

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

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 1st OF MAY, 2023

MISC. PETITION No. 5367 of 2022

BETWEEN:-

1. SMT. LALITABAI @ KUSUMLATA W/O
OMPRAKASH PATIDAR OCCUPATION:
BUSINESS R/O 212/B AYODHYAPURI
COLONY KODARIYA TESHIL MHOW DIST.
INDORE (MADHYA PRADESH)
2. ARJUN S/O OMPRAKASH PATIDAR
(KULMI) OCCUPATION: BUSINESS 212/B,
AYODHYAPURI COLONY, KODARIYA TEH.
MHOW (MADHYA PRADESH)
3. PRAVEEN AGRAWAL S/O LATE
KALYANMAL AGRAWAL OCCUPATION:
BUSINESS CHITAR RESIDENCY,
KISHANGANJ, TEH. MHOW (MADHYA
PRADESH)

.....PETITIONERS

***(BY SHRI V K JAIN, SENIOR ADVOCATE SHRI V K JAIN AND SHRI
DIVYANSH LUNIYA, ADVOCATE FOR THE PETITIONER)***

AND

1. DR. SMT. SHAKUNTALA JINDAL S/O AD
SHRI HUKUMCHANDJI JINDAL THROUGH
POWER OF ATTORNEY HUKUMCHANDJI
JINDAL S/O LATE SHRI NANDLALJI
JINDAL, AGED ABOUT 68 YEARS,
OCCUPATION: ADVOCATE R/O 41/42 MAIN
STREET TEHSIL MHOW DIST INDORE

(MADHYA PRADESH)

2. BHASKAR MAHAJAN S/O MADHUKAR MAHAJAN OCCUPATION: SERVICE HOUSE NO. AE 1068, BAJAJ TEMPO COLONY HOUSING BOARD, NEAR DURGA MANDIR, PITHAMPUR SECTOR-1, DHAR (MADHYA PRADESH)
ALKESH S/O RAMESHCHANDRA OCCUPATION: NOT KNOWN HOUSE NO.
3. 847, RAJEEV AWAS VIHAR, INDORE (MADHYA PRADESH)
4. STATE OF M.P. THROUGH THE COLLECTOR INDORE AND THE EX-OFFICIO DY. SECRETARY, GOVT. OF M.P. ADMINISTRATIVE SHANKUL , MOTI TABELA, INDORE (MADHYA PRADESH)
5. MOHAMMAD IQBAL SHESH S/O NASHIR SHEIKH FLAT NO. B Q - 3, BUNGALOW NO. 87, MHOW (MADHYA PRADESH)
6. NASHRIN SHEIKH W/O MOHAMMAD IQBAL SHEIKH FLAT NO. B Q - 3, BUNGALOW NO. 87, MHOW (MADHYA PRADESH)
7. ARISTHNEMI INFRASTRUCTURE THROUGH DIRECTOR SMT. BARKHA AGRAWAL W/O PRAVEEN AGRAWAL 05, CHINAR RESIDENCY, KISHANGANJ, MHOW (MADHYA PRADESH)

.....RESPONDENTS

*(BY SHRI MOHAN SHARMA, ADVOCATE FOR THE RESPONDENT NO.1.
AND SHRI MONESH JINDAL, ADVOCATE FOR THE RESPONDENT [R-1].*

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

ORDER

1] This Miscellaneous Petition has been filed by the

petitioners/Defendants No.1 to 3 under Article 227 of the Constitution of India against the order dated 31.10.2022, passed by the First Civil Judge, Senior Division, Dr. Ambedkar Nagar, Indore in RCSA No.8/2015 whereby, learned Judge of the Civil Court has allowed the plaintiff's application to place the demarcation report dated 21.10.2022 on record, which has been got prepared by the plaintiff at her own expenses.

2] In brief, the facts of the case are that a civil suit has been filed on 17.3.2015 by the plaintiff/respondent No.1 in respect of an agricultural land situated at Mhow, for declaration and permanent injunction, more particularly, for cancellation of the sale deed executed in favour of the defendant/respondent No.5 and an another sale deed dated 20.2.2015, executed in favour of the defendant/respondent No.4 and also for the following reliefs *inter-alia* :-

ए— यह कि, वादिनी के हित में तथा प्रतिवादी क्रमांक 1 एक लगायत 5 पांच के विरुद्ध यह निर्णय, डिक्री एवं निर्देशात्मक निषेधाज्ञा जारी की जावे कि वादिनी की भूमि सर्वे क्रमांक 11/3 ग्यारह बटा तीन, 11/6 ग्यारह बटा छः, 11/8 ग्यारह बटा आठ जिसका विवरण वाद चरण क्रमांक—3 तीन में किया गया है के पश्चिम तरफ के भाग जिसका कुल क्षेत्रफल लगभग 28636 वर्गफीट अट्टाईस हजार छः सौ छत्तीस है पर जो अतिक्रमण कर अवैध कब्जा किया गया है जो कि वाद के साथ संलग्न नक्शे में “**Encroached Land**” लाल रेखा से दर्शित है जिसका विवरण वाद चरण क्रमांक—14 चौदह में किया गया है उस अतिक्रमण एवं कब्जे को हटावे व उसपर निर्मित दिवाल, फेन्सींग एवं समस्त प्रकार के निर्माण कार्य एवं ओमश्री रेसीडेंसी, महूगांव के प्लॉट क्रमांक D-4 चार पर हुये निर्माण कार्य को तोड़कर, जमीनदोस्त कर उक्त भूमि का रिक्त एवं भूतिमंत आधिपत्य एवं कब्जा वादिनी को प्रदान करें।

बी— यह कि, वादिनी के हित में तथा प्रतिवादी क्रं. 1 एक लगायत 5 पांच के विरुद्ध यह निर्णय, डिक्री एवं स्थायी निषेधाज्ञा जारी की जावें कि वे स्वयं या अन्य किसी के माध्यम से वादिनी की वाद चरण क्रं.—3 तीन में उल्लेखित भूमि के पश्चिम तरफ के भाग जिसका कुल क्षेत्रफल लगभग 28636 अट्ठाईस हजार छः सौ छत्तीस वर्गफीट है जिसपर अतिक्रमण कर अवैध कब्जा किया गया है जो कि वाद के साथ संलग्न नक्शे में “**Encroached Land**” लाल रेखा से दर्शित है जिसका विवरण वाद चरण क्रमांक—14 चौदह में किया गया है जो कि ओमश्री रेसीडेंसी कॉलोनी, महूगांव में प्लॉट क्रं. C-8 आठ, A-11 ग्यारह, A-12 बारह, A-57 सत्तावन, A-58 अट्ठावन A-59 उनसाठ, D-1 एक D-2 दो, D-3 तीन D-4 चार एवं 7.5 सात पाईट पांच मीटर चौड़ी रोड़ तथा ओपन एरिया 604.5 छःसौ चार पाईट पांच स्केयर मीटर के रूप में सम्मिलित किया गया है जो किसी भी रूप में, किसी के भी माध्यम से अंतरित, हस्तांतरित, विक्रय, गिरवी, दान, बंधक आदि नहीं करें और किसी अन्य को किसी भी प्रकार से उसका पूर्णतः या भाग में कब्जा नहीं सौंपे तथा किसी प्रकार का कोई भी निर्माण कार्य नहीं करें ना ही तृतीयपक्ष के अधिकार उत्पन्न करें।

सी— यह कि, प्रतिवादी क्रं. 1 एक लगायत 3 तीन के विरुद्ध यह निर्णय, डिक्री एवं स्थायी निषेधाज्ञा जारी की जावें कि वे स्वयं या अन्य किसी के माध्यम से सर्वे क्रं. 11/1 ग्यारह बटा एक, 11/2 ग्यारह बटा दो, 11/4 ग्यारह बटा चार, 11/5 ग्यारह बटा पांच, 12/1 बारह बटा एक, 12/2 बारह बटा दो व अन्य भूमि जो ग्राम महूगांव, कस्बा महू तहसील महू जिला इंदौर पटवारी हल्का नंबर 4/1 चार बटा एक पर स्थित है पर विकसित की जा रही कॉलोनी “ओमश्री रेसीडेन्सी” में किसी भी प्रकार का कोई निर्माण कार्य नहीं करें, तथा उक्त कॉलोनी का कोई भी प्लॉट, भूखण्ड अर्थात भूमि को अंतरित, हस्तांतरित, विक्रय, गिरवी, दान आदि नहीं करें। तथा ना ही उक्त कॉलोनी में किसी अन्य को किसी प्रकार का कब्जा देवें ना ही बंधक रखे।

डी— यह कि, वादिनी के हित में तथा प्रतिवादी क्रमांक 4 चार के विरुद्ध यह निर्णय, डिक्री एवं स्थायी निषेधाज्ञा जारी की जावें कि प्रतिवादी क्रमांक 4 चार स्वयं या अन्य किसी के माध्यम से ओमश्री रेसीडेंसी कॉलोनी, महूगांव के प्लॉट क्रमांक D-4 चार जो कि वाद के साथ संलग्न नक्शे में “**Encroached Land**” भागपर ‘हरे रंग’ से दर्शित है पर किसी प्रकार का कोई निर्माण

कार्य आदि नहीं करें तथा उक्त प्लॉट को किसी अन्य व्यक्ति को अंतरित, हस्तांतरित, विक्रय, गिरवी, दान, बंधक आदि नहीं करें।

ई- यह कि, वादिनी के हित में यह निर्णय, डिक्री पारित कर यह घोषित किया जावे कि प्रतिवादी क्रमांक 5 पांच के पक्ष में निष्पादित पंजीकृत विक्रयलेख जिसका पंजीयन क्रमांक 1 एकअ/943 नौ सौ त्रियालीस पंजीयन दिनांक 30.07.2013 तीस जुलाई दो हजार तेरह जो कि उपपंजीयक कार्यालय, डॉ. अम्बेडकर नगर, महू में पंजीकृत हुआ है वादिनी पर बंधनकारी नहीं होकर शून्य/void ab initio है।

एफ- यह कि, वादिनी के हित में यह निर्णय, डिक्री पारित कर यह घोषित किया जावे कि प्रतिवादी क्रमांक 4 चार के पक्ष में निष्पादित पंजीकृत विक्रयलेख जिसका पंजीयन क्रमांक 1एकअ/3294 तीन हजार दो सौ चोरानवे पंजीकृत दिनांक 20-02-2015 बीस फरवरी दो हजार पन्द्रह जो कि उप पंजीयक कार्यालय, डॉ. अम्बेडकर नगर, महू में पंजीकृत हुआ है वादिनी पर बंधनकारी नहीं होकर शून्य/ void ab initio है।

जी- यह कि, वादिनी को प्रतिवादी क्रं. 1 एक लगायत 5 पांच से रू. 5,000/- रू. पाँच हजार प्रत्येक माह की दर से 12-12-2014 बारह दिसम्बर दो हजार चौदह से कब्जा सौंपने के दिनांक तक नुकसानी बतौर क्षतिपूर्ति राशि दिलायी जावे जिस बाबद वादिनी के पक्ष में तथा प्रतिवादी क्रमांक 1 एक लगायत 5 पांच के विरुद्ध निर्णय डिक्री पारित की जावे।

एच- यह कि, प्रतिवादी क्रं.-6छ: मध्यप्रदेश शासन के विरुद्ध आदेशात्मक निषधाज्ञा जारी की जावे की वह वादिनी के साम्प्रतिक अधिकारों की सुरक्षा करें एवं वादिनी की भूमि की रक्षा के लिये योग्य कार्यवाही करें। जिस संबंध में वादिनी के हित में निर्णय एवं डिक्री पारित की जावे।

आई- यह कि, वादिनी के हित में व प्रतिवादीगणों के विरुद्ध प्रकरण की समस्त परिस्थितियों को देखते हुए माननीय न्यायालय जो उचित समझे वह सहायता भी पृथक से दिलवायी जाने विषयक निर्णय एवं डिक्री दी जाने की कृपा होंवे।

जे- इस वाद का समस्त व्यय भी वादिनी को दिलवाया जावे।

3] In the said suit, which was filed on 17.03.2015, the case is fixed for recording of the evidence of the plaintiffs.

4] The petitioners' case is that during the pendency of the said suit, the respondent No.1/plaintiff filed an application for appointment of local commissioner for demarcation of the land and it was also prayed that some private person may be appointed as Commissioner. The aforesaid application has been allowed by the learned Judge of the trial court vide its order dated 18.7.2022 directing the Tehsildar, Dr. Ambedkar Nagar, Indore to carry out the demarcation and submit its report, Tehsildar was again directed to carry out the demarcation on **13.9.2022** with a further direction that the demarcation be carried out on 20.9.2022 at 11:00 a.m. on which day and time the parties were also directed to appear in person or through their counsel, hence the notices were not issued regarding the said date and time of the demarcation and it was also noted in the order that if any party does not appear at the time of the demarcation, still the demarcation shall be carried out and the report be submitted before the court.

5] Prior to the said order dated 20.09.2022, on 29.8.2022, an application was filed by the respondent/plaintiff No.1 to the effect that the plaintiff has also averred in her plaint that the Tehsildar has not carried out the demarcation despite the request made to him by the plaintiff and also that the defendant No.3, who is a builder may influence the said Officer, hence, it was prayed that the demarcation may be carried out through some senior officer of the post not lower than the Assistant Superintendent (Revenue).

6] An application was also filed by the plaintiff/respondent No.1 on 29.8.2022 with a request that although the Tehsildar was directed to carry out the demarcation however, he has still not carried out the same as he is being pressurized by defendant No.3 and, hence the same may be carried out through some Advocate or any Engineer who may be appointed as the Commissioner and in his team, the Revenue Officer may also be included, to which, the respondents/defendants No.4 & 5 have opposed and submitted that the powers conferred on the Revenue Officer cannot be delegated to any private person, hence, the application be rejected as the plaintiff herself has not accepted the notices. The trial court, vide its order dated **13.9.2022** held that there is nothing on record to show that the Tehsildar, Dr. Ambedkar Nagar, Indore has any personal interest in the matter and the plaintiff's contention has been rejected that the Tehsildar would not carry out the demarcation in an impartial manner and thus, her application for appointment of some Engineer or Advocate as Commissioner for demarcation purpose was also rejected on the ground that the disputed land is an agricultural land and its proper demarcation can only be done by a Revenue Officer. So far as inclusion of Assistant Superintend (Revenue) is concerned, it was held that since the demarcation can be done effectively by the Tehsildar himself hence, there is no need to assign this work to a superior officer. The Court has also observed that as per the letter dated 30.8.2022, issued by the Tehsildar, Dr. Ambedkar Nagar, Indore, the plaintiff herself has

refused to accept the notice and hence, the demarcation could not be completed. Thus, the application filed by the plaintiff was rejected and vide order dated **13.9.2022** the Tehsildar was again directed to carry out the demarcation on 20.9.2022 as observed above.

7] Pursuant thereto, the Tehsildar, Dr. Ambedkar Nagar, Indore submitted his report dated 29.9.2022, along with all the relevant documents including the field book report and the map etc. Thereafter, the respondent No.1/plaintiff again filed an application under Order 26 Rule 10 of the CPC stating that the Tehsildar has not properly demarcated the land and hence, a prayer was made for examination of the Tehsildar and the Revenue Inspector, and despite opposition of the defendants, the aforesaid applications were allowed and the plaintiff was permitted to cross examine the Tehsildar and the Revenue Inspector vide order dated 17.10.2022.

8] However, the respondent/plaintiff No.1 filed an application under Order 7 Rule 14 (3) read with Section 151 of the CPC on 29.10.2022 stating therein that she has already got the demarcation carried out on her own expenses through a retired revenue officer, hence, the report be taken on record. The aforesaid application was opposed by the defendants that the person, who has carried out the demarcation, is not a Revenue Officer despite the fact that the Commissioner's report has already been received in the court on 22.9.2022 through a competent Officer, and the person who has carried out the demarcation at the instance of the plaintiff though

claiming himself to be a Revenue Officer but he is a retired Revenue Officer. The defendants/respondents No.7 & 8 also opposed the said application.

9] Shri V.K. Jain, Senior counsel appearing for the petitioners has submitted that the impugned order deserves to be set aside as it runs contrary to the order earlier order dated 13.9.2022 wherein, the court has already rejected the plaintiff's application to get the demarcation report carried out through an Advocate or an Engineer and despite the fact that learned Judge of the trial court has already allowed the respondent/plaintiff No.1 to cross examine the Tehsildar on the point of the demarcation report, vide the impugned order dated 31.10.2022, the learned Judge has himself allowed the circumvention of his own order dated 13.09.2022 at the instance of the respondent/plaintiff No.1 which is not permissible.

10] On the other hand, Shri Mohan Sharma and Shri Monesh Jindal, counsel appearing for the respondent/ plaintiff, have vehemently opposed the prayer and submitted that no illegality has been committed by the learned Judge of the trial court in accepting the report as it would not cause any prejudice to any of the parties and the petitioners/defendants would also be entitled to lead their evidence to rebut of the said report. It is also submitted that the respondent/plaintiff No.1 had expressed her apprehension regarding the influence being exercised by the respondent No.3 on the Revenue Officer and in such circumstances, when the plaintiff No.1 herself has

got the demarcation report prepared by a retired Revenue Officer, the learned Judge of the trial court has rightly taken it on record. Thus, it is submitted that no case for interference is made out. In support of their submissions, counsel for the respondent have relied upon the decisions rendered by the Supreme Court in the cases of *Chakreshwari Construction private Ltd. vs. Manohar Lal* reported as (2007) 5 SCC 212; *N.C.Bansal vs. Uttar Pradesh Financial Corporation and another* reported as (2018) 2 SCC 347; *Zarif Ahmad (Dead) through legal Representatives and another vs. Mohd. Farooq* reported as (2015) 13 SCC 673.

11] Heard the counsel for the parties and also perused the record.

12] From the record, it is found that the civil suit itself is filed on 17.3.2015, and it is apparent that even after 8 long years the plaintiff's evidence has not even commenced. It is also found that the Commissioner was appointed at the request of the plaintiff No.1 only and for this purpose, a Tehsildar was appointed by the learned Judge of the trial court vide its order dated 20.9.2022. It is also found that the trial court has also observed that the plaintiff has not appeared for the purpose of demarcation as noticed by the Tehsildar, hence, the court itself has directed the parties to remain present on the spot on 29.9.2022 at 11:00 am and subsequently, the demarcation report has also been submitted before the trial court along with all the documents and the plaintiff's prayer for cross examining of the Tehsildar has also been accepted. It is also found that the plaintiff's application for

demarcation of the land through an Advocate or through an Engineer has already been turned down by the trial court vide its order dated 13.9.2022. In such facts and circumstances of the case, this Court is unable to understand as to what prompted the plaintiff to file the said report of demarcation prepared through a private person, and how the said application has also been allowed by the impugned order despite rejecting the plaintiff's application for demarcation through a private person.

13] On close scrutiny of the documents filed on record, this Court finds that it is a case where the plaintiff, after failing to take a relief directly has tried to claim it indirectly which shall be allowed by the learned Judge of the trial court, and which, in the considered opinion of this Court, cannot be allowed as it is a settled principle of law that what cannot be done directly, can also not be permitted to be done indirectly. Thus, when the plaintiff's application for appointment of a private person for demarcation has been rejected there was no occasion for the learned Judge of the trial to accept the demarcation report prepared through a private person, though a retired revenue officer.

14] So far as the decisions relied upon by the counsel for the respondents are concerned, this Court is of the considered opinion that the decisions are clearly distinguishable. In the case of **Chakreshwari Constructions Private Ltd**(supra), it was a case of amendment and not of appointment of Commissioner. And, in the case of

N.C.Bansal (supra), it is a case of production of certain documents when the trial had not even begun and the application was not filed at a belated stage. In the case of *Zarif Ahmad (Dead) through legal Representatives and another*, it is a case of house/plots only and not an agricultural land. And even otherwise on other facts also these cases are distinguishable and are of no avail to the respondents.

15] In view of the aforesaid discussion, the impugned order dated 31.10.2022 being erroneous and contrary to law is liable to be and **is hereby set aside** and the **petition stands allowed**.

16] Considering the fact that the suit itself is filed in the year 2015 and even the plaintiff's evidence has not been recorded, the learned Judge of the trial court is requested to expedite the matter and conclude the same at the earliest, preferably within a period of six months from the date of receipt of the certified copy of this order.

17] With the aforesaid directions, the Misc. Petition stands **allowed and disposed of**.

(SUBHODH ABHYANKAR)
JUDGE