

**IN THE HIGH COURT OF MADHYA PRADESH AT
JABALPUR
BEFORE
HON'BLE SHRI JUSTICE PURUSHAINDR KUMAR KAURAV
ON THE 10th OF MARCH, 2022
MISCELLENEOUS PETITION No.5065 of 2018**

Between:-

**BHAGWAT NARAYAN DUBEY SON
OF SHRI BAIDEHI SHARAN DUBEY,
AGED ABOUT 48 YEARS, RESIDENT
OF VILLAGE GIDKHINI, TEHSIL
NIWARI, DISTRICT NIWARI
(EARLIER DISTRICT TIKAMGARH)
MP.**

.....PETITIONER

(BY SHRI ASHISH SHROTI - ADVOCATE)

AND

- 1. KALICHARAN, AGED ABOUT 47
YEARS.**
- 2. RAM KHILAWAN, AGED ABOUT 42
YEARS.**
- NO.1 AND 2 SONS OF DISU KORI.**
- 3. ARVIND, AGED ABOUT 27 YEARS,**
- 4. ANIL, AGED ABOUT 25 YEARS,**
- 5. BHAGWANDAS @ MUNNU, AGED
ABOUT 23 YEARS.**

NO.3 AND SONS OF KALICHARAN.

- 6. AJIT KUMAR @ MUNNULAL SON OF PRABHU DAYAL, AGED ABOUT 48 YEARS.**

NO.1 TO 6 RESIDENTS OF VILLAGE GIDKHINI, TEHSIL & DISTRICT NIWARI (EARLIER DISTRICT TIKAMGARH) M.P.

...RESPONDENTS

(BY SHRI P.N.VERMA – ADVOCATE)

This petition coming on for admission this day, Hon'ble Shri Justice Purushaindra Kumar Kaurav, passed the following:

ORDER

This petition under Article 227 of the Constitution of India challenges the order dated 26.09.2018 (Annexure P/5) passed by Vth Civil Judge, Class-II, Niwari in R.C.S.No.300034-A/2016.

2. The facts of the case are that the petitioner-plaintiff filed a suit for declaration that his drain which passes through the space shown in the plaint map (Najri Naksha) be allowed to continue without any obstruction. It is also the prayed that it should be declared that the respondents-defendants have no right to close the said drain. A decree of permanent injunction restraining the respondents-defendants from

creating any hindrance in free flow of his drain was also sought for. The respondents-defendants, while filing the written statement had denied the allegations made in the plaint. Even existence of the drain in question on the space as shown in the plaint map has been denied. When the civil suit was at the stage of evidence of the petitioner-plaintiff, an application under Order XXVI Rule 9 of the CPC was filed by the petitioner-plaintiff for appointing Commissioner for the purpose of ascertaining the factual dispute between the parties. The same has been rejected by the impugned order on the ground that the Commission cannot be appointed for the purpose of collecting the evidence of the petitioner-plaintiff. The learned trial court has given additional reasons to reject the application that neither the plaint map can be proved nor it can be certified by appointing a Commission.

3. Learned counsel appearing for the petitioner-plaintiff submits that the findings recorded by the learned trial court are erroneous. According to him, an application under Order XXVI Rule 9 of the CPC was not filed for collecting the evidence. However, the purpose of filing the application was to ascertain whether the respondents-defendants have encroached upon the Government land by constructing the rooms and, whether such construction is resulting to any blockage

of the plaintiff's drain. According to him, for the purpose of ascertaining the correct factual position, the only remedy available is to file an application under Order XXVI Rule 9 of the CPC, therefore, the said application ought to have been allowed by the trial court. He placed reliance on the decisions of this court in the matter of *Prembai (Smt.) and others Vs. Ghanshyam and others*¹ and *Jaswant Vs. Deen Dayal*².

4. Learned counsel appearing for the respondents-defendants has opposed the petition. He submits that the order passed by the trial court is in accordance with law. The High Court should not entertain the petitioner under Article 227 of the Constitution unless a palpable error is shown. In the instant case, it is to be ascertained as to how plaintiff can substantiate his pleadings but in no case, the plaintiff should be allowed to take recourse of the provision of Order XXVI Rule 9 of the CPC.

5. Having heard the learned counsel for the parties and after perusing the application filed under Order XXVI Rule 9 of the CPC and reply thereto, this Court is of the opinion that the reasonings given by the learned trial court are erroneous and therefore, the impugned

1 (2010) 3 MPLJ 345.

2 (2011) 2 MPLJ 576.

order deserves appropriate interference. In the application filed before the trial court, the petitioner-plaintiff has stated that the case of respondent-defendants was that the map filed by petitioner-plaintiff is false and they are constructing a new room in the land vacant between the houses of petitioner-plaintiff and respondents-defendants which is causing blockage in the plaintiff's drain, whereas, the respondents-defendants have stated in their reply before the trial court that they are making construction only in the land allotted to them. Thus, in this case there is dispute regarding the boundaries of the lands of the petitioner-plaintiff and respondents-defendants and, such issue can be ascertained by appointing a Commission under Order XXVI rule 9 of the CPC. Though the object of local investigation is not to collect the evidence which can be taken in the court but the purpose is to obtain such evidence, which, from its peculiar nature with a view to elucidate any point which is left doubtful in the evidence produced before the Court. This court has considered the scope of Order XXVI Rule 9 of the CPC and in the matter of *Jaswant Vs. Deen Dayal*², and has held that when there is dispute about demarcation of the property and its identity and both the parties are claiming it to be their own, it is incumbent upon the court itself to issue a Commission.

6. Taking into consideration the overall facts and circumstances of the case, the instant writ petition is allowed. The impugned order dated 26.09.2018 (Annx.P/5) is set aside. The application filed by the petitioner-plaintiff under Order XXVI Rule 9 of the CPC is allowed. The learned trial court is directed to appoint appropriate Commission in accordance with law.

(PURUSHAINDR KUMAR KAURAV)
JUDGE

MKL.