

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WP (227) No. 687 of 2018**

Manohar Lal Trivedi, S/o. Shri Babulal Trivedi, Aged About 50 Years, R/o. Khariyar Bada, Budhapara, Raipur, Tahsil & District Raipur, Chhattisgarh.

---- **Petitioner****Versus**

1. Sudhir Agrawal, Aged About 45 Years.
2. Subodh Agrawal, Aged about 41 Years.

Both are S/o. Shri S.K. Agrawal, Advocate, R/o. Turi Hatri, Purani Basti, Raipur, Tahsil & District Raipur, Chhattisgarh.

---- **Respondents**

For Petitioner : Mr. Pushpendra Kumar Patel, Advocate

Hon'ble Shri Justice Goutam Bhaduri**Order On Board****09.08.2018**

Heard.

1. The present petition is against the order dated 11.07.2018 passed in Civil Suit No.4-B/2013 whereby an application under Order 26 Rule 9 read with Section 151 of C.P.C. filed by the petitioner/defendant for demarcation was dismissed.
2. Learned counsel for the petitioner submits that the instant petition is by the defendant. The suit is filed by the respondents/ plaintiffs claiming damages of Rs.50,000/- on the ground that adjacent to their wall, which was constructed by the plaintiffs, the defendant has dig out a plinth which has caused damage and entire wall of the plaintiffs has fallen down, as such, damages was claimed. The defendant contended that the wall which has been claimed by the petitioners/plaintiffs do not belong to them. He further submits that during the course of trial, an application under Order 26 Rule 9 of C.P.C. was filed, which was dismissed by the learned Court below on the

ground that the Court is not going to collect the evidence and the order therefore completely bad in law.

3. Perused the impugned order dated 11.07.2018. The application purportedly dismissed on the ground that one application for demarcation is already pending before the Tahsildar, therefore, there was no justification to entertain the second application. The order do not show that the demarcation application which was filed before the Tahsildar has ended and pursuant thereto the demarcation has already been carried out and in the meanwhile the suit has reached to the stage of evidence. It is obvious that if the Tahsildar do not carry out the demarcation then the identity of the land, which is the central issue of this case wherein two parties are claiming right over the same land, it cannot be decided unless such identification of land is decided.
4. 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.

5. Considering the facts that the application under Order 26 Rule 9 read with Section 151 of C.P.C. was filed, in the opinion of this Court, the Court cannot sit in the fence for the fact that an application before the Tahsildar is filed. The Court has to adjudicate the case on the basis of the evidence, therefore, when the two parties are claiming right over the same land and the damages has been claimed, naturally therefore the possession of the land and identity of the land are to be established otherwise the Court below will fail into exercise his jurisdiction and decide the actual lis between the parties for want of proper evidence.
6. In a result, the order dated 11.07.2018 is set aside and the application under Order 26 Rule 9 read with Section 151 of C.P.C. is allowed. The trial Court is directed to appoint the Revenue Inspector to demarcate the land within a specified period of time.
7. Accordingly, the petition is allowed.

Sd/-
Goutam Bhaduri
Judge