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HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No. 471 of 2014**

Prem Kumar Sharma, son of late Vedprakash Sharma,
 aged about 74 years, R/o Near Sheetla Mandir Aminpara,
 Police Station Purani Basti, Tahsil, Civil and Revenue
 District Raipur (C.G.) Plaintiff

---- Petitioner**Versus**

1. Deepak Singh @ Ramesh Thakur,
2. Rajesh @ Gudda Thakur,

Both son of Gajadhar Singh Thakur, R/o Near Chhattisgarh
 Construction, Lakhenagar Chowk, Police Station Purani
 Basti, Tahsil, Civil and Revenue District Raipur (C.G.)
Defendants

---- Respondents

For Petitioner : Mr. Malay Kumar Bhaduri, Advocate.
 For Respondents: Mr. Manoj Paranjpe, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****30/09/2016**

(1) This is a writ petition filed under Article 227 of the Constitution of India questioning the order dated 29.04.2014 passed by the trial Court in Civil Suit No.140-A/2011, by which the said Court has rejected the application under Order 26 Rule 9 of the Code of Civil Procedure (henceforth 'CPC') filed by the petitioner/plaintiff for appointment of commissioner.

(2) The plaintiff filed a suit for recovery of possession stating inter alia that he is the owner of the suit land bearing Khasra

No.1142 and the defendants have encroached over the part of his land i.e. area ad-measuring 1440 sq. ft. for which he is entitled for recovery of possession.

(3) Defendant No.1 has filed his written statement stating inter alia that he has made construction on the land bearing Khasra No.1141 and Khasra No.2032 and as such, he has not made construction on the land bearing Khasra No.1142.

(4) By the impugned order, the trial Court has held that identity of the land is in dispute but declined to grant application filed by the petitioner/plaintiff under Order 26 Rule 9 of the CPC holding that plaintiff has already closed his case & question of identity of the land can be established by adducing evidence of the plaintiff.

(5) Shri Malay Kumar Bhaduri, learned counsel appearing for the petitioner would submit that the trial Court has committed jurisdictional error in rejecting the application filed by the petitioner/plaintiff under Order 26 Rule 9 of the CPC after having held that there is dispute of identity of the land and without appointing commissioner no effective decree can be passed.

(6) On the other hand, Shri Manoj Paranjpe, counsel for the defendants would support the order impugned.

(7) I have heard learned counsel appearing for the parties and perused the order impugned with utmost circumspection.

(8) A bare perusal of the plaint would show that plaintiff has described the suit land as Bhumi Khasra No.1142 and he has stated that the defendants have encroached over the part of his land i.e. area ad-measuring 1440 sq. ft. whereas the defendant

No.1 in his written statement pleaded that defendant has made construction on the land bearing Khasra No.1141 and Khasra No.2032.

(9) The trial Court, while rejecting the application filed by the petitioner, has clearly recorded a finding that there is dispute as to the identity of the land between the parties but rejected the application holding that question of identity of the land can be established by adducing evidence of the plaintiff.

(10) The Division Bench of the High Court of Madhya Pradesh in case of **Durga Prasad Vs. Parveen Foujdar & others**¹ has held that in absence of agreed map; appointment of commissioner is necessary. It was held as under:-

“25. In cases where there is a dispute as to encroachment, the fact whether there is such an encroachment or not cannot be determined in the absence of an agreed map, except by the appointment of a Commissioner under Order 26, Rule 9 of the CPC. ON 15.09.1996 the plaintiff, accordingly, applied for the issue of a commission to the Director of Land Records for a theodolite survey of the plaintiff's leasehold area. The court by its memo dated 11-10-1966 enquired from Director of Land Records whether he was prepared to undertake the work. The Director of Land Records by his memo dated 01-12-1966 signified his willingness. The Collector's memo dated 19-04-1969 shows that on the dates fixed for the purpose, neither the plaintiff nor any person authorized by him was present at the site.

1 1975 MPLJ 801

For reasons best known to the plaintiff, he did not press the application for commission vide order sheet dated 02-01-1979. The court accordingly, by its memo dated 10-01-1970 recalled the writ of commission issued to the Director of Land Records. The plaintiff, therefore rested his case on the plaint map, Ex.P-1, and his oral evidence. It is needless for us to stress that no finding as to the alleged encroachment can be reached on the oral evidence adduced by the plaintiff. The plaintiff has not examined any witness to prove that he had surveyed the area, and found on actual measurements that the pit EFGH marked in the plaint map, Ex.P-1, fell within his leasehold area.”

(11) The Supreme Court in case of **Shreepat Vs. Rajendra Prasad & others**² has held as under:-

“3. The principal contention raised by learned Counsel for the Appellant is that though there was a serious dispute with regard to identity of the land in dispute, whether the land in dispute formed part of Khasra No.257/3 or Khasra No.257/1, the Courts below did not get identity established and decreed the suit of the Respondent only on the basis of oral evidence which was not sufficient for the purpose of establishing the identity of the land in dispute at the spot.

4. In our opinion, this contention is correct. Since there was a serious dispute with regard to the area and boundaries of the land in question, especially with regard to its identity, the courts below, before decreeing the suit should have got the identity established by issuing a survey commission to

locate the plot in dispute and find out whether it formed part of Khasra No.257/3 or Khasra No.257/1. This having not been done has resulted in serious miscarriage of justice. We consequently allow the appeal, set aside the order passed by the courts below as affirmed by the High Court and remand the case to the trial Court to dispose of the suit afresh in the light of the observations made above and in accordance with law.”

(12) Likewise, the Supreme Court in the case of **Haryana Waqf Board Vs. Shanti Sarup and others**³ has held as under:-

“6. It is also not in dispute that even before the appellate court, the appellant Board had filed an application for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the Local Commissioner should be appointed for the purpose of demarcation in respect of the suit land.”

(13) Since there is serious dispute between the parties with regard to boundary/area of the scheduled suit land specially with regard to identity of the land, therefore, the trial Court should have got the identity of the land established by appointing local commissioner under Order 26 Rule 9 of the CPC and the same has resulted into serious miscarriage of justice and, therefore, this Court is of the opinion the impugned order is liable to be and is hereby set aside. The application filed by the plaintiff before the

³ (2008) 8 SCC 671

trial Court under Order 26 Rule 9 of the CPC is allowed with the following directions:-

- (i) The Revenue Inspector of the concerned circle is appointed as local commissioner. However, the trial Court is at liberty to appoint/replace/substitute another Revenue Inspector, if occasion so arises.
- (ii) The trial Court will issue writ of commission to the concerned Revenue Inspector to submit his report regarding boundary or identity of the suit land within 30 days from the date of receipt of writ of commission.
- (iii) After receipt of the report of the local commissioner, the parties will be entitled to proceed in accordance with law.
- (iv) It is further directed that the trial Court would complete the hearing of the suit on or before 5th December, 2016.
- (v) The trial Court is directed to proceed further only after the order of this Court is complied with.

(14) Accordingly, the writ petition is allowed to the extent indicated above.

(15) Certified copy, today.

Sd/-

(Sanjay K. Agrawal)

Judge

D/-