

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CMPMO No. 197 of 2025

Decided on: 24.12.2025

Radha Devi and others ... Petitioners

Versus

Partap Singh ... Respondent

Coram

Hon’ble Mr. Justice Ajay Mohan Goel, Judge.

Whether approved for reporting?¹ Yes

For the petitioners : Mr. Ashok Kumar Tyagi, Advocate.

For the respondents : Mr. Karan Singh Kanwar, Advocate.

Ajay Mohan Goel, Judge [Oral]

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has assailed order dated 24.03.2025, passed by the learned Appellate Court, in terms whereof, application filed under Order 26, Rule 9 of the Code of Civil Procedure, by the petitioners herein/plaintiffs, stands dismissed.

2. Brief facts necessary for the adjudication of this petition are that the petitioners before this Court filed a suit for permanent injunction for restraining the defendant from causing any interference upon the suit land. The suit was dismissed by learned Trial Court vide judgment dated 30.05.2024. While dismissing the suit, in para-15 thereof, the following findings were returned by the

¹ Whether reporters of the local papers may be allowed to see the judgment?

learned Trial Court:-

“It was mentioned in the demarcation report dated 01.07.2019 (Ex.PW1/C) that defendant had encroached upon 3 biswas of land belonging to plaintiffs by constructing a house. This demarcation report was further affirmed by Asst. Collector 2nd Grade on 04.07.2019, as evident from Ex.PW1/A. Nonetheless, it has come in the cross examination of PW-1 that an appeal against this order is pending in the court of Ld. Sub-Divisional Collector. No tatima or field book has been annexed with the demarcation report nor any points have been depicted in the copy of musabi placed on the case file. In such circumstances, no relief can be granted in favour of the plaintiff on the basis of the demarcation report dated 01.07.2019.”

3. Feeling aggrieved, the petitioners herein have preferred an appeal.

4. During the pendency of this appeal, an application under Order 26, Rule 9 of the Code of Civil Procedure was filed by the petitioners, praying for appointment of a Local Commissioner for demarcation of the suit land. It was mentioned in the application that in terms of the judgment passed by the learned Trial Court, it did not rely upon the demarcation report Ext.PW1/C on the ground that the same did not consist of the map showing the encroachment

of 3 biswas by the defendant and some necessary documents were also not appended therewith by the revenue field staff. Primarily on this count, the application was filed by stating therein that the appellants had done whatever they could do to prove the encroachment and the appellants could not be made to suffer for the act of negligence of field revenue staff.

5. The application was opposed by the non-applicant/defendant.

6. In terms of the impugned order, learned Appellate Court dismissed the application *inter alia* by holding that record demonstrated that applicants had filed the civil suit for permanent prohibitory injunction for restraining the defendant from interfering over the suit land. Learned Court held that in terms of the record, the suit land was owned by the predecessor-in-interest of the plaintiffs and after his death, mutation No. 2502 was attested. Learned Appellate Court also held that old khasra number of the suit land was 2115 and vide mutation No. 2502, Khasra No. 2115/2052/1817/2, measuring 26-17 bighas was inherited by Sh. Shamsher Singh, Sh. Vikram Singh, Sh. Surender Singh, Sh. Balinder Singh and Smt. Radha and another khasra No. 2115/2052/1817/1, measuring 0-2 biswas, which was stated to be

in the possession of Smt. Shyama Devi and there was no information before the Court as to who this Shyama Devi was. Learned Appellate Court also held that it were the plaintiffs otherwise who have to prove their case and it is not for the Court to create evidence in favour of a party and that too at the appellate stage. On these bases, the application stands dismissed.

7. Learned Counsel for the petitioners submitted that the learned Appellate Court erred in not appreciating that as earlier also, the demarcation report which is on record demonstrated that there was encroachment upon three biswas of land by the defendant but the same was not taken into consideration by the learned Trial Court only because of technical defects therein, the plaintiffs had no other alternative but to move to the Court, i.e. the learned Appellate Court for re-demarcation of the area. Learned Counsel further submitted that it is not as if learned Trial Court during the pendency of the suit itself declared that the demarcation was bad in law. This fact came into light only in the judgment and therefore, the cause accrued in favour of the petitioners to assail this aspect of the matter, which they have done in grounds of appeal and further to safeguard their rights, application was also filed under Order 26, Rule 9 of the Code of Civil Procedure. Learned Counsel thus

submitted that the peculiar facts of the case, in which, the application was filed, have not taken into consideration by the learned Appellate Court while dismissing the application. He submitted that in light of the dispute involved between the parties, it was otherwise incumbent upon the learned Court to have had got the suit land demarcated and accordingly, he prayed that as the impugned order was bad in law, the same be quashed and set aside.

8. On the other hand, learned Counsel for the respondent argued that there was no infirmity in the impugned order. He submitted that the demarcation was not ordered in routine in the civil suit itself by the learned Trial Court. He apprised the Court that during the pendency of the suit, an application was filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure, in which, interim was granted by the learned Trial Court. As it was alleged by the plaintiffs that interim order was violated, an application was filed for police assistance, for the implementation of the Court order and it is in the course of deciding this application that the Court ordered the demarcation of the suit land. Learned Counsel further submitted that otherwise also, the demarcation report was correctly not relied upon by the learned Trial Court as there were glaring infirmities

therein. He argued that as this issue was already raised in the grounds of appeal, therefore, it was for the learned Appellate Court to take a call as to whether the learned Trial Court erred or not in not taking into consideration the demarcation on record. However, there was no occasion for the learned Appellate Court to have allowed any application for fresh demarcation of the suit property and the same was rightly rejected. Learned Counsel further submitted that otherwise also, as far as the main civil suit is concerned, during the pendency thereof, no application under Order 26, Rule 9 of the Code of Civil Procedure was filed by the petitioners/plaintiffs and herein the endeavour of the petitioners/plaintiffs was to demonstrate that there is encroachment upon the suit land without realizing that the suit was not for possession and is only for injunction.

9. I have heard learned Counsel for the parties at length and have also carefully gone through the impugned order as well as the judgment passed by the learned Trial Court as also the record of the case, which is available for the perusal of the Court.

10. It is a matter of record that there was a demarcation report available before the learned Trial Court and the learned Trial Court in its wisdom decided not to rely upon the same by returning

findings as are culled out in para-15 of its judgment.

11. A perusal of the grounds of the appeal preferred by the plaintiffs against said judgment demonstrates that the plaintiffs/petitioners have assailed the judgment passed by the learned Trial Court *inter alia* on the ground that the learned Trial Court erred in not relying upon the demarcation report Ext. PW1/A.

12. This Court is of the considered view that as the demarcation report, which was on record before the learned Trial Court, was not relied upon by the learned Trial Court for certain reasons, now it is for the learned Appellate Court to adjudicate as to whether the reasoning assigned in this regard by the learned Trial Court is sustainable in law or not.

13. In order to test the veracity of said findings of the learned Trial Court, no application under Order 26, Rule 9 of the Code of Civil Procedure for fresh demarcation of the suit property could have been filed before the learned Appellate Court nor such application could have been allowed by the learned Appellate Court. This is exactly what has been done by the learned Appellate Court while rejecting the application filed by the petitioners herein.

14. This Court again reiterates that the application under Order 26, Rule 9 of the Code of Civil Procedure was not filed before

the learned Appellate Court on the happening of some event after the adjudication of the suit by the learned Trial Court. The application was filed on same facts, issues and same causes, aggrieved by the fact that the on record demarcation report, which as per the plaintiffs demonstrated that the defendant had encroached upon the suit land, was erroneously not taken into consideration by the learned Trial Court.

15. Therefore, in this backdrop, this Court again reiterates that in these peculiar facts, the application filed under Order 26, Rule 9 of the Code of Civil Procedure was not maintainable and the same has been rightly rejected by the learned Appellate Court. This Court concurs with the findings so returned by the learned Appellate Court and therefore, in the light of above discussion, as this Court does not find any perversity or infirmity in the impugned order, this petition is dismissed. Pending miscellaneous application(s), if any also stand disposed of accordingly.

16. Before parting with the judgment, this Court again intends to make an observation that this adjudication by this Court should not be construed as any ratification of the act of the learned Trial Court of not relying upon the demarcation report which was before it. This Court again reiterates that in light of the fact that one

of the grounds of the appeal before the learned Appellate Court is that the learned Trial Court erred in not taking into consideration the demarcation report, this ground will have to be answered by the learned Appellate Court and answer thereto shall be returned by learned Appellate Court without being influenced by any observation made by this Court in the course of adjudication of this petition.

Parties through Counsel are directed to appear before learned Appellate Court on 12.01.2026.

(Ajay Mohan Goel)
Judge

December 24, 2025
(*narender*)