

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

ON THE 14TH OF MARCH, 2023

MISC. PETITION No. 5362 of 2022

BETWEEN:-

**SHIVNARAYAN S/O GIRDHARI, AGED ABOUT 63
YEARS, OCCUPATION: AGRICULTURE, R/O
GRAMPURA BARATHA, TEHSIL
NARSINGGARH DISTRICT RAJGARH (MADHYA
PRADESH)**

.....PETITIONER

**(SHRI MANISH KUMAR VIJAYWARGIYA, LEARNED COUNSEL FOR THE
PETITIONER.)**

AND

**SHYAMLAL S/O RATIRAM, AGED ABOUT 55
YEARS, OCCUPATION: AGRICULTURE R/O
1. GRAM PURA BARATHA TEHSIL
NARSINGGARH DISTRICT RAJGARH
(MADHYA PRADESH)**

**PREMNARAYAN S/O SHRIKISHAN, AGED
ABOUT 38 YEARS, OCCUPATION:
2. AGRICULTURE GRAM PURA BARAYATHA, TEH.
NARSINGGARH, DISTRICT RAJGARH
(MADHYA PRADESH)**

**RAMGOPAL S/O KALURAM, AGED ABOUT 80
YEARS, OCCUPATION: AGRICULTURE GRAM
3. PURA BARAYATHA, TEH. NARSINGGARH,
DISTRICT RAJGARH (MADHYA PRADESH)**

**4. M.P. RAJYA THROUGH SHRIMAN JILADHISH
MAHODAY, RAJGARH (MADHYA PRADESH)**

.....RESPONDENTS

(SHRI SAMEER SAXENA, LEARNED COUNSEL FOR THE RESPONDENT

NO.3.)

Reserved on : 03.03.2023

Delivered on : 14.03.2023

This petition coming on for orders this day, the court passed the following:

ORDER

[1] Petitioner/plaintiff has filed this present petition being aggrieved by order dated 09.09.2022 whereby application filed under Order 26 Rule 9 of the CPC has been dismissed. The petitioner/plaintiff filed the suit in respect of the suit land mentioned in paragraph No.2 of the plaint. According to the plaintiff, the defendants/respondents has encroached over some part of the land of his ownership. The petitioner/plaintiff applied for demarcation which was conducted by the Tehsildar and the possession of defendant was found hence that gave the cause of action to file the suit for possession.

[2] The defendants have filed a written statement denying the averment made in the plaint, they have also denied the demarcation as well as the report submitted by the revenue authorities. Before adducing the evidence, the plaintiff has filed an application under Order 26 Rule 9 C.P.C. seeking direction for demarcation of the suit land bearing survey No.201/1/2 area 1.0110 Hectare through any revenue authorities. The application was opposed by the defendants and the learned Court has dismissed the application on the ground that the said provision cannot be invoked for the collection of the evidence hence, this petition before this

Court.

[3] Shri Manish Kumar Vijaywargiya, learned counsel for the petitioner/plaintiff submits that the entire suit is based on the allegation of encroachment and the report of the demarcation given by the Revenue Officer but the respondents/defendants are disputing the same, therefore, the Court must appoint a Commissioner in order to adjudicate the controversy between the parties.

[4] Shri Sameer Saxena, learned counsel for the respondent/defendant submits that the plaintiff has filed the suit alleging encroachment, therefore, the plaintiff must establish his case by adducing the evidence in support of the pleadings made in the plaint. The provisions of Order 26 Rule 9 of CPC cannot be invoked for collecting the evidence. In support of his contention, learned counsel has placed reliance on a judgment in the case of *Ashutosh Dubey and another v/s Tilak Grih Nirman Sahakari Samiti [2004 (2) MPHT 14]* decided on *11.11.2003*.

Heard both sides.

[5] In the case of *Haryana WAQF Board Vs. Shanti Sarup and Ors., reported in (2008) 8 SCC 671*, wherein, it has been held that if the controversy is regarding demarcation of the land between the parties, the Court should direct the investigation by appointing a legal Commission. Para 4 and 5 of the aforesaid judgment is reproduced as under:

“4. Admittedly, in this case, an application was filed under Order 26 Rule 9 of the code of Civil Procedure which was rejected by the trial Court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the Court to

direct the investigation by appointing a Local Commissioner under Order 26 Rule 9, CPC.

5. The appellate Court found that the trial Court did not take into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegations of unauthorized possession in respect of the suit land by them as per Para 3 of the plaint. But the only controversy between the parties was regarding demarcation of the suit land because the land of the respondents was adjacent to the suit land and the application for demarcation filed before the trial Court was wrongly rejected.”

[6] A similar view was taken by the High Court that in the case of encroachment, appointing of commission is proper. In ***Durga Prasad Vs. Parveen Foujdar, reported in (1975) MPLJ 810*** this Court has also considered the scope of order 26 Rule 9 and held that the Court should order the appointment of Commission when there is a dispute of encroachment. Para 25 of the said judgment is reproduced as under:

“25. Point No.2: In cases 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 Code of Civil Procedure. On 15.09.1966 the plaintiff, accordingly, applied for the issue of a commission to the Director of Land Records for a theodolite survey of the plaintiff's leasehold area.”

[7] Again this Court has taken a similar view in the case of ***Jaswant S/o Kashi Ram Yadav Vs. Deen Dayal, reported in (2011) 2 MPLJ 576***

had held that the duties of the Court to issue a commission by appointing an employee of the revenue department to get the land in dispute demarcated and for which no application is required. Para 10 of the said judgment is reproduced as under:

“10. The moot question to be decided in this appeal is whether the property in question is of plaintiff or defendant. Both the parties are claiming ownership right on it. According to the plaintiff he purchased the land vide registered sale deed Ext-P-2 from Deen Dayal and the suit property is a piece of that land but according to the defendant it is part of the property which he purchased from Sudhir Shrivastava vide registered sale deed Ext-D-3. According to me, when there is dispute about demarcation of the property in question and its identity and both the parties are claiming it to be of their own on the basis of their document of title it was incumbent upon the Court itself to issue a commission by appointing an employee of revenue department not below the rank of Revenue Inspector to get it demarcated so that it can be identified. In the instant case my attention has been drawn by learned counsel for defendants to the application filed under Order XXVI, Rule 9, Civil Procedure Code but the same has been rejected at the time of the consideration of temporary injunction application. To me learned trial Court erred in substantial error of law in rejecting the said application. The learned First Appellate Court has also committed the same error by not allowing the said application. Indeed, it was 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.”

[8] This court in the case of ***Ansuiya Bai & others. Vs. Rajendra Parsai & others.*** (W.P. No. 1915/2014) decided on 03.04.2018 has already held as under:-

19. The scope of Order 26 Rule 9 of C.P.C. is very limited. The trial court in any suit in which a local investigation is required or proper for purpose of elucidating any matter of dispute may appoint a Commissioner. It is settled law that the parties are required to prove their case by way of evidence, therefore, it is the duty of the plaintiff/defendant to first give evidence in support of their case. After the evidence of parties, if Court deems it proper that any issue is required to be elucidated or explained or clarified then the Court may appoint a Commissioner. The report of the Commissioner is merely a piece of evidence and not binding on the trial Court. It can be used for the purpose of appreciating the evidence on record, if the petitioners/ defendants No.1 and 2 are not satisfied with the report, they can give a better evidence in support of their case. The Court has already given an opportunity to them to adduce the evidence therefore, the defendants cannot use the Commissioner report to collect the evidence. Learned trial Court rightly rejected the application, hence, no interference is called for.

[9] Being aggrieved by the above order the SLP(C) 15712 was filed before the Supreme Court of India and the same has been dismissed on 20.7.2018. In view of the above case law, the power conferred under

Order 26 Rule 9 of the C.P.C. can be exercised at any stage but for a limited purpose, as decided by the learned trial court.

[10] In the present case, the demarcation has already been done by the revenue authorities and the petitioner/plaintiff has filed its report. If the respondents/defendants are disputing the said, then the burden is on the petitioner/plaintiff to prove that demarcation by adducing evidence. Once the demarcation has already been done by the revenue authority, there would be no need for fresh demarcation by appointing a Commissioner, which would be done by the same authority. As discussed above as per the scope of Order 26 Rule 9 of CPC if any elucidation or clarification will be required in future at any stage of the suit then the trial Court shall be competent to pass the order at the appropriate stage.

In view of the above, the present petition is dismissed.

(VIVEK RUSIA)
J U D G E

Divyansh