

HIGH COURT OF CHHATTISGARH, BILASPUR

REVP No. 104 of 2018

1. Sudhir Agrawal, Aged About 58 Years,
2. Subodh Agrawal, Aged About 54 Years

Both are sons of Shri S. K. Agrawal Advocate and residents of Turi Hatri, Purani Basti, Raipur, Tahsil And District- Raipur, Chhattisgarh

---- Petitioners

Versus

Manohar Lal Trivedi S/o Shri Babulal Trivedi Aged About 50 Years R/o Khariyar Bada, Budhapara, Raipur Tahsil And District- Raipur

---Respondent

For petitioners – Shri B.P. Sharma and Shri Sameer Oraon, Advocates.

Hon'ble Shri Justice Goutam Bhaduri

Order

07/02/2020

1. Heard on application for review of the order dated 9/08/2018 passed in W.P.(227) No.687/2018. Despite repeated calls the respondent did not appear.
2. Learned counsel for the petitioners would submit that the petitioners were not heard while the order was passed. In order to mitigate the same, the petitioners are being heard today on the propriety and legality whether the order requires to be recalled or not. Learned counsel for the petitioners would submit that the suit was filed by the petitioners herein they were the plaintiffs claiming damages against the defendant, who was petitioner in W.P.(227) No.687/2018. It is further stated that suit was for damages of Rs.50,000/- on the ground that the defendant Manohar Lal Trivedi has dug up the land which is adjacent to the land of the plaintiffs. Consequently, during the rainy season the water got filled in and eventually the boundary wall which was existing on land of plaintiff fell down. It was stated that because of such fact the suit for damages was filed. It is further contended that the defendant in that case filed an application for demarcation of the

land, thereby he is trying to collect the evidence whereas the suit is not a title suit, it is only B class damages suit. Consequently, order passed on 9/08/2018 appointing of the Commissioner requires to be called back.

3. This court on 9/08/2018 in W.P.(227) No.687/2018 has passed the following order:-

“1.The present petition is against the order dated 11.07.2018 passed in Civil Suit No.4-B/2013 whereby an application under Order 26 Rule 9 read with Section 151 of C.P.C. filed by the petitioner/defendant for demarcation was dismissed.

2.Learned counsel for the petitioner submits that the instant petition is by the defendant. The suit is filed by the respondents/ plaintiffs claiming damages of Rs.50,000/- on the ground that adjacent to their wall, which was constructed by the plaintiffs, the defendant has dig out a plinth which has caused damage and entire wall of the plaintiffs has fallen down, as such, damages was claimed. The defendant contended that the wall which has been claimed by the petitioners/plaintiffs do not belong to them. He further submits that during the course of trial, an application under Order 26 Rule 9 of C.P.C. was filed, which was dismissed by the learned Court below on the ground that the Court is not going to collect the evidence and the order therefore completely bad in law.

3.Perused the impugned order dated 11.07.2018. The application purportedly dismissed on the ground that one application for demarcation is already pending before the Tahsildar, therefore, there was no justification to entertain the second application. The order do not show that the demarcation application which was filed before the Tahsildar has ended and pursuant thereto the demarcation has already been carried out and in the meanwhile the suit has reached to the stage of evidence. It is obvious that if the Tahsildar do not carry out the demarcation then the identity of the land, which is the central issue of this case wherein two parties are claiming right over the same land, it cannot be decided unless such identification of land is decided.

4.Supreme Court in case of **Haryana Waqf Board Vs. Shanti Sarup & Ors. reported in (2008) 8 SCC 671** while dealing likewise issue has ruled that in case when there is encroachment it can be demarcated only by appointment of Commissioner, then investigation

has to be carried out by the local Commissioner by demarcation of the disputed land under Order 26 Rule 9 CPC. In case of **Shreepat Vs. Rajendra Prasad & Ors. reported in 2000(6) Supreme 389** while dealing likewise nature of dispute Supreme Court observed that when serious dispute exist in respect of the area and boundaries of land in question, especially with regard to the identity then it should have been decided and demarcated by the Commissioner appointed under Order 26 Rule 9 of CPC. Likewise this court in case of **Sukhdev Prasad Yadav Vs. Hemlata Mishra and Anr. In Misc. Appeal No.86 of 2013 decided on 25 th September, 2013** has held when the identity of land is in question the identity of the property should be decided by issuance of the commission.

5.Considering the facts that the application under Order 26 Rule 9 read with Section 151 of C.P.C. was filed, in the opinion of this Court, the Court cannot sit in the fence for the fact that an application before the Tahsildar is filed. The Court has to adjudicate the case on the basis of the evidence, therefore, when the two parties are claiming right over the same land and the damages has been claimed, naturally therefore the possession of the land and identity of the land are to be established otherwise the Court below will fail into exercise his jurisdiction and decide the actual lis between the parties for want of proper evidence.

6.In a result, the order dated 11.07.2018 is set aside and the application under Order 26 Rule 9 read with Section 151 of C.P.C. is allowed. The trial Court is directed to appoint the Revenue Inspector to demarcate the land within a specified period of time.

7.Accordingly, the petition is allowed.”

4. The documents filed along with this review petition, the plaint and the written statement are also enclosed alongwith the issue which are framed. Reading of the plaint and the written statement alongwith the application for appointment of receiver, wherein it is averred that the plaintiffs with the connivance of few of the Revenue Officer got the land bearing khasra No.160/3 converted change it to khasra No.160/2 which was earlier number of the petitioners land. The petitioners claimed that the defendant has damaged the suit property. The defendant per contra

contended that actually khasra No.160/2 was earlier number was numbered into 160/5, as part of such land which the plaintiff had purchased got merged into some other land because of the road. It was stated that the Khasra No.160/5 is not available on spot, which is actual number of 174/2. Therefore in revenue records fabricated entries were made with respect to Khasra No.160/2 & 160/3. Under these facts to clarify the position application therefore was filed by the defendant for demarcation of the land.

5. In view of given facts in order to arrive the issue involved, the ownership of the property alongwith past history and the identity of the property are required to be established. The defendant contended that the plaintiffs with connivance of the Revenue Officer has got the land mutated so as to envelope the land of the defendant. The defendant further contended that khasra No.160/3 was numbered as 160/5 and part of it was purchased by the plaintiffs whereas khasra No.160/2 remained as it is which belong to the defendant. Therefore in order to identify the real lis, it would be required to know the genesis and the ownership alongwith the identity of property since the plaintiffs have claimed the damages on the basis of the damage to their property, therefore when counter serious allegations have been made on plaintiffs the same cannot be ignored.

6. In a consequence, I do not find any ambiguity to recall the order dated 9/08/2018. The review petition has no merit and accordingly it is dismissed.

Sd/-

(Goutam Bhaduri)

JUDGE