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RAM LAL & ORS.

v.

SALIG RAM & ORS.

(Civil Appeal No. 8285 of 2009)

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FEBRUARY 04, 2019

**[ABHAY MANOHAR SAPRE AND
DINESH MAHESHWARI, JJ.]**

Code of Civil Procedure, 1908:

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Or.XXVI, r.10(3) – Suit for prohibitory injunction – Dismissed by trial court – First Appellate Court framed additional issues as to whether the defendants had encroached over the land in question and to what extent – Remitted the additional issue to trial court for its finding by appointing Local Commissioner – Trial court after perusing the report of the Local Commissioner returned its finding on the additional issue in favour of plaintiffs – Thereafter First Appellate Court allowed the appeal and decreed the suit – In second appeal, High Court dismissed the suit on the ground that report of the Local Commissioner could not be relied upon as the report was suffering from lack of compliance of applicable instructions and there was no other evidence proving encroachment by defendants – On appeal, held: As per Or.XXVI, r. 10(3) where the Court is dissatisfied with the proceedings of a Local Commissioner, it can direct further inquiry – Therefore, proper course for the High Court was either to issue a fresh Commission or to remand the matter for reconsideration – Entire suit could not have been dismissed for an irregularity – High Court has also overlooked other evidence on record – For just and effectual determination of all the questions in issue, proper course is to issue a fresh Commission and for direction to the trial court to decide the entire suit afresh.

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Allowing the appeal, the Court

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HELD: 1. The First Appellate Court referred not only to the Commissioner's report but also to the oral and documentary evidence adduced by the parties. The First Appellate Court also observed that the Commissioner had made an exhaustive report after carrying out demarcation properly and there was nothing

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on record to show that the report could not be accepted. The First Appellate Court, though dealt with the matter in sufficient detail but appear to have not taken into consideration the method and procedure for carrying out such demarcation, with reference to the applicable instructions and guidelines, as issued by the Financial Commissioner under Section 100 of the Punjab Land Revenue Act, 1887, corresponding to Section 106 of the Himachal Pradesh Land Revenue Act, 1953. [Para 14][1071-E-F]

2. The procedure in relation to such Commission for local investigation is specified in Rules 9 and 10 of Order XXVI of CPC. As per clause (3) of Rule 10 of Order XXVI, where the Court is dissatisfied with the proceedings of such a Local Commissioner, it could direct such further inquiry to be made as considered fit. [Para 16] [1072-C]

3. If the report of the Local Commissioner was suffering from an irregularity, the proper course for the High Court was either to issue a fresh Commission or to remand the matter for reconsideration, but the entire suit could not have been dismissed for any irregularity on the part of Local Commissioner. Hence, the approach of High Court, where after rejecting the Commissioner's report, the High Court straightaway proceeded to dismiss the suit cannot be approved. The plaintiffs have been asserting encroachment by the defendants on their land and have also adduced oral and documentary evidence in that regard. The First Appellate Court had allowed the appeal and decreed the suit filed by the plaintiff not only with reference to the Commissioner's report but also with reference to the other evidence of the parties. The High Court appears to have overlooked the other evidence on record. [Para 17][1072-F-H; 1073-A-B]

4. For just and effectual determination of all the questions involved in the matter, the proper course is of issuing a fresh Commission and for direction to the Trial Court to decide the entire suit afresh on the issues as originally framed as also on the additional issues after taking the report of the Local Commissioner afresh and affording an opportunity to the parties to submit their objections, if any. [Para 18][1073-C]

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- A *State of H.P. v. Laxmi Nand and Others* 1992 (2) SLC 307– referred to.

Case Law Reference

1992 (2) SLC 307 referred to Para 8

- B CIVIL APPELLATE JURISDICTION: Civil Appeal No. 8285 of 2009.

From the Judgment and Order dated 06.11.2007 of the High Court of Himachal Pradesh, Shimla in R.S.A. No. 260 of 1995.

- C Mrs. Priya Puri, Ranjay Dubey, Ms. Vineeta, S.K. Puri, Advs. for the appellants.

Jetendra Singh, Ms. Manju Jetley, Advs. for the respondents.

The Judgment of the Court was delivered by

- D **DINESH MAHESHWARI, J.** 1. This appeal by special leave is directed against the judgment and decree dated 06.11.2007 in RSA No. 260 of 1995 whereby, the High Court of Himachal Pradesh set aside the judgment and decree dated 06.06.1995 passed by the District Judge, Bilaspur in Civil Appeal No. 154 of 1988 and consequently, dismissed the suit (No. 23/1 of 1986) filed by the plaintiffs-appellants for prohibitory injunction and in the alternative, for recovery of possession of the land in dispute.

- F 2. At the outset, it could be noticed for a brief outline of the matter that the plaintiffs-appellants had alleged attempted encroachment over the land in question by the defendants. The Trial Court dismissed the suit. However, the First Appellate Court remitted additional issues for finding by the Trial Court on the question as to whether defendants had encroached over the land in question and to what extent; and for this purpose, the Trial Court was directed to appoint a Local Commissioner and to decide the matter after inviting objections on the report of the Commissioner. After report by the Commissioner, the defendants-respondents raised objections which were rejected and thereafter, the Trial Court returned its findings on the additional issues in favour of the plaintiffs. Thereafter, the Appellate Court allowed the appeal and decreed the suit. However, in second appeal by the defendants, the High Court found that the Local Commissioner had not carried out demarcation in accordance with the applicable instructions; and while ruling that such

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report could not be relied upon and while further holding that there was no other evidence that the defendants had encroached over the land of the plaintiffs, proceeded to allow the appeal by its impugned judgment dated 06.11.2007. A

3. Thus, the question calling for determination in this appeal is as to whether High Court was justified in setting aside the decree of First Appellate Court on the ground that the Local Commissioner had not carried out demarcation in accordance with the applicable instructions? B

4. In view of the short point involved, dilation on all the factual aspect is not necessary. A brief reference to the relevant background aspects would suffice. The plaintiff-appellants had filed the suit leading to this appeal essentially with the averments that they were owners and in possession of the land comprised in Khasra No. 146, admeasuring 1-8 bighas at village Saunkhar, Pargna Ajmerpur, Tehsil Ghumarwin, District Bilaspur and the defendants-respondents, being the owners of neighbouring Khasra No. 148 had been seeking to take over possession and to raise construction on a part of their land. The suit was contested by the defendants by filing their written statement. The Trial Court framed the following issues for determination of the questions involved in the matter:- C D

“1. Whether the plaintiffs are owners in possession over the suit land as alleged?OPP E

2. If issue No. 1 is proved in affirmative, whether the defendants are interfering over the suit land as alleged? OPP

3. Whether the suit is not maintainable as alleged?OPD

4. Whether the suit is not within time as alleged? OPD F

5. Whether the suit is not properly valued as alleged? OPD

6. Relief.”

5. The Trial Court, by its judgment and decree dated 30.09.1988, while deciding issue No. 2 against the plaintiffs, proceeded to dismiss the suit. However, in the appeal preferred by the plaintiffs, the First Appellate Court, by its order dated 24.01.1991, remitted the following two additional issues for determination by the Trial Court:- G

“2-A. Whether the defendants encroached upon the suit land,

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A *if so, to what extent and manner and since when its effect?OPP*

2-B. In case issue No. 2-A is proved, whether the plaintiff is entitled to the alternative relief of possession? OPP”

B The Trial Court was also directed to appoint a Local Commissioner and after inviting objections in regard to the report of Commissioner, to record its findings and to return the same to the Appellate Court. The Trial Court, accordingly, appointed a Local Commissioner; invited objections on the Commissioner’s report; and after confirming the report, returned the findings on the aforesaid additional issues in
C favour of the plaintiffs on 25.09.1991.

6. After receiving findings of the Trial Court, the First Appellate Court took up Civil Appeal No. 154 of 1988 for final disposal. After examining the pleadings of parties as also the oral and documentary evidence adduced by them coupled with the report of Local
D Commissioner, the First Appellate Court came to the conclusion that the disputed construction had been raised over the suit land and the plaintiffs were entitled to the relief of possession as claimed in the alternative. The Appellate Court also rejected the submissions of the defendants-respondents that they were ready to pay the price of the land in question or to exchange the land. The First Appellate Court, therefore, reversed
E the decree of the Trial Court and decreed the suit as under:-

*“In view of my findings on point No. 1 being in favour of the appellants and as against the respondents, the appeal filed by the appellants is accepted. The suit of the appellants for possession as against the defendants is decreed for the land
F measuring 25 Biswansies as shown in Tatima Ext. C-2 attached with the Local Commissioner’s report. The decree for demolition is therefore, passed in favour of the appellants and as against the respondents for land shown in Tatima Ext. C-2, measuring 25 Biswansis which shall form part of the
G decree-sheet. Defendants are given two months time to remove the construction, failing which the plaintiffs shall be entitled to get the relief through process of Court. Decree-sheet be prepared accordingly. The appeal is allowed along with costs, throughout. The file be consigned to record room.”*

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7. The High Court admitted the second appeal against the decree so passed by the First Appellate Court on the following substantial questions of law:- A

“1. Whether the learned courts below were justified in rejecting the appellants’ objections on local commissioner’s report?” B

2. Whether the demarcation report of the Local Commissioner, without considering MUSABI and other revenue record, was not illegal?

3. Whether the learned District Judge was justified in remanding the case?” C

4. Whether the learned courts were justified in ignoring the defendants’ evidence which goes to the root of the case.”

8. The High Court, essentially with reference to the Division Bench decision of the Court in the case of **State of H.P. vs. Laxmi Nand and Others: 1992 (2) SLC 307**, observed that the demarcating officer was required to locate three permanent points on different sides of Khasra No. 146 that was to be demarcated; and when Local Commissioner did not fix such permanent points and there was no reference of Musabi or Momi in the report, the Local Commissioner had not carried out demarcation in accordance with the applicable instructions. For this reason, the High Court answered the relevant questions in favour of the defendants, while observing, *inter alia*, as under:- D E

“16.....The Local Commissioner did not fix three permanent points on three different sides of khasra No. 146. There is no reference of Musabi or Momi in report Ex. C-1. The demarcating officer, as per State of H.P. vs. Laxmi Nand and others (supra), is also required to record the statements of interested parties before taking of three permanent points to the effect that all of them have agreed and accepted the three points as permanent points on three different parts of the property. The lower appellant court as well as trial court have not considered the report of the Local Commissioner, as per law laid down by this Court. The Local Commissioner has not carried out demarcation in accordance with the instructions for carrying out the demarcation, therefore, demarcation report Ex. C-1 is not a legal piece of evidence, and can not F G H

- A *be relied for decreeing the suit of the plaintiffs- respondents. There is no other evidence on record to show that the appellants- defendants have encroached any portion of khasra No. 146 owned and possessed by the respondents- plaintiffs. The learned lower appellate court has erred in relying the Local Commissioner's report Ex. C-1 for decreeing*
- B *the suit of the respondents- plaintiffs, therefore, the impugned judgment and decree are liable to be set-aside. The substantial questions of law No. 1 and 2 are answered in favour of the appellants- defendants and against the respondents- plaintiffs."*
- C 9. After answering the aforesaid questions in favour of the defendants and while observing that there was no other evidence on record to show that the defendants had encroached over any portion of Khasra No. 146, the High Court proceeded to allow the appeal and to dismiss the suit.
- D 10. Assailing the impugned judgment of the High Court, learned counsel for the plaintiff-appellant has strenuously argued that the demarcation was carried out by the Local Commissioner in the presence of parties and after hearing them; and his report, when accepted by the Trial Court and the First Appellate Court, could not have been discarded
- E by the High Court only on the ground of the so-called want of fixing three permanent points. Learned counsel has also argued that apart from the report of Local Commissioner, there had been oral and documentary evidence on record to prove the encroachment by the defendants and as such, the High Court had been in error in assuming that there was no other evidence besides the Local Commissioner's report on the question
- F of encroachment by the defendants.
- G 11. *Per Contra*, learned counsel for the defendants-respondents, while referring to the decision in *Laxmi Nand* (supra), has contended that the Local Commissioner having not carried out demarcation in accordance with law, the report in question was not a legal piece of
- H evidence and could not have been relied upon. According to the learned counsel, there being no other evidence on record to show that the defendants have encroached over any portion of Khasra No. 146, the High Court has rightly allowed the second appeal and dismissed the baseless suit filed by the plaintiffs-appellants.

12. Having given anxious consideration to the rival submissions, we are clearly of the view that the impugned judgment, on its final conclusion for dismissal of the suit cannot be sustained and the entire matter deserves to be remanded to the Trial Court for consideration afresh. A

13. As noticed, in essence, the case of the plaintiffs has been that the defendants were interfering with, and encroaching over, a part of their land comprised in Khasra No. 146. The Trial Court dismissed the suit but the First Appellate Court, at the initial stage, found it just and proper that further issues be determined on the question/s as to whether the defendants had encroached over the suit land and, if so, the extent and the manner thereof. The Trial Court was further directed to appoint a Commissioner and to hear the parties on objections, if any, and then to return the findings on additionally framed issue Nos. 2-A and 2-B. The Trial Court did appoint a Commissioner who carried out demarcation; the objections to his report were rejected; and thereafter, the Trial Court returned the findings in favour of the plaintiffs. B C D

14. After receiving findings from the Trial Court, the First Appellate Court decided the appeal by its detailed judgment dated 06.06.1995. The First Appellate Court referred not only to the Commissioner's report but also to the oral and documentary evidence adduced by the parties. The First Appellate Court also observed that the Commissioner had made an exhaustive report after carrying out demarcation properly and there was nothing on record to show that the report could not be accepted. The First Appellate Court, though dealt with the matter in sufficient detail but appear to have not taken into consideration the method and procedure for carrying out such demarcation, as delineated by the High Court of Himachal Pradesh in the case of *Laxmi Nand* (supra) with reference to the applicable instructions and guidelines, as issued by the Financial Commissioner under Section 100 of the Punjab Land Revenue Act, 1887, corresponding to Section 106 of the Himachal Pradesh Land Revenue Act, 1953 (Himachal Pradesh Act No. 6 of 1954). E F

15. It appears from the observations made by the High Court in the present case that the Local Commissioner omitted to scrupulously follow the applicable instructions for carrying out such demarcation and particularly omitted to fix three reference points on different sides of the land in question. However, the report made by the Local Commissioner was accepted by the Trial Court as also by the First Appellate Court. G H

- A The question is: If the Local Commissioner's report was suffering from want of compliance of the applicable instructions, what course was to be adopted by the High Court?

16. An appropriate answer to the question aforesaid is not far to seek. In the course of a civil suit, by way of incidental proceedings, the Court could issue a Commission, *inter alia*, for making local investigation, as per Section 75 of the Code of Civil Procedure ("the Code" hereafter). The procedure in relation to such Commission for local investigation is specified in Rules 9 and 10 of Order XXVI of the Code. Suffice it to notice for the present purpose that, as per clause (3) of Rule 10 of Order XXVI, where the Court is dissatisfied with the proceedings of such a Local Commissioner, it could direct such further inquiry to be made as considered fit. This clause (3) of Rule 10 of Order XXVI of the Code reads as under:-
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- "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."*
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17. The fact that the Local Commissioner's report, and for that matter a properly drawn up report, is requisite in the present case for the purpose of elucidating the matter in dispute is not of any debate, for the order dated 24.01.1991 passed by the First Appellate Court having attained finality whereby, additional issues were remitted for finding on the basis of Local Commissioner's report. In the given set of facts and circumstances, we are clearly of the view that if the report of the Local Commissioner was suffering from an irregularity i.e., want of following the applicable instructions, the proper course for the High Court was either to issue a fresh commission or to remand the matter for reconsideration but the entire suit could not have been dismissed for any irregularity on the part of Local Commissioner. To put it differently, we are clearly of the view that if the Local Commissioner's report was found wanting in compliance of applicable instructions for the purpose of demarcation, it was only a matter of irregularity and could have only resulted in discarding of such a report and requiring a fresh report but any such flaw, by itself, could have neither resulted in nullifying the order requiring appointment of Local Commissioner and for recording a finding after taking his report nor in dismissal of the suit. Hence, we are unable to approve the approach of High Court, where after rejecting the Commissioner's report, the High Court straightway proceeded to dismiss
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the suit. The plaintiffs have been asserting encroachment by the defendants on their land and have also adduced oral and documentary evidence in that regard. As noticed, the First Appellate Court had allowed the appeal and decreed the suit filed by the plaintiff not only with reference to the Commissioner's report but also with reference to the other evidence of the parties. Unfortunately, the High Court appears to have overlooked the other evidence on record.

18. In the totality of circumstances, in our view, for just and effectual determination of all the questions involved in the matter, the proper course is of issuing a fresh Commission and for direction to the Trial Court to decide the entire suit afresh on the issues as originally framed as also on the additional issues after taking the report of the Local Commissioner afresh and affording an opportunity to the parties to submit their objections, if any.

19. Accordingly, this appeal is allowed in the manner that the judgment and decree dated 06.11.2007 in RSA No. 260 of 1995 is set aside but the said appeal is disposed of by setting aside the judgment and decree of the subordinate Courts; and the suit filed by the plaintiffs-appellants is restored for reconsideration by the Trial Court keeping in view the observations and requirements foregoing.

20. The parties through their respective counsel shall stand at notice to appear before the Trial Court on 05.03.2019. The Trial Court shall be expected to issue a fresh Commission immediately and after examining the objections, if any, to the Commissioner's report, to dispose of the suit afresh expeditiously and preferably within a period of three months from the date of appearance of the parties. Costs of the proceedings shall follow the final decision of the suit.