
(1972) 08 AHC CK 0021
In the Allahabad High Court
Case No : Second Appeal No. 3985 of 1963

Suraj Pal and Others

APPELLANT

Vs

Smt. Meera alias Merhia and Others

RESPONDENT

Date of Decision : 02-08-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10, Order 26 Rule 18

Citation : AIR 1973 All 148 : (1972) 42 AWR 630

Hon'ble Judges : J.S. Trivedi, J

Bench : Single Bench

Advocate : V.K.S. Chaudhary, K.N. Tripathi and G.B. Tewari, for the Appellant;
H.S. Joshi and B.L. Yadav, for the Respondent

Final Decision : Dismissed

Judgement

This Is a defendants Second Civil Appeal against the judgment and decree of Additional Civil Judge, Allahabad dismissing the appeal and confirming the decree of the trial Court The suit was filed by the plaintiff-respondents for possession and injunction restraining the defendant-appellants from interfering with their possession over the property in dispute. The plaintiffs" case was that Jang Bahadur was the owner of the house in dispute and after Jans Bahadur"s death the plaintiffs who were the daughters of Jang Bahadur came in exclusive possession and continued to remain in exclusive possession. It was further stated that on account of fire that broke out in the village most of the house was damaged and when she started to make constructions the defendant-appellants attempted to demolish the said constructions and during the pendency of the suit took forcible possession. The suit was initially filed for injunction. The relief for possession was added on the allegation that during the pendency of the suit possession over some portion was taken unlawfully by the defendant-appellants. 2. The defendants" case was that the property in suit was the Zila of Kayasth Pathshala, Allahabad who was the Zainindar of the village and one Suraj Din was said to have purchased it and the defendant-appellants are transferees from

Suraj Din. The trial Court decreed the plaintiffs' suit holding that the site and the land in dispute belonged to Jang Bahadur and that the plaintiffs were entitled to a decree for possession and injunction. The decree of the trial Court was confirmed by the lower appellate Court. 3. It has been contended before me in the second appeal that the report of the Commissioner issued ex parte was not admissible and that the finding of the fact based on the report therefore, suffers from an error of law. Apart from the oral evidence a commission was issued at the instance of the plaintiff to take note of the articles of the house and for determining whether the house was in occupation of the plaintiff or the defendant. According to the plaintiff the house had been in her possession and contained her articles. An ex parte commission was issued. The Commissioner informed the defendant and served the injunction notice and in the presence of the defendant an inventory of the articles and of the persons occupying the house was prepared. This report of the Commissioner has been relied upon as a corroborative evidence in support of the plaintiff's title. 4. The contention of the learned counsel for the appellant is that an ex parte issue of a commission is not contemplated and where a commission has been issued ex parte, the report of the Commissioner will not be admissible under Order 26. Rule 10. Civil P. C. His contention is that in the instant case the report of the Commissioner could not be admissible under Order 26, Rule 18 and if the plaintiff or the Court wanted to rely on the report it was the duty of the plaintiff to prove the report. Reliance has been placed by him on *Mandera Mukherjee Vs. Sachindra Chandra Mukherjee and Others*, where it was laid down that:-- "Where the Court has not directed the parties to appear before the commission. any notice by the commissioner himself to the defendant would not validate the appointment of the commissioner. Under Rule 10 (2) the report of a commissioner is evidence, and any evidence recorded by a commissioner without notice to the parties to the suit cannot be used as evidence at all. The order of the Court appointing a commissioner, without notice to the defendants is obviously without jurisdiction." 5. On the other hand learned counsel for the respondent has contended that Order 26. Rule 18 only contemplates the issue of a notice directing the opposite party to appear before the commission and the purpose is that the party should be informed about the appointment of the commissioner. 6. Order 26, Rule 18 contemplates a notice after the appointment of a commissioner. There is no provision in the CPC which bars the Court from issuing a commission ex parte. The purpose is that as soon as commissioner is appointed the party should be intimated about the appointment of a commissioner so that the proceedings before the Commissioner may not go ex parte and may not be in violation of the rules of natural justice. If therefore, instead of a court the Commissioner informs the parties the notice given by him should be deemed to be sufficient compliance of Order 26, Rule 18. Civil P. C. 7. In *Maroli Achuthan Vs. Kunhipathumma*, it was laid down that:-- "The presence of parties is Imperative under Order 26, Rule 18. Hence, there must be a direction by the court of which notice has to be given to the parties or at least the Commissioner should issue notice to the parties calling upon them to appear for investigation. Though there is no direction by the court directing the

parties to appear under Order 26. Rule 18, if notice is issued to the parties by the Commissioner, that will be substantial compliance with the provisions of Order 26, Rule 18." 8. In Totaram Ichharam Wani Vs. Dattu Mangu Wani, the Bombay High Court while considering the power of the Court to appoint an ex parte commissioner during an injunction proceeding held that the Court had power to appoint a commissioner and authorise him to dig up the ornaments alleged to be in the defendant's land. 9. S KUPPUSWAMI Vs. COMMISSIONER OF Income Tax, MADRAS. OCTOBER 20, 1953., . It was laid down that:-- "The object of the local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its very peculiar nature can only be had on the spot There is no provision that a commission could be issued only after notice has been issued to the defendant and, therefore, an order appointing the commissioner without notice to him and hearing him is not illegal and opposite to the provisions of Order 26, Rule 18." 10. The Commissioner having given notice of his appointment to the parties there was substantial compliance of the provisions of Order 26. Rule 18 and the report of the Commissioner in these circumstances was admissible under Order 26. Rule 10. Civil P. C. 11. It would be material to mention that the report has been relied upon as a corroborative evidence. Both the Courts have given concurrent finding of fact on the basis of the oral evidence on record that the plaintiffs have been in possession and that the defendant had no title to the house in dispute. Even if the report was not admissible the findings of the Courts below based on oral evidence are not vitiated by any error of law. I have been taken through the record by the parties and I fully agree with the findings of the Courts below. 12. The appeal, therefore, has no force and is accordingly dismissed with costs. Appeal dismissed.