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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 28th August, 2019

+ **CM (M) 844/2019 & CM APPL. 25632/2019**

KASHI RAM (DECEASED) THR LRS Petitioner

Through: Mr. J.K. Jain, Advocate (M:
9811073456).

versus

GAON SABHA NASIRPUR Respondent

Through: Ms. Hetu Arora Sethi, ASC GNCTD
(M: 9810368590).

Mr. Anil Tomor, Exaition Assistant
(Agriculture) (M: 8826983265).

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition challenges the impugned order dated 6th February, 2019 by which the application filed by the Plaintiff No. 1/ Petitioner (*hereinafter 'Plaintiff No.1'*) seeking demarcation of the land was dismissed. The brief background is that Plaintiff No. 1 claims to be recorded as co-owner of the land measuring 4 *bighas* 14 *biswas* out of Khasra No. 365 and 8 *bighas* 11 *biswas* out of Khasra No. 366 in the revenue estate of village Nasiripur, Palam, Delhi, since 1948-49 (*hereinafter 'suit property'*). However, it is further claimed that after 1954, though the land was shown as vested in the Gaon Sabha - Respondent/Defendant (*hereinafter 'Defendant'*), no action has been taken by the Defendant to take possession of the said land and until the filing of the present suit, the possession of the land was with Plaintiff No.1. Plaintiff No. 1, in 1991 found that the

Defendant started threatening to dispossess him and demolish parts of the suit property. Accordingly, the present suit was filed seeking the following reliefs: -

“It is, therefore, most respectfully prayed that the Hon'ble Court may kindly be pleased to pass a decree of permanent injunction in favour of the plaintiffs and against the defendant thereby restraining the defendant, its officials, servants, agents, etc. from taking the forcible possession of suit land measuring 4 bighas 14 biswas out of khasra no.365 and 8 bighas 11 biswas out of khasra no.366 situated in the revenue estate of village Nasirpur, Palam, New Delhi-110045 by fencing the suit land with barbed wires, except with the due process of law. Cost of the suit be also awarded to the plaintiffs.”

2. The case of the Defendant is that the land falling in Khasra No. 365/366 is in its possession.

3. The following issues were framed in the suit:-

“1.) Whether the suit of the plaintiff is not maintainable in view of the Section 99 of Delhi Panchayati Raj Act? OPD

2.) Whether the suit of the plaintiff is not maintainable for non-joinder of necessary party u/s 161 of Delhi Land Reforms Act? OPD

3.) Whether this court has no jurisdiction to try this suit? OPD

4.) Whether this suit is hit by section 41 (h) of Specific Relief Act? OPD

5.) Whether plaintiff is entitled to the decree of permanent injunction as prayed for? OPD (sic OPP)

6.) Relief.”

4. The Court granted a *status quo* order on 17th August, 2013. Somewhere around 11th November, 2013, the DDA along with its officials,

carried out demolition and it was claimed that the demolition was carried out in Khasra No. 393, though, according to Plaintiff No.1, the demolition was carried out in the property belonging to Plaintiff No.1. Accordingly, an application was filed by Plaintiff No.1 seeking appointment of a Local Commissioner to demarcate the land and delineate Khasra No. 365/366 and Khasra No. 393. The prayer in the said application reads as under:-

“It is, therefore, prayed that Tehsildar, Najafgarh, Delhi be appointed as Local Commissioner to demarcate the land in dispute and report whether the same falls in khasra NO.365/366 or 393 of village Nasirpur, Delhi.

Hon'ble court may pass such other and further order as deem fit and proper under the facts and circumstances of the case.”

5. The said application was resisted by the Defendant on the ground that Plaintiff No.1 is trying to encroach upon government land in Khasra No. 393 which is not permissible. The Trial Court decided the said application and held that the exercise of appointment of a Local Commissioner and carrying out demarcation would amount to collection of evidence on behalf of Plaintiff No.1. It further held that such an exercise cannot be carried out and it is for Plaintiff No.1 to prove that it is in possession of Khasra No. 365/366. The observations of the Id. Trial Court read as under:-

“Thus, if the aforesaid legal principles regarding appointment of local commissioner are applied to the facts and circumstances of the present case, this court is of the opinion that no ground for appointment of local commissioner has been made out by the plaintiff. If the application of the plaintiff is allowed it would amount to collecting of evidence on behalf of the plaintiff. Since the plaintiff has claimed himself to be in possession of land in khasra no.365 as well as 366, in

the considered opinion of the court, the initial burden to prove his case falls on the plaintiff himself. As evidence is being led on behalf of the plaintiff, the plaintiff may bring any evidence to prove his case in accordance with law. Before this stage such issue was never raised by the plaintiff. Hence, this court does not deem fit to allow the application at this stage of the suit. Further, the word demarcation signifies the action of fixing of boundary or limits of something. However, if the prayer of the plaintiff in the application is taken into account, it is revealed that the purpose of appointing local commissioner is to report whether the suit land falls in khasra no.365-65 or 393 of Village Nasirpur. The burden of proof to prove that the suit land falls in khasra no.365 as well as 366 and does not fall in khasra no.393 falls on the plaintiff himself in terms of section 101 of the Indian Evidence Act, so as to make him entitled to the relief of permanent injunction as prayed for.”

6. After making the above observations, the application for demarcation was dismissed by the Trial Court.

7. The Court has heard the ld. counsels for the parties. On behalf of Plaintiff No.1, it has been submitted that without the demarcation being carried out, it would be difficult to proceed further in the suit as there is variation in the stand of the Defendant itself. There is no clear clarity as to in which property demolition was carried out and the Defendant ought to be directed to do the demarcation. Reliance is placed on the following three judgments:

- ***Ponnusamy Pandaram v. The Salem Vaiyappamalai Jangarnar Sangam, AIR 1986 Madras 33***
- ***Babu & Ors. v. Nain Singh & Anr. [RSA 198/2015, decided on 19th October, 2015]***

- ***Venu Gopal Tari & Ors. v. Nilconta S. Xete & Ors., AIR 1975 GOA, DAMAN & DIU 32.***

8. On the other hand, ld. counsel appearing for the Defendant relies upon the order passed in appeal MCA No. 03/14 relating to some land wherein the Court therein has held that there was a cloud on the title itself.

“It is to be noted at the outset that the decree dated 28.11.1975 found the plaintiffs to be in unauthorized cultivation of the suit land. The jamabandi on the other hand specifically recorded the Gaon Sabha as the tenure holder. Thus, neither document can be considered as being indicative either of ownership/ tenure of the plaintiffs or authorized possession.

*...
The suit in question is precisely such a suit. A cloud over title would emerge if there exists an apparent defect in title or if the title of a third party is indicated. In the present facts, the jamabandi does not record the plaintiffs to be the owners / tenure holders. It is rather the Gaon Sabha which is recorded as such. Thus on both counts i.e apparent defect in title of the plaintiffs and the likelihood of a third party title instead, the title of the present plaintiffs is manifestly under a cloud. A combined reading of the two documents i.e the decree dated 28.11.1975 and the jamabandi also suggests that a declaratory decree alone can clarify the title, if any, of the plaintiffs. In such a scenario, when the suit itself may not be maintainable, there arises no prima facie case for grant of an interim injunction either.”*

9. On the basis of the above findings, ld. counsel submits that the onus to prove that Plaintiff No.1 is in possession of Khasra No. 365/366 is on Plaintiff No.1 and the same cannot be shifted upon the Defendant.

10. A perusal of the issues shows that on the issue as to whether Plaintiff No.1 is entitled to an injunction or not, the onus would be on Plaintiff No.1

– though in the order it is inadvertently typed as ‘OPD’. The onus to prove Issue no. 5 has to obviously be on the Plaintiff. It is the case of Plaintiff No.1, in the plaint, that he is in possession of Khasra No. 365/366. The evidence of Plaintiff No.1 is currently going on and the Defendant has also to lead its evidence. Upon evidence being led, the Court will consider whether the injunction sought for by Plaintiff No.1 is liable to be granted or not and whether there is a requirement or need to demarcate the land or to direct demarcation. At this stage, the demarcation has been rightly rejected as Plaintiff No.1’s onus cannot be shifted onto the Defendant and demarcation cannot be directed. The Trial Court’s discretion to allow demarcation at a later stage, after the evidence has been led by the parties, is left open.

11. The petition and all pending applications are disposed of.

AUGUST 28, 2019
MR

PRATHIBA M. SINGH
JUDGE