



IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE PRANAY VERMA

ON THE 6th OF MARCH, 2025

SECOND APPEAL No. 23 of 2005

BAGDIRAM

Versus

RAMSINGH

Appearance:

Shri Kailash Kaushal, learned counsel for the appellant.

None for the respondent.

ORDER

1. This appeal under Section 100 of the CPC has been preferred by the appellants/defendants being aggrieved by the judgment and decree passed by the Courts below whereby the claim of plaintiffs/respondents for permanent injunction has been decreed.

2. As per the plaintiffs, by a registered sale deed dated 29.03.1961 Jagannath, Daulatramji and Dhannaji had purchased survey No.72/82 area 4.31 acre from Pyara S/o Tulsiji Chamar. They divided the land



amongst themselves subsequently as a result of which survey No.72/82/2 fell to the share of Jagannath, survey No.72/82/3 fell to the share of Dhannaji and survey No.72/82/1 fell to the share of Daulatramji. The same were accordingly recorded in the revenue records. The plaintiffs are in possession of survey No. 72/82/2 area 0.809 hectare fallen to the share of their predecessor Jagannath which is the suit land but the defendants are attempting to encroach over the same which has necessitated filing of the suit for permanent injunction restraining the defendants from interfering with their possession over the same.

3. The defence of the defendants was that they are the owners of survey No.3 area 2.561 acre which is an entirely distinct land from the land owned by the plaintiffs. The areas of both the lands are different and they are situated in different villages. The plaintiffs want to forcefully grab the land of the defendants, who are not in possession of any land of the plaintiffs. The defendants also laid a counter claim for declaration of their title over their land. The plaintiffs filed their written statement to the counter claim of the defendants.

4. Upon recording of evidence of the parties the trial Court decreed



the plaintiffs' claim holding that they have proved that the suit land is a part of the land owned by them and that defendants are interfering with their possession over the same. Appeal preferred against the said judgment and decree by the defendants has been dismissed by the lower appellate Court by the impugned judgment.

5. By order dated 10.05.2006 this appeal was admitted on the following substantial question of law :-

“Whether the learned Courts below were justified in decreeing the plaintiff's suit for permanent injunction without deciding the dispute regarding the identity of the land according to law.”

6. Learned counsel for the appellants has submitted that the dispute between the parties was a boundary dispute hence the same could not have been decided by the Courts below without appointment of a local Commissioner as envisaged under Order 26 Rule 9 of the CPC. Even if no application in that regard had been preferred before the Courts below then also it was their duty to themselves appoint such a Commissioner. The dispute is only whether the suit land forms part of the land owned by the plaintiffs or forms part of the land owned by the defendants. The same could not have been decided on the basis of the



evidence adduced by the parties and a local Commissioner ought to have been appointed.

7. Despite service of notices upon them no one has appeared to contest this appeal on behalf of the respondents.

8. I have considered the submissions of the learned counsel for the appellants and have perused the record.

9. From the pleadings of the parties it is evident that there is no dispute as regards title between them. While the plaintiffs contend that they are owners of survey No.72/82/2, the defendants contend that they are owners of survey No.3. The plaintiffs have alleged that defendants are encroaching over their land whereas the defendants have stated that they are in possession of their own land and have not encroached over plaintiff's land. The dispute is hence purely a boundary dispute i.e. whether the suit land forms part of survey No.72/82/2 owned by the plaintiffs or forms part of Survey No.3 owned by the defendants. The said dispute ought not to have been decided by the Courts below without appointing a local Commissioner as envisaged under Order 26 Rule 9 of the CPC for demarcation of the suit land and submission of spot inspection report.



10. Order 26 Rule 9 of the CPC reads as under :-

“Order 26 Rule 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.”

11. In **Prembai V/s. Ghanshyam 2010 (3) M.P.L.J. 345** it has been held by this Court that if there is a dispute about demarcation of the boundaries then in such a situation it would be appropriate for the Court to appoint a competent Commissioner and it is the law of land which is to be followed. It was held as under :-

“13. That apart, I do not find any merit in the contention of learned counsel for the respondent No. 1/plaintiff, that an application was submitted by plaintiff to appoint the Commissioner which was vigorously opposed by defendants and accordingly the learned trial Court dismissed that application on 28-7-1995 and, therefore, now the defendants are estopped from raising this ground. According to me, if there is a dispute about the demarcation of the



boundaries, the Supreme Court and this Court have interpreted the law as envisaged under Order XXVI, Rule 9, Civil Procedure Code that in such a situation it would be appropriate to the Court to appoint a competent Commissioner and, hence, it is the law of land which is to be followed and, therefore, in these facts and circumstances, there cannot be any estoppel against law. The substantial question of law No. 1 is thus answered in favour of appellants.”

12. In **Loknath Gautam V/s. State of M.P.** 2018 SCC Online MP 600 it has been held by this Court that whenever there is dispute as to encroachment the fact whether there is an encroachment or not cannot be determined in absence of agreed map except by appointment of a Commissioner under Order 26 Rule 9 of the CPC. It was held as under :-

“16. The ancillary question is whether for the purpose of determining the identity of land or in case of boundary dispute power under Order 26 Rule 9 can be exercised? This point is no more res integra. The Division Bench of this Court in the case reported in 1975 J LJ 440, [Durga Prasad v. P. Foujdar] opined that 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 CPC.

17. The Bombay High Court has consistently taken the view that in cases of boundary dispute and dispute about the identity of land, courts should



order local investigation under Order 26 Rule 9 CPC. (See : (2004) 3 Mah LJ 724, [Sukhdeo Parashramji Bhugul (Dr.) v. Wamanroa Nagorao Charhat]; (2009) 6 AIR Bom R (NOC 1033) 329, [Girish Vasantrya Bhoyar v. Nimbaji Warluji Bambal]; (2010) 4 AIR Bom R (NOC 450) 127, [Yeshwant Bhaduji Ghuse v. Vithabaji Laxman Ladekar]; (2014) 1 AIR Bom R 16 : AIR 2014 (NOC 173) 59, [Malhar v. Shivaji] and (2015) 4 AIR Bom R (NOC 3) 2, [Shyam Janardam Chaoudary v. Asha Ramdas Katkar]). Alok Aradhe, J in 2012 (III) MPWN 62, [Beejanwala Talukdar (Smt.) v. Radhakrishna Rai] opined as under:

“6. The appellant in the plaint has stated that defendant nos. 1 and 2 have taken possession of the land belonging to him which has been marked with letters A, B, C, D which forms part of Khasra No. 32. On the other hand, defendants nos. 1 and 2 in the written statement have denied the factum of encroachment and have stated that they are in possession of the land which has been purchased by the defendant no. 2 on 20-01-1976 which forms part of Khasra No. 32. There is no agreed map. In the absence of any agreed map, the trial court could not have decided the issue of encroachment. [See : Haryana Waqf Board v. Shanti Sarup, (2008) 8 SCC 671 and decision of Division Bench of this court in the case of Durga Prasad v. Parveen Foujdar, 1975 MPLJ 801]. For the aforementioned reasons, the substantial question of law framed by this court is answered in negative and in favour of the appellant.”

[Emphasis Supplied]



13. In **Suman Pandagre V/s. Madhu Pandagre and Others 2022** **SCC Online MP 6030** it has been held by this Court that application under Order 26 Rule 9 of the CPC can be filed at any stage of the proceedings. It is purely a legal question that can also be raised at the appellate stage. It has been held as under :-

“8. From the perusal of the aforesaid judgments by the various Courts it is apparently clear that the application under Order 26 Rule 9 of CPC can be filed at any stage of the proceedings even prior to the defendants marking their presence before the Court or at the final stage of the proceedings. It is purely a legal question that can also be raised at the appellate stage also. The basic concept for filing an application seeking appointment of Commissioner for identity of a land in question or is there is any boundary dispute or dispute with respect to the maps or where there is dispute with respect to encroachment, which cannot be determined in absence of any agreed map normally the Court should have appointed the Commissioner. In the present case the civil suit has been filed on the ground of easmentary right by the petitioner/plaintiff stating that the by-lane is in existence and it has been used by the plaintiff and his forefathers since long. There is a specific denial to the aforesaid aspect by the defendants in their written statement. In such circumstances, it is not a Government land or a Government road that the identity of the land is of a material aspect in the matter. There is nothing on record to show that the particular land is being identified as a disputed land in the matter. In such circumstances, the application



filed under Order 26 Rule 9 of CPC should have been allowed by the learned trial Court for identification of the land in question. Allowing such an application will amount to substantial justice to the parties and will also expedite the proceedings of the civil suit.”

14. In **Jaswant V/s. Dindayal 2011 (2) MPLJ 576** it has been held that when there is a dispute about demarcation it is the duty of the Court itself to issue commission by appointing an employee of Revenue Department not below the rank of Revenue Inspector to get the land in dispute demarcated and for its identification no application is required for that purpose.

15. In **Vayathinattar and Another V/s. Sakkubai Ammal AIR 2004 Madras 419** the dispute between the parties was as regards demarcation. None of the parties filed any application before the Courts below for appointment of a local Commissioner. In such circumstances it was held that the best evidence in cases of such nature could have been obtained only by appointment of a Commissioner and that the same was a legal necessity and has to be complied with. Holding so the judgment and decree passed by the Courts below were set aside and the matter was remanded back to the trial Court for appointment of a local



Commissioner as envisaged under Order 26 Rule 9 of the CPC. It was held as under :-

“17. None, particularly, the plaintiff who claims that the suit property is lawfully belonging to her has been encroached upon by the defendants and annexed to their lands has filed an application for the appointment of Commissioner to measure the property and submit a report with sketch, and this Court wonders as to why the plaintiff has not resorted to file an application nor even the defendants thought of in this line, as a result of which the Courts have to arrive at their own conclusions based on the paltry evidence placed on record and, therefore, since the best of evidence in cases of such nature could have been obtained only by appointment of a Commission and ascertainment of the extent of lands in possession and enjoyment of each party to the contest, and since this legal necessity has not been complied with, the lower Courts have not been in a position to act with the conclusive proof which could be relied upon and, therefore, it is only desirable to do this requirement which is absolutely necessary in the case in hand and, therefore, needless to mention that it is a case which has to be remanded back to the trial Court for observing this requirement in the circumstances of the case and to give a decision based on such report obtained and hence, both the judgments rendered by the trial Court and the first appellate Court have to be set aside and the case remanded for re-consideration and hence, the sole substantial question of law has to be decided in the manner and with the following result.



In result

(i) *****

(ii) *the case is remanded to the trial Court for re-consideration in appointing a commissioner and measuring the suit property and the other properties surrounded by the suit property so as to ascertain the facts regarding the possession of the extent of lands by parties and to file a report with sketch and the trial Court shall decide on such additional evidence placed on record also with further opportunity for the learned counsel for both to be heard and to decide the dispute on merits and in accordance with law;”*

16. In **Baliram V/s. Melaram and Another** AIR 2003 HP 87 it has been held that to issue commission under Rule 9 of Order 26 of the CPC it is not necessary that either or both the parties must apply for issue of commission. The Court can appoint local Commissioner *suo moto* if it is deemed necessary that a local investigation is required. If local investigation is requisite and proper it should be exercised so that a final and just decision is rendered in the case. It was held as under :-

“13. Rule 9 of Order 26 of the Code of Civil Procedure (hereafter referred to as 'the Code'), empowers the Court to issue commission to make local investigation which may be required for the purpose of elucidating any matter in dispute. Though the object of the local investigation is not to collect evidence which can be taken in the Court, but the purpose is to obtain



such evidence, which from its peculiar nature, can only be had on the spot with a view to elucidate any point which is left doubtful on the evidence produced before the Court. To issue a commission under Rule 9 of Order 26 of the Code, it is not necessary that either or both the parties must apply for issue of commission. The Court can issue local commission suo motu, if, in the facts and circumstances of the case, it is deemed necessary that a local investigation is required and is proper for the purpose of elucidating any matter in dispute. Though exercise of these powers is discretionary with the Court, but in case the local investigation is requisite and proper in the facts and circumstances of the case, it should be exercised so that a final and just decision is rendered in the case.”

17. The principles which thus emerge are that if there is a dispute about demarcation of boundaries or where there is a dispute as to encroachment the fact whether there is such an encroachment or not and for the purpose of determining identity of land by local investigation in absence of an agreed map, exercise of power under under Order 26 Rule 9 of the CPC by appointment of a competent Commissioner is necessary. In case of such a dispute best evidence can be obtained only by appointment of a Commissioner and ascertainment of the extent of lands in possession or enjoyment of the parties. The



same is the law of land and is a legal necessity in absence of which the Court would not be in a position to act with the conclusive proof which could be relied upon. When there is a dispute about demarcation, it is the duty of the Court itself to issue commission and it can issue such commission *suo moto* also if in the facts and circumstances of the case it is deemed necessary that a local investigation is required for elucidating any dispute in the matter. For that purpose no application is required. It is not necessary that either or both the parties must apply for issue of commission. An application under Order 26 Rule 9 of the CPC can be filed at any stage of the proceedings even prior to the defendants marking their presence before the Court or at the final stage of the proceedings. It is purely a legal question that can also be raised at the appellate stage. Though exercise of power is discretionary but in case local investigation is requisite and proper it should be exercised so that a just decision is rendered in the case since it is the duty of the Courts to ensure that substantial justice is delivered to the parties.

18. Thus, in view of the aforesaid discussion, the judgment and decree passed by the Courts below cannot be sustained and are hereby set aside and the matter is remanded back to the trial Court for



appointment of a local Commissioner under Order 26 Rule 9 of the CPC and obtaining a Commissioner's report and thereafter deciding the matter afresh in accordance with law. However, it is made clear that the parties would be entitled to lead evidence only to the extent of the report to be submitted by the local Commissioner.

19. The appeal is accordingly allowed. No order as to costs.

(PRANAY VERMA)
JUDGE

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