

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No. 263 of 2018**

Pronov Kumar Roy, S/o Shri P.C. Roy, aged about 38 years, R/o Vinoba Nagar, Civil & Rev. Distt: Bilaspur (C.G.)

----Petitioner/plaintiff

Versus

1. Javahar Lal Gupta, S/o Late Shri Narayan Gupta, aged 54 years, R/o Vinoba Nagar, Civ. & Rev: Distt: Bilaspur (C.G.)
2. State of Chhattisgarh, through Collector, Distt: Bilaspur (C.G.)
3. State of Chhattisgarh through Tehsildar, Distt: Raipur (C.G.)

---- Respondents/defendants.

For Petitioner	: Ms.Aditi Singhvi, Advocate.
For Respondent No. 1	: Mr. C.B. Kesharwani, Advocate.
For State	: Mr. Vimlesh Bajpai, Govt. Advocate.

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

17/01/2019

1. By the impugned order dated 2nd November, 2017, plaintiff's application under Order 26, Rule 10 of the Code of Civil Procedure (henceforth "CPC") has been rejected, against which instant writ petition has been preferred.
2. Counsel for the petitioner would submit that the impugned order is bad and unsustainable in law, which is liable to be set aside.
3. Per contra, counsel for respondent No.1 would support the impugned order and submit that it amounts to collection of evidence.
4. I have heard learned counsel appearing for the parties.
5. The case of the plaintiff is that he is owner & possession holder of the land bearing Khasra No. 724/35, area 1260 sq. ft., in which upon 660 sq. ft. of land, defendants have encroached illegally *whereas* it is the case of the defendant No. 1 that he is the owner of the land bearing

Khasra No.729/09, area 2000 sq. ft., which they have purchased by registered sale deed and they are in peaceful possession over the said land.

6. The trial Court, by its impugned order, rejected the said application without considering the merits of the application i.e. whether there is need for appointment of local commissioner or not as there is dispute as to the identity of the land between the parties.

7. The Division Bench of the High Court of Madhya Pradesh in case of **Durga Prasad Vs. Parveen Foujdar & others**¹ has held that in absence of agreed map; appointment of commissioner is necessary. It was held as under:-

“25. In cases where there is 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 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 for a theodolite survey of the plaintiff's leasehold area. The court by its memo dated 11-10-1996 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.”

1 1975 MPLJ 801

8. The Supreme Court in case of **Shreepat Vs. Raiendra Prasad & others**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 identity of the land in dispute, where 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.2571. 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.”

9. The aforesaid judgments of the Supreme Court have been followed by this Court in the matter of **Smt. Santoshi Jangade Vs. Abhishek Singh**³ and held as under:-

“13..... Since there is serious dispute between the parties with regard to boundary/area of the scheduled suit land especially with regard to identity of the land, therefore, the trial Court should have got the identity of the land established by appointing local Commissioner under Order 26 Rule 9 of the CPC and the same has resulted into serious miscarriage of justice and, therefore, the impugned order is liable to be and is hereby set aside- The application filed by the plaintiff before the trial Court under O.26 R. 9 of the CPC is allowed.”

10. In view of above, impugned order 2.11.2017 rejecting the petitioner's application filed under Order 26 Rule 9 of the CPC without considering the merits of the application is hereby set aside. The trial Court is directed to reconsider the application in light of the afore-cited judgments of the Supreme Court and the High Court.

11. The writ petition is allowed to the extent indicated hereinabove.

Sd/-
(Sanjay K. Agrawal)
Judge

² JT 2000 (7) SC 379

³ 2018 (2) C.G.L.J. 269

