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THE HIGH COURT OF MADHYA PRADESH
Writ Petition No.1115/2014
Ram Biloki and another Vs. Ramswaroop and others

Gwalior, Dated :10/12/2018

Shri J.P. Mishra with Shri Gaurav Mishra, Counsel for the petitioners.

None for the respondents.

Heard finally.

This petition under Article 227 of the Constitution of India has been filed against the order dated 7-1-2014 passed by Civil Judge, Class 1 Karera, Distt. Shivpuri, in C.S. No.13-A/2013, by which the application filed by the petitioner under Order 26 Rule 9 C.P.C. for appointment of Local Commissioner was allowed with a further direction that the Local Commissioner would also submit his report with regard to the objections raised by the respondent in his reply to the application.

The necessary facts for the disposal of the present petition in short are that the petitioner has filed a suit for permanent injunction in respect of suit plot admeasuring 35x36 sq. meters in survey no.20001/ area 0.12 hectare situated at Tila Road Chouraha, National Highway, Tahsil Karera, Distt. Shivpuri. It was pleaded that the plot in question is on the North of National Highway and now the defendants are trying to dispossess them.

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The respondents filed their written statement and denied
plaint averments.

The plaintiffs/petitioners filed an application under Order
26 Rule 9 C.P.C. seeking for appointment of Commissioner to
seek report on the following issues :

जांच बिंदु

1. वादीगण की दुकान के उत्तर दिशा में फोर
लाइन से डिवाइडर तक बीच की दूरी कितनी है
तथा राष्ट्रीय राजमार्ग में कितनी भूमि आती है तथा
दुकान से फोरलाइन रोड तक बीच की दूरी कितनी
वादीगण का दुकान का दरवाजा फोर लाइन की
तरफ स्थित है या नहीं ।
2. पुराने टीला रोड से लगकर प्रतिवादी कं 1 की
दुकानों की पीछे खुली व पुराना कच्चा मकान स्थित
है या नहीं ।
3. यह कि प्रतिवादी कं 1 की दुकानों से फोर
लाइन तक की बीच की दूरी कितनी है ।
4. यह कि उक्त मौके की स्थिति की जांच हो
जाने से प्रकरण के निराकरण में जांच रिपोर्ट
सहायक होगी तथा पक्षकारों को न्याय मिल सकेगा ।
प्रार्थी कमिश्नर फीस जमा करने को तैयार है ।

The defendants filed their reply and submitted no
objection for appointment of Commissioner, but prayed that the
Commissioner should also be directed to submit his report on
the following issues also :

प्रतिवादीगण की ओर से आवेदन का उत्तर प्रस्तुत

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करते हुए सीमांकन कराये जाने में सहमति व्यक्त की गई है और यह लेख किया गया है कि जांच के बिन्दु में फोर लाइन से लगकर किस सर्वे नं की कितनी भूमि है तथा वादीगण कितनी भूमि में मालिक है व उनका मकान व दुकान कितने रकबे पर बना हुआ है तथा कितना रकबा शासकीय भूमि पर बना है व कितना स्वयं के पर बना है के तथ्य की भी जांच कराई जाना आवश्यक है।

By the impugned order, the Trial Court allowed the application and appointed the Commissioner, but also directed that the Commissioner shall also submit his report with regard the prayer made by the defendants.

Being aggrieved by the order of the Trial Court, it is submitted by the counsel for the petitioner that while allowing the application, the Trial Court should not have directed the Commissioner to submit the report with regard to the prayer made by the defendants also, because it would amount to collecting evidence, which is not permissible.

Heard the learned Counsel for the petitioner. None appears for respondents though served.

It is well established principle of law that where the dispute is of boundaries, then the same can be resolved by appointing a Commissioner. Thus, in order to hold that there is

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dispute of boundaries, there should not be any claim of title over the land belonging to another party. Thus, except the question of identity of property, no other dispute should be involved. However, where a party to the suit claims that the area of his land has been wrongly reduced, then it cannot be said that it is a simple case of boundary dispute. Unless and until, the claim of the plaintiff that the area of his land has been reduced is established, no further relief can be granted to him. Thus, the present case, cannot be said to be a simple case of boundary dispute.

Order 26 Rule 9 CPC reads as under :

9. Commissions to make local investigations.— In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any *mesne profits* or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

Thus, it is clear that a local Commissioner can be appointed for either elucidating any matter in dispute, or of

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ascertaining the market-value of any property or the amount of any *mesne profits* or damages or annual net profits. However, the words “elucidating any matter in dispute” would not include, collection of evidence. The Court by passing an order under Order 26 Rule 9 C.P.C. cannot delegate its powers of adjudicating the dispute to a Local Commissioner.

This Court in the case of **Ashutosh Dubey and another Vs Tilak Grih Nirman Sashkari Samiti and another** reported in **2004(3) MPLJ 213** has held as under :

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied :--
(i) the error is manifest and apparent on the fact of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

Considering the aforesaid, it is apparent that the order passed by the Courts below is without jurisdiction and the Court below has assumed jurisdiction which was not vested in it. Once the application under Order 26 Rule 9, CPC was rejected by the Trial Court on merits, there was no occasion for the Trial Court for re-consideration of the aforesaid application on similar facts. Apart from this, it is settled law that no such commission may be issued for collecting the evidence in the case. If the aforesaid order allowed to remain in existence it will cause serious injustice to the other side. This Court in *Laxman v. Ramsingh*, Civil Revision

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No. 18 of 1982, decided on 24-2-1982 (1992 MPWN 255) has considered similar question held :--

"The prayer for appointment of a Commissioner was made on the ground that the Commissioner would be able to see on the spot the crop which is standing on the suit lands. This according to the defendant will bring out the truth of his case as according to him it was gram crop as sown by the applicant which was standing on it. Learned Counsel for the non-applicant plaintiff had submitted that the appointment of Commissioner as being sought on certain assumptions. He had in this connection pointed out certain pleadings in that behalf. The object of local investigation is not so much to collect evidence for either of the parties. It is within the discretion of the Court to order a local investigation or reject the prayer. The Court below has exercised that discretion by rejecting that application. In view of the circumstances, it can not be said that the Court has committed any error on jurisdiction while rejecting the application in that behalf."

7. Similar position is here, in this case the prayer for collecting of the evidence on spot has been sought through appointment of the commission which is beyond the scope of Order 26 Rule 9, CPC. In the circumstances Court below erred in allowing the application.

If the facts of this case are considered, then it is clear that even the application filed by the petitioners for appointment of Commissioner should not have been allowed by the Trial Court, because by prayer made in the application as well as in the reply to the application, the parties to the suit

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have tried to collect evidence through Commissioner, which cannot be allowed.

Accordingly, this Court is of the considered opinion that the order dated 7-1-2014 passed by Civil Judge, Class-1 Karera, Distt. Shivpuri, in C.S. No.13-A/2013, by which the application filed by the petitioner under Order 26 Rule 9 C.P.C. for appointment of Local Commissioner was allowed with a further direction that the Local Commissioner would also submit his report with regard to the objections raised by the respondent in his reply to the application, cannot be allowed to stand in its entirety. Accordingly, the same is set aside and the application filed by the petitioners under Order 26 Rule 9 C.P.C. is hereby rejected. The parties are directed to prove their case by leading evidence in the Court.

The Trial Court is directed to proceed in accordance with law.

The Petition is **allowed**, however, the impugned order, in its entirety is set aside.

The interim relief granted by this Court by order dated 18-2-2014 is hereby vacated.

Arun*

(G.S. Ahluwalia)
Judge