

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 175 of 2004**

1. Ashok Kumar Jaiswal, Son of Ramjilal Jaiswal.
2. Ajay Kumar, Son of Ramjilal Jaiswal.
3. Anil Kumar, Son of Ramjilal Jaiswal.
4. Smt. Phulli Devi, Widow of Ramjilal Jaiswal.

All residents of Near Bus Stand, Korba, Tahsil & Distt. Korba, Chhattisgarh.

---- Appellants/Plaintiffs**Versus**

1. Neetu, Son of not known, Occupation – Shopkeeper, Resident of Korba, Chhattisgarh.
2. (A). Smt. Reshma Bai, W/o Late Shri Narayan Prasad.
(B). Rakesh Singh, S/o Late Shri Narayan Prasad.
(C). Lalla Singh, S/o Late Shri Narayan Prasad.

All are residents of Power House Road, Korba, Tahsil & District – Korba, Chhattisgarh.

--- Respondents/Defendants

For Appellants	:	Mr. B.D. Guru, Advocate
For Respondents	:	Mr. Ashok Kumar Shukla, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****01.07.2019**

1. This second appeal preferred by the plaintiffs under Section 100 of the Code of Civil Procedure (henceforth 'CPC') was admitted for hearing on the following substantial question of law :-

“Whether both the Courts below are justified in dismissing the suit of the plaintiff without appointing the Commissioner under Order 26 Rule 9 read with Section 151 of the Code of Civil Procedure to find out whether the suit land is part of bearing Khasra

No. 576/1, owned by the plaintiffs or the suit land is part of bearing Khasra No. 576/3, owned by defendants by recording a perverse finding?"

(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. Plaintiffs filed a civil suit for declaration of title and permanent injunction stating *inter alia* that they are owners and title holders of suit land bearing Khasra No. 576/1 with an area of 0.09 acres and they continued to be in possession by getting their names duly recorded in the revenue record. It was further pleaded that on 30/04/1996, the defendants started raising construction on the land of the plaintiffs and even after being informed by the plaintiffs that they are the title holders of the suit land, the defendants did not stop the construction work thus, need to file the civil suit arose seeking above-stated reliefs.
3. The defendant No. 2 filed his written statement and pleaded that he is the title holder of the land bearing Khasra No. 576/3 and is carrying out construction on the same land and not on plaintiffs' land, therefore, plaintiffs are not entitled for decree of declaration grant title and permanent injunction.
4. The trial Court by its judgment and decree dated 26/02/2001 dismissed the civil suit No. 165-A filed by the plaintiffs, holding that the defendants have already constructed the house on the suit land and they have failed to make out a case for declaration of title and grant of permanent injunction.
5. On an appeal being preferred by the plaintiffs, the first appellate Court dismissed the civil appeal No. 1-A/2002 vide order dated 28/01/2004 by agreeing with the findings recorded by the trial Court, against

which this second appeal has been preferred wherein substantial question of law has been formulated and incorporated in the opening paragraph of the judgment.

6. Mr. B.D. Guru, learned counsel for the plaintiffs submits that the dispute is with regard to the identity of the land, which the trial Court ought to have resolved by appointing a local Commissioner under Order 26 Rule 9 read with Section 151 of the CPC, but on the contrary, dismissed the suit, which was also affirmed by the first appellate Court without noticing the necessity of appointing a local Commissioner. Therefore, the judgment and decree passed by both the Courts below deserves to be set aside and be remanded back for appointing a local Commissioner and thereafter, trying the suit in accordance with law.
7. Mr. Ashok Shukla, learned counsel for the defendants submits that he has no instructions in the appeal.
8. I have heard learned counsel for the parties, considered their submissions and went through the records with utmost circumspection.
9. It is not in dispute that the plaintiffs own the land bearing Khasra No. 576/1 and they are stating that defendants are raising construction on their land, however, defendants are asserting that the suit land, in which construction is being raised, is part of their land bearing Khasra No. 576/3. In that view of the matter, the trial Court ought to have asserted the identity of the land by appointing a local Commissioner in terms of Order 26 Rule 9 read with Section 151 of the CPC.
10. The Division Bench of the High Court of Madhya Pradesh, in the matter of ***Durga Prasad Vs. Parveen Foujdar & Ors.***¹ has held that

¹ 1975 MPLJ 801 : (AIR 1975 MP 196)

in absence of agreed map, appointment of commissioner is necessary. Relevant para of the report states as under :-

“25. Point No. 2: 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 Code of Civil Procedure. On 15-9-1966 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 the Director of Land Records whether he was prepared to undertake the work. The Director of Land Records by his memo dated 1-12-1966 signified his willingness. The Collector's memo dated 19-4-1969 shows that on the dates fixed for the purpose, neither the plaintiff nor any person authorised 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 2-1-1970. The Court accordingly by its memo dated 10-1-1970 recalled the writ of commission issued to the Director of Land 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 the matter of ***Shreepat Vs. Rajendra Prasad***

& Ors.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 the identity of the land in dispute, whether the land in dispute formed part of

² JT 2000 (7) SC 379

Khasra No. 257/3 or Khasra No. 257/1, the courts below did not get the 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 & Ors.***³ (2017 ILR 129 XI) has made the following observation :-

“It is also not in dispute that even before the appellate court, the appellant-Board had filed an application for appointment of a Local Commissioner 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.”

3 (2008) 8 SCC 671 : (2008 AIR SCW 6500)

13. Reverting back to the facts of the case and in view of the law laid down in the aforesaid cases, it appears that there is a serious dispute, particularly with regard to the identity of the suit land between the parties, as the plaintiffs claim to be the owner of the land bearing Khasra No. 576/1, in which the defendants have raised construction, claiming that the land is a part of their land bearing Khasra No. 576/3. Therefore, the trial Court should have got the identity of the suit land established by appointing a local Commissioner under Order 26 Rule 9 read with Section 151 of the CPC, and not doing the same has resulted in serious miscarriage of justice. Therefore, the judgment and decree passed by both the Courts below are hereby set aside and suit be remanded to the trial Court. The trial Court is directed to appoint the concerned Revenue Inspector, directing him to submit his report regarding boundaries differentiating the lands of the plaintiffs as well as the defendants and thereby, establishing the identity of the suit land. It would also be expedient to direct the trial Court to decide the suit, after hearing the parties, preferably within a period of four months from the date of receipt of a copy of this order, as the suit is an old one and is pending since 01/05/1996.

14. With the aforesaid observations, the second appeal is allowed to the extent indicated herein-above. No cost(s). A decree be drawn up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge