

**HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT  
JABALPUR**

<b>Case No.</b>	<b>M.P. No.32 OF 2021</b>
<b>Parties Name</b>	Suneel Prakash Sharma & Others <i>Vs.</i> Vivek Kumar Ruthiya & Another
<b>Date of order</b>	<b>21/12/2021</b>
<b>Bench Constituted</b>	<b>Single Bench:</b> Justice Purushaindra Kumar Kaurav
<b>Order passed by</b>	Justice Purushaindra Kumar Kaurav
<b>Whether approved for reporting</b>	Yes
<b>Name of counsel for parties</b>	<b>For Petitioner:</b> Shri Avinash Zargar, Advocate <b>For Respondents:</b> Shri Sidharth Gulatee, Advocate for respondent No.1.
<b>Law laid down</b>	Held: The power under Order XXVI Rule 9 of CPC for appointment of Commissioner can also be exercised in order to ascertain the correct factual position, if the same is not ascertainable on the basis of the oral and documentary evidence.
<b>Significant paragraph numbers</b>	<b>Para - 7</b>

**ORDER**

**(21/12/2021)**

This petition takes exception to order dated 12.03.2020 (Annexure P/1) passed by the Vth Additional Judge to the Court of I<sup>st</sup> Civil Judge, Class – II (Trainee Judge), District-Sehore

(M.P.) in Execution Case No.4/2019, allowing an application under Order XXVI Rule 9 of CPC, filed by respondent No.1/decree- holder. The decree-holder, in his application before the Executing Court had pleaded that the petitioners/objectors are the tenants on the portion adjoining to the tenancy portion of Emmanuel School and have encroached upon the part of the area of tenanted part of Emmanuel School by erecting a wall. There are two separate areas which were given on rent; one was in the possession of Emmanuel School and another was in possession of the present petitioners/objectors. In the map filed along with the civil suit, both the areas are clearly demarcated and, the area over which encroachment by present petitioners/objectors is made, is not the part of their tenancy as the same was part of tenancy area of Emmanuel School.

2. In reply to the aforesaid application, the petitioners/objectors have pleaded that the dispute relating to Civil Suit No.167-A/2016 was compromised between the parties of the said suit on 27.10.2018 and, accordingly, the same was decreed. The petitioners/objectors have nothing to do with the said decree. However, on the strength of the compromise

decree, neither their tenancy can be disturbed nor they can be evicted from any of the part which is not the subject matter of the compromise decree. According to them, there was a Civil Suit No.81-A/2006 relating to their tenancy which is presently pending as S.A.No.442/2012 before this Court in which stay has been granted in their favour and the same is still in operation.

3. Shri Avinash Zargar learned counsel for the petitioners/objectors, in support of his arguments, has relied upon the decision in the case of *Vadlamani Suryanarayana Murthy Vs. Saripalli Balakameswari*<sup>1</sup>

4. Shri Sidharth Gulatee, learned counsel for respondent No.1/decree- holder in support of his arguments has relied upon the judgment passed in the case of *Bhikobai Vs. Dhannalal*<sup>2</sup>, *Shalini Shyam Shetty v. Rajendra Shankar Patil*<sup>3</sup> and *Beyond Malls LLP Vs. Lifestyle International Pvt.Ltd.*<sup>4</sup>

5. I have heard learned counsel for the parties and perused the record.

6. The only question which is to be decided by this Court is, whether to ascertain the correct factual position in order to execute the compromise decree, the learned Executing Court

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1 2007 2 ALD 94

2 1975 MPLJ 616

3 (2010) 8 SCC 329

4 (2021) 1 MPLJ 337.

has exceeded its jurisdiction in exercising powers under Order XXVI Rule 9 of CPC ?

7. A bare perusal of Order XXVI Rule 9 of CPC shows that the power under the said provisions can be exercised in order to ascertain the correct factual position, if the same is not ascertainable on the basis of the oral and documentary evidence.

8. The learned Executing Court has found that there is no agreed map between the parties and there was major disagreement with regard to boundaries, therefore, it is found expedient to exercise power under Order XXVI Rule 9 of CPC for the purpose of ascertaining the correct fact, which, in my considered view, cannot be said to be suffering from any jurisdictional error.

9. The decision<sup>1</sup> cited by the learned counsel for the applicant is of no help to him, as in the present case learned Executing court has not doubted the correctness of the pendency of the suit in S.A.No.442/2012.

10. Thus, this court finds that no interference is required at this stage. The petition is accordingly **dismissed**.

(PURUSHAINDRA KUMAR KAURAV)  
JUDGE