

HIGH COURT OF CHHATTISGARH, BILASPUR

W.P.(227) No. 860 of 2017

Vinod Kumar Tembhre S/o Namdev Tembhre, Aged About 64 Years
R/o Qr. No.14, Shastri Nagar, Ward No.19, Near Chouhan Plaza,
Bhilai Tahsil And District Durg, Chhattisgarh

---- Petitioner

Versus

1. Manish Kumar Agrawal S/o Manhar Lal Agrawal, Aged About 41 Years R/o Daldali Marg Mahasamund Tahsil And District Mahasamund, Chhattisgarh, Present Address Flat No. J/24 II Floor, Vandematram Apartment, Ward No.2, Model Town, Bhilai Tahsil And District Durg, Chhattisgarh
2. Mohammad Ilias S/o Sheikh Bismillah Musalman, Aged About 75 Years R/o Noori Masjid Road, Beside Noori Masjid Faridnagar, Supela, Bhilai, Tahsil And District Durg, Chhattisgarh
3. Jwala Singh S/o Rameshwar Singh Kushwaha, Aged About 48 Years R/o Jwala Transport, Sunder Nagar Kohaka, In Front Of Faridnagar Ground, Kohka Bhilai Tahsil And District Durg, Chhattisgarh
4. Smt. Neelam Chowksi W/o Chowki Benjamin, Aged About 46 Years R/o Trimukha Bhawan Plot No.93 Ayappa Nagar, Near Shiva College, Faridnagar, Supela Bhilai Tahsil And District Durg, Chhattisgarh
5. Abhijeet Marathe S/o S.R.Marathe, Aged About 45 Years R/o H.N.431/97 Shantinagar Supela Bhilai Tahsil And District Durg, Chhattisgarh, Present Address Qr.No.124 Road No.1 Near Shitla Mandir Shantinagar Supela Bhilai, Tahsil And District Durg, Chhattisgarh
6. Jayant Marathe S/o T.S.Marathe, Aged About 55 Years R/o 5/1 Railway Colony, Railway Station Bhilai Nagar District Durg, Chhattisgarh, Present Address Qr.No.2, Road No.27, Suruchi Beauty Parlour, Anand Enclave, Smritinagar Bhilai, Tahsil And District Durg, Chhattisgarh
7. Ramesh Sawai S/o Kishan Sawai, Aged About 52 Years R/o Near Chandi Mandir, Bhatapara Kohaka Bhilai Ward No.9 Tahsil And District Durg, Chhattisgarh
8. Rajendra Kumar Binjhlekar S/o Bachhan Lal Binjhlekar, Aged About 45 Years R/o Road No.15, Ward No.11, Chandra Nagar, Behind Lal Lakdi Tal, Kurud Road, Kohka Bhilai, Tahsil And District Durg, Chhattisgarh
9. State Of Chhattisgarh, Through Collector Durg, District Durg, Chhattisgarh

---- Respondents

For petitioner –Shri P.R. Patankar, Advocate.
For respondent No.1 – Shri B.P. Sharma and Shri M.L. Saket,
Advocates.
For respondents No.3 & 4- Shri Vipin Tiwari, Advocate.
For respondent No.6-Dr. Saurabh Pande, Advocate.
For State- Shri S.R.J. Jaiswal, PL.

Hon'ble Shri Justice Goutam Bhaduri

Order

12/04/2018

Heard.

1. Instant petition is against the order dated 12/10/2017 passed by the court of 4th Additional District Judge, Durg, wherein application under Order 26 Rule 9 of CPC to demarcate the suit land was dismissed.
2. Learned counsel for the petitioner/plaintiff would submit that suit was filed against the defendants with a prayer that sale deed dated 11/04/1983, the sale deed dated 1/05/1999 be declared null and void and further defendant No.1 be dispossessed from the suit property encroached upon by him which belongs to the plaintiff. It is contended that originally in 1979-80 khasra No.5814 with the old number 432/2 & 439/1 was recorded in the name of Faguram, Thanwarin and Tulsiram, which was subsequently made as khasra number 14/19. The land is situated at Kohka. It was stated that in the year 1979-80 Tulsa Bai W/o Kishan Sawai purchased the land bearing khasra no.432/30, 439/20 and total 13 decimals were purchased. Thereafter, on 31/03/1983, 5 decimals were sold to Haridas S/o Balaji Bagmare who subsequently sold it to Kamla Bai Binjhlekar on 20/07/1999 who sold it on 20/08/2009 to Rajendra Kumar Binjhlekar. Likewise another 5 decimals of land was sold to Vinod Kumar Tembhre on 31/03/1983 and name of the petitioner/plaintiff was recorded in the revenue record. It is stated that thereby out of 13 decimals, 10

decimals were already sold by Tulsa Bai.

3. Thereafter, in the month of April, 1983 though she had ownership only to the extent of 3 decimals of land left, the sale deed was executed over and above of holding and land was sold over and excess of the holding of 3 decimals. It is stated that sale was executed in favour of Mohd. Ilias defendant No.2 of 4 decimals. The pleading is further that Mohd. Ilias thereafter on 1/05/1999 sold it to Jwala Singh defendant No.3 and Neelam Chowksi defenant No.4. Subsequently, it is contended that on 17/05/2004 Jwala Singh and Neelam Chowksi inflated further area of the land to the extent of 5 decimal and sold it to Abhijeet Marathe defendant No.5 and Jayant Marathe defendant No.6. The said Abhijeet Marathe and Jayant Marathe further by sale deed dated 29/01/2008 sold the land to Manish Kumar Agrawal defendant No.1 who is at present in possession of the land. It is pleaded further that plaintiff after retirement from the service when tried to construct the house it was found that defendant No.1 has encroached upon his part of the land and suit was filed for cancellation of the earlier sale deed by which Manish Kumar Agrawal derived title and also for possession of the land.

4. It is stated that suit was filed in November, 2016, thereafter defendant No.1 Manish Kumar Agrawal filed his written statement on 2/03/2017 and immediately thereafter an application under Order 26 Rule 9 of CPC was filed for demarcation of the suit property land which was presently bearing khasra no. 5814/2. It is stated that the learned court below without application of mind cursorily dismissed the application without going into it and understanding the spirit of the dispute and in a mechanical manner dismissed the application. It is contended that it was necessary to demarcate the land so as to decide the nature of the encroachment which was complained, therefore prayed that impugned

order may be set aside and demarcation may be ordered for.

5. Learned counsel for the respondents vehemently opposes the argument and would submit that order of the court below is well merited which do not call for any interference by this court.

6. Perused the order of the court below. Learned court below simply dismissed the application for demarcation on the ground that since prayer for cancellation of the sale deed has been made, therefore demarcation would not be necessary. Perused the plaint and the written statement filed along with this petition. Perusal of the plaint would show that primarily suit is based on the ground that originally from whom nucleus of title originated i.e. Tulsa Bai W/o Kishan Sawai has acquired land of 13 decimals of khasra no.432/30, 439/20 in the year 1979-80 and executed two sale deed of 5 decimals of each initially to Haridas S/o Balaji Bagmare and one Vinod Kumar Tembhre plaintiff/petitioner herein. Therefore by necessary implication. Pleading would show that thereafter Tulsa Bai was only left with 3 decimals of land after execution of the sale deed of 10 decimals of land. However, in the year 1983 instead of 3 decimals she executed a sale deed of 4 decimals which was not within her holding and ownership. Subsequently, pleading would show that Mohd. Ilias had executed sale deed in favour of Jwala Singh and Neelam Chowksi, who are defendants No.3 and 4 in the suit. Said defendants further on 17/05/2004 sold 5 decimals to Abhijeet Marathe defendant No.5 and Jayant Marathe defendant No.6 and eventually sale deed was executed in favour of Manish Kumar Agrawal on 29/01/2008 by Abhijeet Marathe and Jayant Marathe of 5 decimal instead of 3 decimal.

7. Considering the nature of dispute it would be necessary to trace history in back and when there is serious dispute existing in respect of the boundaries and when it has been specifically pleaded that originally sale

deed was executed by Tulsa Bai by inflating the part of holding from actual ownership, therefore in order to find out encroachment upon land whether the encroachment part belong to the petitioner/plaintiff it was necessary to direct investigation by appointing local Revenue Inspector as Commissioner to demarcate the said land under Order 26 Rule 9 of CPC.

8. Supreme Court in case of **Haryana Waqf Board Vs. Shanti Sarup & Ors.** reported in **(2008) 8 SCC 671** while dealing likewise issue has ruled that in case when there is encroachment it can be demarcated only by appointment of Commissioner, then investigation has to be carried out by the local Commissioner by demarcation of the disputed land under Order 26 Rule 9 CPC. In case of **Shreepat Vs. Rajendra Prasad & Ors.** reported in **2000(6) Supreme 389** while dealing likewise nature of dispute Supreme Court observed that when serious dispute exist in respect of the area and boundaries of land in question, especially with regard to the identity then it should have been decided and demarcated by the Commissioner appointed under Order 26 Rule 9 of CPC. Likewise this court in case of **Sukhdev Prasad Yadav Vs. Hemlata Mishra and Anr.** in **Misc. Appeal No.86 of 2013** decided on **25th September, 2013** has held when the identity of land is in question the identity of the property should be decided by issuance of the commission.

9. Considering the nature of the dispute alleged and the plaint allegations, in the opinion of this court unless and until demarcation is carried out, court below will not be in a position to decide actual lis about encroachment. When the primarily pleading have been made that original owner who subsequently sold property inflated her holding from its actual ownership and holding and sold over and excess of land to other persons who are defendants herein to find out the same the demarcation of land would be necessary.

10. Consequently, in the facts of this case, order dated 12/10/2017 is set aside. Application filed by the petitioner under Order 26 Rule 9 of CPC is allowed. It is directed that the court below shall refer the matter to the concerned Tahsildar who shall appoint Revenue Inspector and the concerned Revenue Officer shall demarcate the disputed land to show actual holding of the parties with their actual derivation of title qua the area and traced through their nucleus of title which they derived from their predecessor so as to adjudicate the actual lis between the parties.

11. With such observation, the petition stands allowed.

Sd/-

(Goutam Bhaduri)

JUDGE