

**HIGH COURT OF CHHATTISGARH, BILASPUR****Second Appeal No.155 of 2006**

Bhola Prasad Kori, S/o Shri Ramsukh Kori, aged about 34 years, Occupation Porter (Railway), resident of near railway line, adjacent to Gudakhu Factory, Shanker Nagar, Bilaspur (CG)

----- Appellant/Defendant

**Versus**

1. Mst. Urmila, Wd/o Rama Yadav, by Caste Yadav aged about 69 years, occupation house-wife, R/o Shanker Nagar, Bilaspur (CG)

2. Umesh Yadav (dead) through LR's

2(a) Santosh Yadav S/o-Late Shri Umesh Kumar Yadav, aged about 35 years,

(b) Rameshwari Yadav, D/o-Late Shri Umesh Kumar Yadav, aged about 33 years,

(c) Chandi Yadav D/o-Late Umesh Kumar Yadav, aged about 28 years,

(d) Smt. Urmila Bai Wd/o Late Shri Umesh Kumar Yadav, aged about 60 years,

Note: the Lrs. No.2(a) to (d) are R/o Vasant Vihar, Rajkishor Nagar, Devika Vihar, Bilaspur, Tahsil & Distt. Bilaspur (CG)

----- Plaintiffs

3. State of Chhattisgarh, through the Collector, Bilaspur (CG)

----- Respondents

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|---------------------------|--------------------------|
| For Appellant/Defendant   | : Mr.R.N.Pusty, Advocate |
| For Res.No.1&2/Plaintiffs | : Mr.Ali Asgar, Advocate |
| For Respondent No.3       | : Mr.Akash Pandey, P.L.  |

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**Hon'ble Shri Justice Sanjay K. Agrawal**

**Judgment on Board**

**30/09/2019**

1. In second appeal preferred by the appellant/defendant, the following substantial questions

of law were formulated for determination:-

"(1) Whether in the facts and circumstances of the case, both the Courts below were justified in granting the decree of possession in favour of the plaintiffs/respondents No.1 and 2, when they had utterly failed to establish the identity of the suit land so as to enable the Courts to pass an effective decree in terms of Order 7 Rule 3 of the Code of Civil Procedure

(2) Whether the defendant//appellant was estopped from challenging the demarcation, which was without jurisdiction, void and not binding on him, as the same was carried out without following the due procedure and behind the back of the defendant/appellant ?"

[For the sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court]

2. The plaintiffs filed a suit for declaration of title, possession and permanent injunction in respect of the suit land bearing Khasra No. 828/1, area 20 decimal situated at Torwa, Tahsil and District Bilaspur alleging encroachment by the defendant admeasuring 3 decimal to the southern side of the land of the plaintiffs vide demarcation report (Ex.P-5) and panchnama (Ex.P-6).

3. The defendant filed his written statement and denied the averments made in the plaint stating inter-alia that he is holder of adjacent lands which were the part of original Khasra Nos.828/5 and 828/1 and ancestors of the defendant had purchased the said lands from ancestor of the plaintiffs and since then, he is in possession with other family members and for construction

of shops he has obtained licence on 23.11.1995 and construction was over in 1995 itself and then demarcation (Ex-P-5) has been done behind his back without any notice and denied to have encroached 3 decimal of land of the plaintiffs.

4. Upon consideration of oral and documentary evidence available on record, the trial Court, by its judgment and decree dated 28.1.2005, decreed the suit of the plaintiffs holding that the plaintiffs are owners of land bearing Khasra No.828/1, area 20 decimal on the basis of khasra entry of the year 1995-96 (Ex.P-1) and further held on the basis of demarcation report (Ex.P-5) that the defendant has encroached 3 decimal of land of Khasra No.828/1 and granted decree in favour of the plaintiffs for possession, which was questioned by the defendant by filing an appeal under Section 96 of the CPC before the first appellate Court, but he remained unsuccessful and thereafter, this second appeal under Section 100 of the CPC has been filed by him before this Court, in which substantial questions of law have been framed by this Court, which have been set-out in the opening paragraph of this judgment.

5. Mr.R.N.Pusty, learned counsel for the appellant/defendant, would submit that demarcation was not done in accordance with law, particularly in view of

the provisions contained in Section 124 of the Chhattisgarh Land Revenue Code, 1959 (hereinafter called as "the Code") as the defendant was not noticed while making demarcation report (Ex.P-5) and panchahama (Ex.P-6), which is apparent from the statement of revenue inspector R.P. Jaiswal (PW-2) that demarcation was not made in accordance with law and relied upon the judgment of the Madhya Pradesh High Court in the matter of **Jagdish Prasad v. State of MP**<sup>1</sup>.

6. On the other hand, Mr.Ali Asgar, learned counsel for the respondents No.1 and 2/plaintiffs, would support the impugned judgment and decree and submit that both the Courts below have concurrently recorded a finding that the defendant has encroached upon 0.03 decimal of land owned by the plaintiffs. Concurrent finding recorded by two Courts below is finding of fact based on evidence available on record particularly, demarcation report (Ex.P-5) and panchanama (Ex.P-6), therefore, no exception can be taken by the defendant that demarcation so made vide Ex.P-5 is not in accordance with law and relied upon the judgment of the Supreme Court in the matter of **Pratibha Singh and another v. Shanti Devi Prasad and another**<sup>2</sup>.

7. I have heard learned counsel for the parties and

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<sup>1</sup> 2009(2) MPLJ 429

<sup>2</sup> AIR 2003 SC 643

considered their rival submissions made herein-above and also went through the records with utmost circumspection.

8. The plaintiffs claimed that they are owners of the land bearing Khasra No.828/1, area 20 decimal and out of which, 3 decimal to the southern side of land of the plaintiffs has been encroached by the defendant, which is apparent from demarcation report (Ex.P-5) and panchnama Ex.P-6), which the defendant has denied stating that he has not encroached upon the plaintiffs' land.

9. In order to prove demarcation report (Ex.P-5) and panchnama (Ex.P-6), revenue inspector R.P. Jaiswal has been examined as PW-2. In para-3 of his statement, R.P. Jaiswal (PW-2) has clearly admitted that in order to make demarcation, Chanda (permanent mark) was not available, therefore, he made fixed point near road and started demarcation, but the same is not mentioned in his report (Ex.P-5). He has also admitted that at the time of demarcation, no field book was prepared, which was necessary to be prepared at the time of demarcation. He has further admitted that map prepared by him is only on the basis of revenue map and he has not prepared any map on the basis of demarcation. He has further admitted that he has not mentioned in his report length and width of 3 decimal of land which was allegedly encroached by the defendant. He has further admitted that though part

of encroachment of the defendant is a part of Khasra No.828/1, but he has not mentioned in which direction the defendant has encroached upon the plaintiffs' land. He has also stated that there is no evidence on record that the defendant was noticed while making demarcation, as such, the plaintiffs' witness R.P. Jaiswal (PW-2) has made serious discrepancies in making demarcation, neither field book was prepared nor map on the basis of demarcation was prepared and even length and width of the encroached land has been mentioned in his report. It is also not established that whether the defendant was ever noticed before making demarcation.

10. Not only this, plaintiff No.2-Umesh Kumar Yadav (PW-1) in his statement has also admitted that Ex.P-5 did not have the signature of the defendant. Demarcation report (Ex.P-5) filed and proved by the plaintiffs is recommendation made by the revenue inspector to the Tahsildar in which only it has been concluded by the revenue inspector that the defendant has encroached 0.03 decimal out of Khasra No.828/1, area 0.20 decimal. He has not mentioned the manner of making demarcation report. It is also not clear as to whether the report of the revenue inspector was accepted by the Tahsildar as under Section 129 of the Code, the Tahsildar or any other Revenue Officer is the authority competent to make demarcation.

Section 129 of the Code states as under:-

**"129. Demarcation of boundaries of survey number or sub-division or plot number.-(1)**

The Tahsildar or any other Revenue Officer empowered to act may, on the application of a party interested, demarcate the boundaries of a survey number or of a sub-division or of a plot number and construct boundary marks thereon.

(2) The State Government may make rules for regulating the procedure to be followed by the Tahsildar or any other Revenue Officer empowered to act in demarcating the boundaries of survey number or of a sub-division or of a plot number prescribing the nature of the boundary marks to be used, and authorising the levy of fees from the holders of land in a demarcated survey number or sub-division or plot number."

11. Section 11 of the Code defines Revenue Officers.

Apart from other officers, Tahsildars (including Additional Tahsildars), Superintendents of Land Records, Naib Tahsildars and Assistant Superintendents of Land Records have been included as Revenue Officers.

12. Since Revenue Inspector is not a Revenue Officer as it has not been included in list of Revenue Officer enumerated in Section 11 of the Code, therefore, revenue inspector is not a revenue officer for the purpose of Section 129 of the Code, as such, the alleged demarcation made by the revenue inspector has not shown to be accepted by the revenue officer/Tahsildar, therefore, both the Courts below have committed grave illegality in holding and accepting the report submitted by the revenue

inspector to the Tahsildar as demarcation report. Both the Courts below have committed illegality in holding that the recommendation, which is also not in accordance with law, is the valid demarcation in view of the provisions contained in Section 129 of the Code.

13. Since, there is serious dispute with regard to area of encroachment and identity of the land, therefore, it would be expedient to get the identity of land established by appointing revenue 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 thereby, the trial Court committed illegality in decreeing the suit of the plaintiffs without appointing local commissioner and the first appellate Court perpetuated the illegality by affirming the judgment and decree so passed by the trial Court. The substantial questions of law are answered in favour of the defendant and against the plaintiffs.

14. In view of above, the judgment and decree passed by both the Courts below are hereby set aside. The matter is remitted to the trial Court for appointing the Commissioner (Revenue Commissioner) for local investigations in accordance with Rule 3 of the Chhattisgarh Commissions for Local Investigation Rules, 1962 and thereafter upon receipt of the Commissioner's

report to proceed in accordance with law. The parties will be entitled to lead their evidence in accordance with law.

15. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s). The trial Court is directed to conclude the trial within three months from the date of receipt of copy of this judgment.

16. A decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)

Judge

B/-