report in modified form on appreciation of evidence on record. It is the domain of the trial court and the First Appellate Court to appreciate the evidence to determine a particular fact. The findings of the learned trial Court and first appellate court cannot be faulted with in second appeal, unless perversity is apparent on the face of the record or learned Courts ignored a material document or material evidence, which is not the case of the Appellant. The findings of facts arrived at by the learned Trial Court as well as by the First Appellate Court, were recorded after detailed consideration and appreciation of the evidence on record, including the reports of the survey commissioners.

31. As a matter of fact Order 26 Rule 10 of Code of CPC provides that the learned Court for the purpose of elucidating any matter in dispute, may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court. Under the provisions of order 26 Rule 10(1) the commissioner is required to submit report of the local inspection in writing along with evidence to the court, for consideration of the court. Order 26 Rule 10(2) Code of CPC provides that 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 with the permission of the court. Order 26 Rule 10(3) further provides that if the learned Court is for any reason is

dissatisfied with the proceedings of the commissioner, it may direct such further inquiry to be made as it shall think fit. Therefore, the report of the Commissioner is a piece of evidence and in terms of Order 26 Rule 10(3) of the Code of CPC the Commissioner can be called on to make further inquiry only when the court is dissatisfied with the report. In the instant case, such Survey Commissions were held either at the instance of the trial Court or at the instance of the appellate Court. Had there been dissatisfaction on the report, the learned Court below would have asked for such report instead of appreciating the report. The learned court below appreciated and compared the report of the Survey Commissioner vis-...-vis the evidence on record to come to an appropriate findings. If the court would not have taken up the task of appreciation of the Commissioner's report, several more such fresh reports of the Commissioner also would not have resolved the issue.

32. In the present case it would appear from the judgment passed by the learned Subordinate judge (the trial court) dated 29th August, 1987, relating to issue No. 3 that the learned Court by an order dated 13.08.79 and 15.9.79 appointed survey commissioner for the local investigation in order to ascertain as to whether the suit land is covered by old jote No. 74 and dag Nos. 2116 and 2117 of Mouja Doulbari and present survey plots No. 548, 649, 650, 704/2099 and 651/2081 of Khatian No. 715. Survey commissioner submitted report dated 28.06.1981, but the Defendants (present Appellant) did not file any objection, however, on the prayer of the Plaintiff the survey commissioner was examined and cross examined by the parties and the learned Sub Judge vide his order 30.6.1983 modified the survey commission's report by passing an order in presence of both the parties. The Survey Commissioner reported that all the aforesaid plots, namely, CS plot No. 648, 649, 650 and 704/2099 of khatian No. 715 of Mouja-Doulbari, were within old jote No. 74 and he reported that only one plot namely 651/2081, was part of jote No. 72, but the learned Trial Court by considering the available documents on record including the report of the survey commissioner, the annexed old map and CS map, by way of superimposition and comparison and considering all relevant documents admitted to evidence on record, came to a finding of fact that the said plot 651/2081 also appertain to jote No. 74 and not Jote No. 72 and thus modified the report. The word super imposition did not mean anything more than comparison and appreciation of the evidence on record. Such finding was also accepted by the First Appellate Court.

33. It would be pertinent to extract herein below as to how the trial Court modified the report of the Survey Commissioner at the initial stage as far back as on 30.06.1983, after hearing both the parties and by formally passing an order of the Court. The relevant discussion in the judgment of the trial Court reads as follows:

The learned Sub-Judge vide his order dated 30.06.83 accepted the survey Commissioner's report with certain modifications. According to report of Survey Commissioner, the suit land of C.S. Plot Nos. 648, 649, 650, 704/2099 of Khatian

No. 715 of Mouja Doulbari case within old jote No. 74 and plot No. 651/2081 of said khatian is a part of plot No. 651 of jote No. 72 of defdt No. 1. The then learned Sub-Judge vide his order dated 30.06.83 held that the suit plot 651/2081 is not a part of jote No. 72 but is a part of old jote No. 74. The relevant portion of said order runs as follows:

30.06.86

The Survey Commissioner is to relay the suit land and land of old jote No. 74 of Mouja Doulbari and to report whether the suit is covered by the land of dag No. 2116 and 2117 of old jote No. 74 of Mouja Doulbari and present Survey Plot Nos. 648, 649, 650, 651/2081 and 704/2099. He is also to show whether there is any such dag measuring 651/2079 within the suit plot. The commissioner is also directed to show if the lands of Plaintiff's kabalas covered the suit land. He is also to report whether the land of old jote No. 74 is at present in possession of Umesh Nath. The commissioner is to prepared Map in different colors showing the land of old jote No. 74 and present survey Plot Nos. 648, 649, 650, 651/2081 and 704/2099 and the land purchased by the plttf. by his two kabalas

The Plaintiff filed objection to the report. The Defendant did not file any objection to it. On application of the Plaintiff, the Survey Commissioner was examined. The Plaintiff the Survey Commissioner was examined. The defence had opportunity to cross-examine the Survey Commissioner.

The report of the commissioner reveals in para 3, the suit plot 651/2081 is part of plot No. 651 of jote No. 72 of defdt No. 1. In respect of suit plot 648/649/650 and 704/2099 the report is clear that they do not fall within jote No. 72.

The Plaintiff purchased 4 kanis 1 ganda 2 kranta 1 dhur of land as per present measurement by kabalas Nos. 1-74 and 1-7408 both dt. 16.6.70 read with correction deed No. 1-8 dated 18.6.79 in C.S. Plot Nos. 648, 649, 650, 651/2081 and 704/2099 of khatian Nos. 715 of Mouja Duolbari within old jote No. 74. the said khatian No. 715 is attested and marked Exbt/A-4 in suit and finally published on 4.1.68.

Sri Jatra Mohan Sarkar, defdt No. 1 purchased the entire land of old jote No. 72 measuring 12 kanis 13 gandas and 3 karas in plot Nos. 2219, 2220, 2221, 2222/2224 by registered deed dt. 10.4.62 AD Exbt. B-1. the kanatian No. 204 of Mouja Doulbari in the name of defdt No. 1 records 15 kanis 13 gandas 1 kara and 2 dhurs of land with mention of plots Nos. 533, 533/1840 6/539/1906 /531/693 therein.

As per khatian No. 715 of mouja Doulbari Exbt.A-4 location of plot No. 651 of khatian No. 204 Exbt.A-14 is adjacent to the north of plot No. 651/2081 of khatian No. 715. the said plot 651 measures 5 kanis 8 gandas 1 kranta and 15 dhurs of land and khatian No. 204 was finally published on 4.1.68. As per old sketch map Exbt. A-17 of jote No. 74 of Doulbari plot No. 2222 is adjacent to the north of jote No. 74 and plot No. 2222 as per old khatian Exbt. B-2 measures 5

kanis 3 karas and 1 kranta of land. So khatian No. 2-4 measures more land than the land shown in the old khatian Ext. B-2. Hence plot no 651/2081 cannot be part of jote No. 72 as reported by the Survey Commissioner as Jamini Mohan Sarkar cannot get title of more land and jote No. 72 cannot contain more land than 12 kanis 13 gandas and 3 karas which is covered by registered deed dt. 10.4.62 AD. The sketch map of survey also shows that plot No, 651 is to the north of plot No. 651/2081. The agreement for sale and the registered deed both dated 10.4.62 AD and both between Jatra Mohan Sarkar and Jibananda Ghosh also indicate that the plot No. 72 situates adjacent to the north of plot No. 74 and the land covered by registered deed dt. 10.4.62 situates adjacent to the north of jote No. 74. So nothing wrong is found in khatian Nos. 715 & 204.

It is also seen that the sketch map Exbt. B-4(1) contains the Plot Nos. 648, 649,650, 651/2081 and 704/2099 of khatian No. 715 of the Plaintiff and plots Nos. 533, 651, 533/1840, 531, 693 and 539/1906 of khatian No. 204 of Defendant No. 1. The sketch map showing Plot Nos. 648,649,650,651/2081 and 704/2099 and as per the said Exbt.4(1) tallies with the sketch map of the Survey Commissioner by super imposition of old jote No. 72 (Exbt.B-4(series)) and also with the sketch map. The said Exbt. B-4(series) and also with the sketch map Exbt. A-17 of old jote No. 74 by a super imposition.

Hence the report of survey commissioner that plot No. 651/2081 is part of jote No. old 72 of Defendant No. 1 is not correct. Accordingly the report of Survey Commissioner is accepted after the aforesaid modification. Against that order neither party preferred any revision to the Higher Court. Besides that neither party adduced any evidence also either documentary or oral, to rebut the decision also. I already held that it was decided there that entire suit land was within old jote No. 74 and not within jote No. 72. This issue is accordingly decided in favour of the Plaintiff.

34. The appellate Court, while affirming the judgment of the trial Court, observed as follows:

In the instant case there was no omission, rather the survey commissioner made some additions and some apparent mistakes which, after hearing at length of both sides of the parties and after consideration of the available records placed before the lower court, were rejected and the learned Sub Judge accepted the report of the Survey Commissioner with some modification (vide order dated 30.6.83) and treated the modified report as part of the decree while delivering the judgment. I have stated above that the Defendant No. 1 did not file any revision against the acceptance of Survey Commissioner's report (with modification) contained in the order dated 30.6.83 in T.S. 2/71 and/or did not adduce evidence to rebut that decision. So at this belated stage in the appellate court the Defendant No. 1 was not justified in raising this point. I hold that the Ld. Sub-Judge has rightly accepted the report (with modification) as a part of the decree. I would like to state here that the local investigation made by the Commissioner under Order 26 Rule 9 is merely to assist the court by placing a

report of such local investigation before the court. Such report is not, in any way, binding on the court and the court has power to arrive at its own conclusion even if this is at variance with such report (AIR-1970 Mysore-314). As I have stated above, the Defendant No. 1 did not file any objection against the Survey Commissioner's report (Ext. C-3) in the Id. Court and as stated above, neither he filed revision against the order of acceptance of report contained in the order dated 30.6.83 & 27.1.84 in T.S. No. 2/71, nor did he or his lawyer put any question while cross examining P.W.1 at the time of adducing additional evidence on 22.9.83 denying C.S. Plot No. 651/2081 as a part of jote No. 74. In the instant case the Survey Commissioner was examined as a witness(P.W.7). "It is open to a court to take the report of the Survey Commissioner into consideration after objection against it had been disposed of in order to assess the substantive evidence produced by the parties in a case" ----- Even if commissioner was examined as a witness, the court has discretion to take or not to take into consideration the report of the commissioner in respect of disputed fact after considering the objection against it (AIR-1973 All 235). In the instant case, the Id. Sub-Judge has analysed the Survey Commissioner's report in respect of disputed fact and after assessing the substantive evidence, on being satisfied the Id. Sub-Judge accepted the report of the Survey Commissioner and treated it (i.e. report with modification) as a part of the decree. I do not find any illegality in the judgment of the Id. Lower court in this respect.

35. It would appear from a decision in Umrao Petitioner v. Smti Minu @ Manju and Ors. reported in AIR 2000 P&H 38 in paragraph-8 that it has been held that the report of local commissioner could be considered and examined by the court on its merits.

36. In the case, Sankar Kumar and Another Vs. Mohanlal Sharma, in paragraph-4 it is categorically held that law is well settled that merely because report of the commissioner is accepted during the trial, such report is not binding on the trial court at the time of final decision of the suit, acceptance of the commissioner's report at that stage only means that the report is considered to be a part of the record and is to be considered along with other evidence on record at the time of final hearing.

37. In the instant case, the survey commissioner's report, which was admitted to evidence, was considered at the time of deciding the suit finally and the learned Court accepted almost the whole of the report except in respect of one plot of land, which was modified, and that too with sufficient and cogent reasons, on the basis of the available evidence on record.

38. Apparently the decision in Debendra Nath Nandi (supra) and Mahendra Nath Parida (supra) are not applicable to the present case as the cases arose out of different situation, unlike the case in hand.

39. Learned Counsel for the Plaintiff submitted that the Defendant Appellant having failed in both the courts below, has now prayed for remanding the suit by

framing new issues, so that the Appellant who is in illegal possession of the suit land can continue in his unlawful possession and deprive the Plaintiff of enjoying the fruit of his suit filed in 1971, by abusing the process of the court, by raising irrelevant issues. Learned Counsel for the Plaintiff submitted that justice demands that this Second Appeal ought to be dismissed with heavy cost.

40. Superimposing maps is a utility for comparing two maps to the same frame of reference, allowing direct comparison of features and other characteristic. The name is slightly misleading, but by superimposition actually performs a comparison, and then reorients the associated maps to follow the difference. Comparison of maps is permissible in appreciating the documentary evidence on record. For a court of law, unless a complex situation is encountered in appreciating Survey Commissioner's report, leading to dissatisfaction, it is not necessary for it to refer back to the Survey Commissioner in terms of Order 26 Rule 10(3) of Code of Civil Procedure. However, the option is certainly always open to the trial Court to call the Survey commissioner for clarification or further inquiry. But for that matter, the Court appreciating the evidence on record will have to be dissatisfied with the report of the Survey Commissioner. In the instant case, the learned Court below carried out a comparison of maps available on records basing on other evidence on record to come to decision. The above modification was carried out by the trial Court on 30.06.1981 long before the judgment was delivered by giving all reasonable opportunity of being heard to both the parties. The order passed by the Court modifying the report of the Survey Commissioner was never challenged by any of the parties. Therefore, such a process carried out by the trial court on facts attended by other supporting evidence on record, which has been approved by the first appellate court does not warrant interference in second appeal.

41. The question of law, therefore, stands answered accordingly. In my view, there is no merit in the Second Appeal, the same is accordingly dismissed. No costs.