

HIGH COURT OF MADHYA PRADESH: JABALPUR
SINGLE BENCH:

HON. SHRI JUSTICE A.K. SHRIVASTAVA

SECOND APPEAL NO. 934/2010

..... Appellant : Smt. Padma, W/o Keshav
Prasad Brahmin, aged about
49 years, R/o Tikuriya Mohalla,
Panna, Tehsil and District Panna
(M.P.)

Versus

..... Respondents : 1. Rambihari S/o Kishori Soni,
aged about 50 years, R/o Kalinger,
Tehsil Narainee, Distt. Banda (U.P.)
at present residing at Brajpur,
Tehsil & District Panna (M.P.)

2. State of M.P. through Collector,
Panna (M.P.)

.....
Appellant - Shri Ravish Agrawal, learned senior
Advocate with Shri Abhishek
Arjaria, Advocate

Respondent No.1 - Shri P.S. Gaharwar, Advocate.

Respondent No.2 - Shri Anand Nema, Panel Laywer

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O R D E R

(19/05/2011)

1. This second appeal has been filed at the instance of the plaintiff who has lost from both the courts below as her suit for declaration, injunction and recovery of possession has been dismissed by the learned Trial Court and the

appeal which was preferred by her has been dismissed by the impugned judgment and decree.

2. The facts necessary for disposal of this appeal lie in narrow compass. Suffice it to say that a suit for declaration of Bhumi-swami rights and injunction in respect of certain agricultural land, the description whereof has been mentioned in the plaint has been filed by the plaintiff. According to the plaintiff, she is the allottee from the State Government and the suit property has been allotted to her vide allotment order Exhibit P/1. According to the plaintiff, the suit property which has been allotted to her has been encroached upon by the defendant no.1, hence a suit for declaration, injunction and recovery of possession has been filed by her.

3. The defendant no.1 filed written statement and denied the plaint averments and has also filed counter claim stating therein that 0.28 hectares of land has been allotted to him by the State Government vide order dated 30.09.92 and since the plaintiff is trying to interfere in his possession, hence it has been prayed that plaintiff should not interfere in 0.28 hectares of land which has been allotted to him and the

order dated 24.3.84 passed in Case no. 19B 82-83 dated 24.3.84 passed in favour of plaintiff be quashed.

4. On the basis of the pleadings placed on record, the learned Trial Court framed necessary issues and after recording evidence of the parties, dismissed the suit of the plaintiff. The appeal which was filed has also been dismissed by the impugned judgment and decree.

5. In this manner, this second appeal has been filed by the plaintiff.

6. This second appeal was admitted on the following substantial question of law:-

“Whether the judgment and decree passed by learned two Courts below is vitiated in absence of appointing a Court Commissioner to identify and demarcate the suit property?”

7. The contention of Shri Arjaria, learned counsel for the appellant is that on bare perusal of the order dated 25.3.78 passed by Additional Commissioner, Sagar it is as clear as a noon day that Khasra No.41/1 is a big survey number comprising of area 5.371 hectares and out of this area 0.100 hectares land has been allotted to the plaintiff for her

residence under the Madhya Pradesh Gramo Me Ki Dakhal Rahit Bhoomi (Vishesh Upabandh) Adhiniyam, 1970. Learned counsel further submits that in the same order it has been mentioned by the Additional Commissioner that the four boundaries of the patta given to the plaintiff of Survey No.41/1 are mentioned in it, but if the written statement of the defendant particularly paragraph 25 is taken into account in proper perspective, it would reveal that the land given on patta to the defendant is adjoining to the plaintiff's land since it has been so admitted by the defendant and the defendant has also shown and pleaded the four boundaries in this para. By placing reliance on the decision of the Supreme Court in **Firm Srinivas Ram Kumar Vs. Mahabir Prasad and others AIR 1951 SC 177,** it has been submitted that since the four boundaries are not in dispute and it is also not in dispute that on account of admission of the defendant in the written statement that the suit property is adjoining to his land therefore, the suit of plaintiff should be decreed. But whether the suit property is a part of Survey No.41/1 or is the part of Survey No.117/1 and 117/2 learned counsel submits that as per defendant's own case, a patta was given to him by the State

Government of 0.28 hectares land situated in two survey numbers 117/1 area 0.18 hectare and 117/2 area 0.10 hectare (in total 0.28 hectare) which is adjoining to the plaintiff's land and therefore, it was incumbent upon the learned Trial Court to appoint a Commissioner to ascertain which portion has been allotted to the plaintiff and defendant no.1 by the State Government. Learned counsel submits that on bare perusal of the written statement as well as the documents placed on record it is proved that plaintiff is having a valid patta in her favour granted by the State Government and for its demarcation a Commissioner ought to have been appointed by the learned Trial Court. In support of his contention, learned counsel has placed heavy reliance on **Shreepat Vs. Rajendra Prasad and others(2000) 6 Supreme 389** and also in **Haryana Wakf Board Vs. Shanti Shaup and others (2008)8 SCC 671.** Learned counsel has also placed reliance on the Division Bench judgment of this Court in **Keshav Singh Vs Dhantobai and others 2009(2) MPWN 2** and a Single Bench decision of this Court in **Prem Bai and others Vs. Ghanshyam and others 2010(3) M.P.L.J. 345.**

9. On the other hand, Shri Gaharwar, learned counsel appearing for the respondent no.1 argued in support of the impugned judgment and decree and submitted that patta of the plaintiff was cancelled and in this regard learned counsel has invited my attention to the order of Settlement Officer, Panna dated 20.7.94 (Exhibit D/6) in Appeal Case No. 111/A-6A/1993-94 (Prabhu Dayal Soni Vs. Smt. Padmawati W/o Keshav Prasad) and therefore there is no necessity to issue a Commission to inspect the suit property because the patta on the basis of which plaintiff has filed her suit is no more in existence.

10. In reply to the contention it has been put forth by Shri Arjaria, learned counsel for the appellant that in the order of Settlement Officer dated 20.7.94 (Exhibit D/6) no where the said authority has set aside the patta granted in favour of plaintiff but, on bare perusal of the said order, it would become luminously clear that the case was remanded to the Assistant Land Records in order to ascertain that possession of which specific portion was given to Prabhu Dayal, appellant of that case and Smt. Padmawati, respondent of that case and who is plaintiff here in this suit.

Learned counsel further submits that even in the order of Additional Commissioner (Exhibit P/7) dated 25.3.98, nowhere the validity of the patta granted in favour of the plaintiff was in question because the plaintiff filed appeal against the order of Tehsildar, Panna dated 30.9.92 granting patta in favour of defendant which was allowed by the Sub Divisional Officer vide order dated 27.1.1995 (Exhibit P/6) and which was set aside in revision filed by the defendant before Additional Commissioner vide order dated 25.3.98 (Exhibit P/7). Thus in these proceedings validity of the patta granted to the defendant was in question and not the validity of the patta granted to the plaintiff and therefore, since the plaintiff is having patta (Exhibit D/1) in her favour allotting 0.100 hectares of land to her by the State Government, therefore, the spot inspection was quite necessary.

11. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be allowed.

Regarding substantial question of law framed:-

12. On bare perusal of the written statement particularly paragraph 25 since the defendant no.1 has specifically admitted that the suit land is adjoining to his land, therefore,

this admission of defendant is the turning point of the case and has lighten the burden of proof on the plaintiff upto certain extent. In the same para of the written statement, the four boundaries have also been described by the defendant no.1. Hence the judgment of the two Courts below holding that plaintiff's patta is uncertain and is not having any four boundaries etc. is in contravention to the defendant's own admission. The decision of **Firm Srinivas Ram Kumar (supra)** (para 8) squarely applicable in the present case.

13. I do not find any merit in the contention of learned counsel for the respondent that patta granted in favour of plaintiff has been cancelled by order dated 20.7.94 (Exhibit D/6) of the Settlement Officer because in this order the appellant was one Prabhu Dayal and plaintiff of this suit Smt. Padmawati was the respondent and there was dispute between them that portion of which area of the land they are possessing by virtue of the patta given to them since Survey No.41/1 compromised of huge land. Needless to say 0.100 hectare land has been allotted to the plaintiff by the State Government from this survey number only. By this order (Exhibit D/6) dated 20.7.94 the case was only remanded to

the Assistant Land Records by setting aside its order dated 25.11.1992 and nothing more. In the entire order, nowhere the patta granted to the plaintiff has been cancelled. Since the defendant himself has admitted the existence of the suit property granted to the plaintiff, according to me, because the suit property is adjoining to defendant's land, therefore, in order to ascertain the identity of the suit property, the appointment of Commissioner was quite necessary. According to me, even if no application was submitted to get the suit property inspected and demarcated by either of the parties it was the bounden duty of the Court itself to appoint a Commissioner in order to ascertain and to identify the suit property so that the grain may be taken out from the chaff. The decisions of **Shreepat (supra), Haryana Wakf Board (supra) and Keshav Singh (supra)** placed reliance by shri Arjaria are applicable in the present case.

14. The substantial question of law is thus answered in favour of the plaintiff-appellant and against the defendant no.1-respondent no.1 that the judgment of the two Courts below is vitiated in absence of appointing any Commissioner to get the suit property demarcated for its identification.

15. The judgment and decree of the two Courts below are hereby set aside and the case is remanded to the learned Trial Court to appoint a Court Commissioner not below to the rank of Tehsildar to get the suit property identified and demarcated and to submit a report. After inspecting, demarcating and identifying the suit property, a report shall be submitted by the Court Commissioner in the Trial Court and the parties shall be free to file objections on his report. They shall also be free to cross examine the Court Commissioner upon his report. The Trial Court shall thereafter pass a fresh judgment on all the issues. It is however made clear that on a limited point only the case is being remanded to the learned Trial Court and it is made clear that it shall not permit either of the parties to adduce any other evidence and shall confine the trial only on the limited point in the light of this order. The parties are hereby directed to remain present in the Trial court on 4.7.2011. On this date, the learned Trial Court shall appoint a Commissioner. The judgment may be passed by learned Trial Court on or before 30.11.2011. The cost of the Commission shall be borne equally by the parties.

16. Resultantly, this appeal succeeds and is hereby allowed and the impugned judgment and decree passed by the learned two Courts below are hereby set aside and the case is remanded back to the learned Trial Court . Looking to the facts and circumstances of the case, parties are hereby directed to bear their own costs.

{A.K. Shrivastava}
Judge

rao

Second Appeal No. 934/201019.05.2011

Shri Ravish Agrawal, learned senior counsel with Shri Abhishek Arjaria, learned counsel for the appellant.

Shri P.S. Garharwar, learned counsel for the respondent no.1

Shri Anand Nema, learned Panel Lawyer for the respondent no.2/State.

Learned counsel for the appellant is heard on the question of admission.

This second appeal is admitted on the following substantial question of law:-

“Whether the judgment and decree passed by learned two Courts below is vitiated in absence of appointing a Court Commissioner to identify and demarcate the suit property?”

Shri Gaharwar, learned counsel accepts notice on behalf of respondent no.1.

At the request of learned counsel for the parties, the appeal itself is heard finally.

Order dictated. Signed and dated separately.

(A.K. SHRIVASTAVA)
JUDGE

