

HIGH COURT OF CHHATTISGARH, BILASPUR
WP227 No. 1002 of 2018

1. Janak Kumar S/o Shri Resham Lal Kesharwani, Aged About 37.
 2. Pramod Kumar S/o Shri Banshilal Kesharwani, Aged About 39 Years.
 3. Puranlal S/o Shri Jagdish Prasad Kesharwani, Aged About 30 Years.
- Both R/o Mahantpara, Shivrinarayan, Tahsil Navagarh, District Janjgir Champa Chhattisgarh.

---- **Petitioners**

Versus

1. Krishna Kumar Kesharwani S/o Shri Jagdish Prasad, Aged About 20 Years.
 2. Omprakash Sultania S/o Late Shri Ganpat Rai, Aged About 60 Years.
- Both R/o Mahantpara, Shivrinarayan, Tahsil Navagarh, District Janjgir Champa Chhattisgarh.
3. State Of Chhattisgarh Through Collector, Janjgir, District Janjgir Champa Chhattisgarh.

---Respondents

And

WP227 No. 1005 of 2018

1. Janak Kumar S/o Shri Resham Lal Kesharwani Aged About 37 Years Occupation Business, R/o Mahantpara, Shivrinarayan, Tahsil Navagarh, District Janjgir-Champa, Chhattisgarh.
2. Pramod Kumar S/o Banshilal Kesharwani Aged About 39 Years R/o Mahantpara, Ward No. 1, Shivrinarayan, Tahsil Navagarh, District Janjgir-Champa, Chhattisgarh.

---- **Petitioners**

Versus

1. Ganesh Prasad Agrawal S/o Maluram Agrawal Aged About 54 Years R/o Talapara Road, Vinoba Nagar, Bilaspur, District Bilaspur, Chhattisgarh.
2. State Of Chhattisgarh Through Collector, Janjgir, District Janjgir-Champa, Chhattisgarh.

---Respondents

And

WP227. No. 1058 of 2018

Radhelal Soni S/o Shri Chakradhar Prasad Soni Aged About 53 Years R/o Bhoghapara Shivrinarayan Sub Tahsil Shivrinarayan, Tahsil Navagarh, District- Janjgir-Champa, Chhattisgarh.

---- **Petitioner**

Versus

1. Omprakash Sultania S/o Late Shri Ganpat Rai Aged About 60 Years Occupation Business And Agriculture, R/o Mahantpara Shivrinarayan Sub Tahsil Shivrinarayan, Tahsil Navagarh, District- Janjgir-Champa, Chhattisgarh.
2. State Of Chhattisgarh Through Collector, Janjgir, District- Janjgir-Champa, Chhattisgarh.

---Respondents

And
WP227 No. 1060 of 2018

Radhelal Soni S/o Chakradhar Prasad Soni Aged About 53 Years R/o Bhoghapara Shivrinarayan, Sub Tahsil Shivrinarayan, Tahsil Navagarh, District Janjgir Champa Chhattisgarh.

---- Petitioner

Versus

1. Ganesh Prasad Agrawal S/o Shri Malu Ram Agrawal Aged About 47 Years R/o Bilaspur, Vinoba Nagar, Talapara Road, Bilaspur, Tahsil And District Bilaspur Chhattisgarh.
2. State Of Chhattisgarh Through Collector, Janjgir, District Janjgir Champa Chhattisgarh.

---Respondents

For Petitioners	:	Mr. Y.C. Sharma, Advocate.
For State	:	Mr.Vimlesh Vajpai, Dy, GA & Ms. K. Tripti Rao, PL.
For Respondent No.1 (in WP227 No.1005/2018)	:	Mr. A. K. Prasad, Advocate,

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

09.01.2019

1. By the impugned order plaintiffs' application under Order 26 Rule 9 of the Civil Procedure Code has been allowed by the trial Court, questioning that order these writ petitions have been preferred.
 2. Learned counsel for the respondents would submit that the trial Court is absolutely unjustified in granting the application at the verge of trial as the case is fixed for hearing.
 3. Mr. A. K. Prasad submits that the demarcation report pursuant to the order has already been submitted.
 4. I have heard learned counsel for the parties.
 5. The Division Bench of the High Court of Madhya Pradesh in case of **Durga Prasad Versus Parveen Foujdar & Ors** has held that in absence of agreed map; appointment of Commissioner is necessary.
- It was held as :-

“25. In case 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 C.P.C. On 15.09.1996 the plaintiff, accordingly, applied for the issue of an 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 01.12.196 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.”

6. The Supreme Court in case of **Shreeepat Vs. Raiendra Prasad & Ors** 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, 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.2571/1. 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.”

7. Likewise, the Supreme Court in the case of **Haryana Waqf Board Vs. Shanti Sarup and Ors** 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.”

8. Reverting to the facts of the case, the trial Court has clearly recorded finding that there is a serious dispute between the parties with regard to the boundary, area of land and identity of land, therefore, the trial Court has appointed the local Commissioner under Order 26 Rule 9 of the C.P.C.
9. In view of the above-stated analysis and in compliance of impugned order and the fact that demarcation report has already been submitted before the trial Court, I do not find any illegality or perversity in the impugned order. The writ petitions are liable to be and are hereby dismissed. However, the petitioners are at liberty to object the Commissioner report in accordance with law. No cost(s).
10. A copy of this order be sent to the concerned trial Court directly and through Email and Fax.

Sd /-

(Sanjay K. Agrawal)

Judge