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HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No. 313 of 2017**

Smt. Santoshi Jangade, wife of Shri Venkat Raman, aged about 30 years, R/o. Village Damapur, Post Chhatan, P.S., Tahsil and District Mungeli (C.G.) Plaintiff

---- Petitioner**Versus**

1. Abhishek Singh, son of late R.K. Singh, aged about 35 years, R/o. Vikas Nagar, 27 Kholi, Behind Chief Justice Bungalow, Near Kalika Bhawan, Bilaspur, Tahsil and District Bilaspur (C.G.)
2. State of Chhattisgarh, Through : The Collector, Bilaspur, District Bilaspur (C.G.)Defendants.

---- Respondents

For Petitioner : Mr. Atanu Ghosh, Advocate.

For Respondent No.1: Mr. R.K. Agrawal, Advocate.

For Respondent No.2: Mr. S. Majid Ali, Panel Lawyer

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****28/06/2017**

(1) This is a writ petition filed under Article 227 of the Constitution of India questioning the order dated 08-08-2016 passed by the trial Court in Civil Suit No.9-A/2014, 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 declaration of title and permanent injunction stating *inter alia* that he is the owner, title and possession holder of Khasra No.489/4, area 1716 sq.ft.,

which is being interfered by the defendant No. 1/respondent and, therefore, the decree of declaration of title and permanent injunction be granted in her favour..

(3) Defendant No.1 has filed his written statement stating inter alia that the suit land is a part of Khasra No.490/4, area 1000, which is owned and possessed by him and, therefore, the petitioner/plaintiff is not entitled for any relief.

(4) By the impugned order, the trial Court has held that the plaintiff is free to conduct demarcation of her land and get the land demarcated.

(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 part of Khasra No.489/4, area 1716 sq.ft., which is being interfered with by the defendant No.1 *whereas* the defendant No. 1 in his written statement pleaded that he has made construction on the land bearing Khasra No. 490/4, area 1000 sq.ft..

(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 by 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. For reasons best known to the plaintiff, he did not press the application for commission vide order sheet dated 02-01-

1 1975 MPLJ 801

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

³ (2008) 8 SCC 671

(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.

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

(15) Certified copy as per rules.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-