

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 477 of 2005**

Shital Prasad Mishra, S/o Late Gauri Shankar, Age 65 Years, R/o Purani Basti, Kayastha Para, Raipur (C.G.)

---- Appellant/plaintiff

Versus

Domaar Singh, S/o Gendram Sinha, R/o Near Dugdh Diary, Sanjay Nagar, Tikra Para, Raipur.

---- Respondent/defendant

For Appellant/plaintiff	:	Mr. Raja Sharma, Advocate.
For Respondent/defendant	:	None present, though served.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

04/07/2019

(1) The substantial questions of law involved, formulated and to be answered in this plaintiff's second appeal state as under:

“1. Whether the trial Court was justified in rejecting the application filed by appellant / plaintiff under Order 26 Rule 9 of the CPC for appointment of local commissioner ignoring the fact that there is a dispute of the identity of the land as the plaintiff has claimed the suit land to be the part of Khasra No. 120/2 whereas the defendant has claimed the suit land to be the part of Khasra No. 121 by recording findings which are perverse to the record ?”

And

2. Whether the first appellate Court was justified in affirming the judgment & decree so passed by the trial Court ?

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

(2) The plaintiff filed a suit for ejectment and for vacant possession of the suit land stating inter-alia that he is owner and title holder of the suit land bearing Khasra No. 120/2, area 0.108 hectare, out of which 704 sq. ft. of land has been encroached by the defendant and consequently decree be granted in his favour.

(3) The defendant filed written statement stating inter alia that suit land is part of Khasra No. 121, area 1216 sq.ft. and he has not encroached upon the land of plaintiff and no construction has been made on the land bearing Khasra No. 120/2 owned by the plaintiff.

(4) During pendency of the suit, plaintiff filed an application under Order 26 Rule 9 of the CPC for appointment of local commissioner to find out whether suit land is part of Khasra No. 120/2 or 121/1, which the trial Court has rejected on 18.02.1999 and, thereafter, dismissed the suit finding no merit holding the plaintiff has not filed any document demonstrating that construction has been made on the plaintiff's land bearing Khasra No. 120/2, which the first appellate Court has affirmed and dismissed the appeal, against which, this second appeal under Section 100 of the CPC has been preferred by the appellant/plaintiff, in which, substantial questions of law has been formulated, which has been set-out in the opening paragraph of this judgment.

(5) Mr. Raja Sharma, learned counsel for the appellant/plaintiff would submit that the trial Court was absolutely unjustified in rejecting the application under Order 26 Rule 9 of the CPC to find out whether the suit land is part of Khasra No. 120/2 or 121/1 and thereby dismissing the suit. He would further submit that the first appellate Court has

also committed illegality in affirming the order/judgment of the trial Court and, therefore, the judgment & decree of both the Courts below are liable to be set aside and the matter be remitted back to the trial Court for appointment of commissioner and thereafter to decide the matter afresh by granting the appeal.

(6) I have heard learned counsel appearing for the appellant and considered his submissions made hereinabove and also went through the record with utmost circumspection.

(7) It is not in dispute that the plaintiff is title holder of the suit land bearing Khasra No. 120/2, but he has failed to prove that defendant has encroached upon the suit land and according to the defendant, he is in possession of the land bearing Khasra No. 121/1, as such, it is a case where dispute is about the identity of suit land, whether it is part of Khasra No. 120/2 owned by plaintiff or Khasra No. 121/1 owned by defendant No.1, which can only be established by appointing Revenue commissioner for ascertaining the identity of land under Order 26 Rule 9 of the CPC. In this connection, pertinent decision of the Supreme Court and the Madhya Pradesh High Court may be noticed profitably.

(8) The Supreme Court in the matter of **Shreepat Vs. Rajendra Prasad & others**¹ in identical fact situation remanded the matter to the trial Court for appointing Survey Commission to find out the 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

1 JT 2000 (7) SC 379

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.”

(9) Likewise, the Supreme Court in the matter of **Haryana Waqf Board Vs. Shanti Sarup and others**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 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.”

(10) Very recently, in the matter of **Ram Lal & Ors. v. Salig Ram & Ors.**³ the Supreme Court with regard to necessity of appointment of Local Commissioner under Order 26 Rule 9 of the CPC 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.”

(11) The Division Bench of the High Court of Madhya Pradesh in the matter of **Durga Prasad Vs. Parveen Foujdar & others**⁴ has held that in absence of agreed

² (2008) 8 SCC 671

³ JT 2019 (2) SC 106

⁴ 1975 MPLJ 801

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 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.”

(12) Following the principle of law laid down in this regard, revering to the facts of the present case, it appears that there is serious dispute between the parties with regard to boundary/area of the scheduled suit land specially with regard to identity of land as to whether the suit land is part of Khasra No.120/2 owned by the plaintiff or Khasra No.121/1 owned by defendant, therefore, the trial Court should have got the identity of 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 the trial Court thereby committed an illegality in rejecting the application filed under Order 26 Rule 9 of the CPC on the ground of delay and the first appellate Court perpetuated the illegality by dismissing the appeal.

(13) In view of above, the judgment and decree passed by both the Courts below are hereby set aside. The application filed by the plaintiff before the trial Court under Order 26 Rule 9 of the CPC is allowed with the following directions:-

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

(iv)The Collector, Raipur to see that demarcation is done expeditiously by the Revenue Inspector so appointed by the trial Court and report is submitted well in time.

(14) The second appeal is allowed to the extent indicated hereinabove. The trial Court is directed to decide the suit within 3 months from the date of receipt of copy of this order. The substantial question of law is answered accordingly. No cost(s).

(15) A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

