

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 32 of 2006**

Ram Singh Thakur S/o Puran Lal Thakur, Aged 63 years, R/o Village Narayanpur, Tahsil Narayanpur, Distt. Bastar, Chhattisgarh.

---- Appellant/Defendant**Versus**

1. Narendra Jain S/o Mohan Lal Jain, Aged 29 years, R/o Village Narayanpur, Tahsil Narayanpur, Distt. Bastar, Chhattisgarh.

---- Plaintiff

2. The State of Chhattisgarh, Through the Collector, Bastar Jagdalpur, Distt. Bastar, Chhattisgarh.

----Respondents

For Appellant	:	Mr. Arvind Dubey, Advocate
For Respondent No. 1	:	Mr. Prasoon Agrawal, Advocate
For State	:	Mr. Sanjeev Kumar Agrawal, Panel Lawyer

Hon'ble Shri Justice Sanjay K. Agrawal**Judgment On Board****30.08.2019**

1. The substantial question of law involved, formulated and to be answered in this second appeal preferred by the defendant states as under:

“Whether the plaintiff's suit for recovery of possession on the allegation that the defendant has encroached upon a portion of his land could be validly decreed in the absence of valid demarcation particularly when the defendant raises dispute with regard to the identity of the property ?”

(For the sake of convenience, parties would be referred hereinafter as per their status and ranking shown in the suit before the trial Court.)

2. Plaintiff herein brought a civil suit bearing No. 01A/2002 for declaration of title and recovery of possession alleging *inter alia* that he is owner of the property bearing khasra No. 710/3 area 0.03/0.012 decimal, out of which defendant has encroached upon 0.01 decimal of land unauthorizedly and illegally and as such, plaintiff is entitled for decree of possession to the extent of land owned by him and encroached by the defendant.
3. In the written statement filed by the defendant, he averred that he is carrying on the business of photo studio since the year 1997-98 in the land bearing khasra No. 555 area 7.73/3.130 acres which is owned by the Government, therefore, he has neither encroached upon the land of the plaintiff nor is the plaintiff entitled for any decree for recovery of possession.
4. Learned trial Court, after appreciating the oral and documentary evidence on record, decreed the civil suit filed by the plaintiff, vide judgment and decree dated 31/08/2005 and granted decree for recovery of possession in favour of plaintiff by holding that plaintiff is owner of the land bearing khasra No. 710/3 area 0.03/0.012 out of which defendant has encroached upon 0.01 decimal of land which is proved by Exhibit P3 which is a map prepared by P.W. 2 namely M.R. Yadav.
5. Against the judgment and decree of the trial Court, defendant preferred civil appeal No. 15A/2005 in which learned first appellate Court agreed with the finding recorded by the trial

Court that defendant has encroached upon 0.01 decimal of land which is owned by the plaintiff and by its judgment and decree dated 20/12/2005, dismissed the appeal filed by the defendant.

6. Questioning the judgment and decree passed by both the Courts below, defendant has preferred this second appeal under Section 100 of the Code of Civil Procedure in which substantial question of law has been formulated on 26/04/2006 and has been set out in the opening paragraph of this judgment.
7. Mr. Arvind Dubey, learned counsel appearing for the appellant/defendant would submit that both the Courts below are absolutely unjustified in holding that defendant has encroached upon the suit land which is owned by the plaintiff, without conducting demarcation by appointing a Revenue Commissioner to identify the extent of encroachment made by defendant and therefore, merely on the basis of Exhibit P3 i.e. a map allegedly prepared by P.W. 2 namely M.R. Yadav, it cannot be held that defendant has encroached upon the suit land which is owned by the plaintiff. As such, the decree for recovery of possession passed by both the Courts below in favour of the plaintiff deserves to be set aside.
8. Mr. Prasoon Agrawal, learned counsel appearing for respondent No. 1/plaintiff would support the impugned judgment and decree and submit that both the Courts below have rightly decreed the suit of the plaintiff for recovery of possession and as such, the second appeal deserves to be dismissed.

9. I have heard learned counsel appearing for the parties, considered their rival submissions and perused the records thoughtfully.
10. Learned trial Court, after appreciating the oral and documentary evidence on record, has clearly held that plaintiff is the title-holder of the suit land bearing khasra No. 710/3 area 0.03/0.012 decimal and has further held that defendant No. 1 has encroached upon 0.01 decimal of plaintiff's land which is proved by Exhibit P3 which is a map prepared by P.W. 2 i.e. M.R. Yadav, whereas it is the case of the defendant that he is in possession of the land bearing khasra No. 555 area 7.73/3.130 acres which is the land owned by the Government.
11. In the instant case, the dispute is whether the defendant has actually encroached upon the suit land which is owned by the plaintiff, and if yes, what is the extent of encroachment made by the defendant, and that could have only been established by the trial Court by appointing Survey Commissioner for ascertaining the identity of the land under Order 26 Rule 9 of the CPC to find out whether it is part of plaintiff's land bearing khasra No. 710/3 or part of the land bearing khasra No. 555, which is owned by State and in which defendant is said to be in possession. In this connection, pertinent decision of the Supreme Court and the Madhya Pradesh High Court may be noticed profitably.
12. The Supreme Court, in the matter of ***Shreepat Vs. Rajendra Prasad & Ors.***¹, in identical situation, remanded the matter to the trial Court for issuing Survey Commission to find out the

¹ JT 2000 (7) SC 379

exact position. It was observed 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.”

13. Likewise, the Supreme Court, in the matter of ***Haryana Waqf Board Vs. Shanti Sarup & Ors.***², 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

² (2008) 8 SCC 671

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.”

14. Very recently, in the matter of ***Ram Lal & Ors. Vs. Salig Ram & Ors.***³, the Supreme Court, with regard to necessity of appointment of Local Commissioner under Order 26 Rule 9 of the CPC, has held as under :-

“18. In the totality of circumstances, in our view, for just and effectual determination of all the questions involved in the matter, the proper course is of issuing a fresh Commission and for direction to the Trial Court to decide the entire suit afresh on the issues as originally framed as also on the additional issues after taking the report of the Local Commissioner afresh and affording an opportunity to the parties to submit their objections, if any.”

15. The Division Bench of the High Court of Madhya Pradesh, in the matter of ***Durga Prasad Vs. Parveen Foujdar & Ors.***⁴, has held that in the 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

3 JT 2019 (2) SC 106

4 1975 MPLJ 801

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 02-01-1979. 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."

16. When the Court has to decide the issue as to encroachment, proof thereof was/is a matter governed by Section 36 and 60 of Evidence Act. These are the public records which are relevant under Section 36 of the Indian Evidence Act. It shall be useful to quote and refer to Section 36 of the Indian Evidence Act, which reads as follows:-

"36. Relevancy of statements in maps, charts and plans.- Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or

plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.”

17. Section 60 of the Indian Evidence Act, 1872 provides as under :-

60. Oral evidence must be direct.- Oral evidence must, in all cases, whatever, be direct; that is to say -

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds;

ProvidedX....X.....X.....

ProvidedX....X.....X.....

[While quoting, emphasis is supplied].

18. Thus, in absence of records in the hands of Court Commissioner, the extent of encroachment is incapable of adjudication, as such, Commissioner so appointed has to

ascertain boundary mark, boundaries of undisputed and unencroached area, based on undisputed boundary marks as per public record and thereafter, to measure the extent of encroachment. If such report of the Commissioner is proved, as rendered, keeping in view the requirements of rules relating to measurement and if it withstands the test of cross-examination, unless admitted document, alone can be the foundation as to proof of fact and of extent of encroachment.

19. Since, there is a serious dispute with regard to the area of encroachment and as to whether the area encroached by the defendant is part of khasra No. 710/3, which belongs to the plaintiff, or it is a part of khasra No. 555, which according to the defendant is a Government land, learned trial Court should have got the identity of the land established by appointing survey Commissioner under Order 26 Rule 9 of the CPC, which has not been done and the same has resulted into serious miscarriage of justice and the trial Court thereby, committed illegality in decreeing the suit of the plaintiff without appointing a local Commissioner and the first appellate Court perpetuated the illegality by affirming the decree so passed by the trial Court.

20. In view of above, the judgment and decree passed by both the Courts below are hereby set aside and the trial Court is directed to do the following :-

(i). The Revenue Inspector of the concerned circle is appointed as survey 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 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 survey commissioner, the parties will be entitled to proceed in accordance with law.

21. The second appeal is allowed to extent indicated herein-above. No cost(s).

22. A decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)

Judge

Harneet