

Ram Charan and ors. Vs. Murli and ors.

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Court : Allahabad

Decided On : Feb-05-1975

Reported in : AIR1975All399

Judge : T.S. Misra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 26, Rules 8 and 9 - Order 39, Rule 7

Appeal No. : Second Appeal No. 4241 of 1965

Appellant : Ram Charan and ors.

Respondent : Murli and ors.

Advocate for Def. : Kamta Natha and ;S.N. Prasad, Advs.

Advocate for Pet/Ap. : V.K.S. Chaudhary, Adv.

Disposition : Appeal allowed

Judgement :

T.S. Misra, J.

1. This appeal by the defendants arises in the following circumstances. The plaintiffs respondents filed the suit out of which this appeal has arisen for an injunction restraining the defendants from interfering with the possession of the

plaintiffs over the alleged sahan land marked by letters GLMND in the plan given at the foot of the plaint and not to demolish any constructions of the plaintiffs existing on the said land and not to fix any door or window opening towards the said land. They also claimed damages to the tune of Rs. 25/- on account of the alleged demolition of a wall shown by letters XY in the site plan. The allegations of the plaintiff were that they were the owners in possession of the said land GLMND which was their sahan land and that they had their cattle troughs, pegs, kolhu and trees on the said land. They had also their wall at the place XY which was illegally demolished by the defendants. They alleged that the defendants had no right, title or interest in any part of the said land and were not entitled to use the same in any manner whatsoever.

2. The suit is resisted by the defendants on a variety of grounds. They alleged, inter alia, that they had built their house in their agricultural plots of land and had been using the land in dispute lying towards the west of their house as sahan. They denied that the land in dispute was the sahan of the plaintiffs. They further denied that they had demolished the alleged wall at the place XY. They claimed that the cattle troughs, pegs, trees and the alleged kolhu belonged to them and not to the plaintiffs. They also raised the plea that the suit was barred by time and also by the principles of estoppel.

3. On the motion of the plaintiffs the trial court granted a temporary injunction against the defendants and also issued a commission with the direction to visit the spot, to prepare a map on scale of the plaintiffs' house, the land in suit and to show if there existed any construction over it. The commissioner was also directed to mark the place where the plaintiffs alleged their demolished constructions existed. Pursuant to this order the commissioner visited the spot, prepared a site plan paper No. 66 Ka Al and submitted his report 14-C.

4. On the pleadings of the parties the trial Court framed as many as eight issues. Both the parties to the suit adduced oral evidence in support of their respective contentions. On a consideration of the evidence on record the trial court held that the suit land was neither the sahan land of the plaintiffs nor was it appurtenant to the plaintiffs' house and that it had not vested, in the plaintiffs. It also held that the

defendant had not taken permission in respect of the sahanland from the zamindar and they had no interest in it. It, however, held that the defendants had demolished, the wall of the plaintiffs SY and were liable to pay Rs. 25/- as damages. The pleas with regard to limitation and estoppel were repelled. On these findings the suit was dismissed. Aggrieved by that decision the plaintiffs preferred an appeal. The appellate court below relying on the observations of the commissioner and his report that the houses of the defendants were of recent constructions and the chabutra of the defendants was 'quite new' as also on circumstance that the defendants had their ancestral house at another place in the village while the plaintiffs had no other house except the house in which they were living and which adjoined the land in suit and that the situation of the house of the two parties in relation to the land in dispute showed that the land in suit could not have been used by the defendants reversed the findings recorded by the trial Court and held that the plaintiffs' case of using the land in dispute as their sahan darwaza was clearly proved as against the defendants. The appellate court below also held that the plaintiffs had exceeded their rights in making the wall on other persons' land and were, therefore, not entitled to any damages. The appeal was, therefore, partly allowed and the suit was decreed for permanent injunction restraining the defendants from interfering with plaintiffs' user of the land in suit as their sahan only on that part of it which does not lie to the west of the imaginary line NX as shown in the commissioner's map. The suit with regard to relief Ja was dismissed. Aggrieved, the defendants have now come up to this Court on second appeal.

5. For the appellants, it was urged that the appellate court below had erred in placing reliance on the report of the commission (paper No. 14-C). The objection was that the order appointing the commissioner being ex parte and without giving notice to the defendants appellants was violative of Rule 18 of Order 26, Civil Procedure Code. With regard to the report, the objection was that the commissioner had exceeded his authority while giving his opinion about the age of the constructions made by the defendants.

6. It is not disputed that the order appointing the commissioner was passed ex parte on 24th January, 1964. The suit was filed on 23rd Jan. 1964. On that date

the plaintiffs filed an application 6-C for appointment of a commissioner for inspection of the land in dispute and to submit his report with regard to the facts stated therein. This application was put up before the trial Court on 24th January, 1964 and was allowed. The trial Court appointed Mr. Sri Ram Pathak Vakil as commissioner and directed him to visit the spot, prepare a map on scale of the plaintiffs' houses, the land in suit, show if there existed any constructions on it and mark the place where the plaintiffs alleged his demolished constructions existed. The commissioner was also directed to serve the defendants 1 and 2 with the order and notice of injunction and to submit his report by 3rd February, 1964.

7. Rule 18 of Order 26, Civil Procedure Code provides that where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders and that where all or any of the parties do not so appear, the Commissioner may proceed in their absence. Rule 9 of Order 26 makes provision for local investigation it provides 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. Sub-clause (2) of Rule 10 of Order 26 provides that the report of the Commissioner and the evidence taken by him but not the evidence without the report shall be evidence in the suit and shall form part of the record but the court or with the permission of the court any of the parties to the suit may examine the Commissioner personally in open court touching any of the matters referred in his report, or as to his report, or as to the manner in which he has made the investigation. Under Rule 7 of Order 39, Civil Procedure Code the Court may on the application of any party to a suit and on such terms it thinks fit make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein. Rule 8 of Order 39, Civil Procedure Code provides that an application by the plaintiff for an order under Rule 6 or Rule 7 may be made after notice to the defendants at any time after institution of the suit, Thus there are two provisions for making local investigation. Under Rule 9 of Order 26 local investigation may be ordered to be

made by a commission where the court deems it to be requisite or proper for the purposes of elucidating any matter in dispute. Under Rule 7 of the Order 39 the court may on the motion of any party to the suit make an order or inspection of any property which, is the subject-matter of such suit or to which any question may arise therein. In the instant case, an application was moved by the plaintiffs for inspection of the sahan in dispute and the houses of the plaintiffs and the defendants and to prepare a site plan relating thereto. On this application the trial court passed the order appointing a commissioner to visit the spot, prepare a map on scale of the plaintiffs' house and the land in suit and to show if there existed any constructions over it, and also to mark the place where the plaintiffs alleged their demolished constructions existed. This order is obviously covered by Rule 7 of Order 39 and not by Rule 8 or Rule 9 of Order 26, Civil Procedure Code. A combined reading of Rule 7 and Rule 8 of Order XXXIX, Civil Procedure Code would make it clear that it is not obligatory on the part of the Court to issue notice to the defendants before making an order under Rule 7. This is borne out from the expression 'may' used in Rule 8. It is well settled that in construing a power the Court will read the word 'may' as 'must' when the exercise of the power will be in furtherance of the interest of a third person for securing which the power was given. And, as was held in *Province of Bombay v. Khushaldas* : [1950]1SCR621 enabling words are always potential and never in themselves significant of any obligation. The word 'may' used in Rule 8 of Order 39 is only an enabling word and is in itself not significant of any obligation. In appointing a commissioner for making inspection of any property which is the subject-matter of the suit or as to which any question may arise in the suit the court has to bear in mind the urgency of the situation and the necessity for passing the interim order to protect the rights of the parties or to secure the interests of justice. In such matters the court has to exercise its discretion whether to appoint a commission ex parte without notice to the opposite party with regard to any of the matters mentioned in Rule 7 of Order 39. If the Court exercises its discretion to issue a commission for inspection of any property which is the subject-matter of the suit or as to which any question may arise therein, without giving notice to the opposite party the order would not be illegal. That being so, the order passed by the trial Court issuing commission for the purposes referred to above was not illegal.

8. The submission on behalf of the appellants with regard to the report of the commissioner was that the commissioner had exceeded his authority by giving his opinion about the age of the house of the defendants and their chabutra. The commissioner was appointed on the application of the plaintiffs. The plaintiffs had not asked in their application 6-C for a report about the age of the constructions made by the defendants. The trial Court had also not directed the commissioner to submit his report with regard to the age of the constructions made by the defendants. The commissioner had, therefore, no authority to give his opinion about the age of the defendants' constructions. The appellants were, therefore, justified in contending that the commissioner had exceeded his power and authority while opining about the age of the constructions of the defendants. The appellate court below while reversing the findings received by the trial court relied on the report of the commissioner. It observed:--

'According to commissioner, defendants' houses and chabutra were of recent construction, while plaintiffs' houses were admittedly very old. If defendants had no houses at this place till recently, it was highly unlikely for the defendants to be tying their cattle and otherwise using his land when they were living far away from it.'

Thus, the opinion of the Commissioner with regard to the age of the defendants' houses and chabutra weighed with the appellate court below in coming to the conclusion that the land in dispute was the sahan of the plaintiffs. The Commissioner had in his report opined that the houses of the defendants were 'of recent construction' and the chabutra of the defendants was 'quite new'. This opinion was accepted and relied upon by the appellate court below. The commissioner was, however, not called upon to give this opinion. A report with regard to the age of a building cannot straightway be accepted nor can it be a conclusive proof of the age of the building. It is merely one of the pieces of evidence amongst other evidence led by the parties. That apart, the commissioner gave no reasons in support of his aforesaid opinion. He was also not examined in the case as a witness to support his aforesaid opinion with regard to the age of the constructions of the defendants. It was, therefore, not open to the appellate court below to rely on that part of the opinion of the commissioner. The basic questions,

in view of the respective contentions of the parties with regard to the land in dispute, the plaintiffs contending that it was their sahan land and the defendants claiming the same to be their sahan land, thus are whether the houses of the defendants were in existence on 1st July, 1952, and if so what portion of the disputed land is appurtenant to their houses and what portion of the said land is appurtenant to the plaintiffs' houses and whether the plaintiffs or the defendants have been in possession of the land in dispute or any portion thereof. The appellate court below has not approached the case in its correct perspective and has erred in relying on the aforesaid opinion of the commissioner.

9. The learned Counsel for the appellants further urged that the courts below had erred in relying on paper No. 33A1. The submission was that the Court should have compared the thumb impression appearing on the said paper with the, other thumb impression of Murli on the record. In my view, this contention has no force. Murli had denied his thumb impression on paper No. 33A1. There was no convincing evidence on the record to establish that paper No. 33A1 bore the thumb mark of Murli. The court cannot assume the role of an expert and compare the disputed thumb impression with the other thumb impression of Murli on the record. The court below was, therefore, justified in not placing reliance on the said document.

10. In view of the pleadings of the parties it was necessary for the trial court to frame the following issue in the case:--

'Whether the defendants' houses in question marked by letters DSTB and ABXY as well as the chabutra BSTW were in existence on 1st July, 1952 if so, what portion of the disputed land is appurtenant to the said houses of the defendants and what portion of the said land is appurtenant to the plaintiffs' houses ?

A re-trial of the suit is, therefore, necessary.

11. In the result the appeal is allowed, the decree passed by the appellate court below is set aside, the decree passed by the trial court is also set aside, the suit is remanded to the trial court with the direction to re-admit the suit to its original number, frame the aforesaid issue and re-try the suit giving an opportunity to the

parties to the suit to adduce further evidence, if any, and decide the suit on the basis of the evidence already recorded and the evidence which the parties may further produce. The parties shall bear their own costs in this Court.

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