

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

<b>Case No.</b>	<b>M.P. No.2448/2022</b>
<b>Parties Name</b>	<i>Omprakash Agrawal &amp; Ors. Vs. Sandeep Kumar Agrawal &amp; Anr.</i>
<b>Date of Order</b>	<b>29<sup>th</sup> August. 2022</b>
<b>Bench Constituted</b>	<b>Justice S.A.Dharmadhikari</b>
<b>Order passed by</b>	<b>Justice S.A.Dharmadhikari</b>
<b>Whether approved for reporting</b>	Yes
<b>Name of counsel for parties</b>	<p><b>For Petitioner</b> : Shri Rajas Pahankar, learned counsel.</p> <p><b>For Respondents/State</b> : Shri Amit Seth, learned counsel.</p>
<b>Law laid down</b>	<p>(1) Application under Order 39 Rule 1 and 2 of CPC has to be decided on three sound principles i.e.</p> <p>(i) Whether plaintiff has a prima facie case;</p> <p>(ii) Whether balance of convenience is in favour of the plaintiff;</p> <p>(iii) Whether the plaintiff would suffer irreparable injury if temporary injunction is declined.</p> <p>(2) Status quo order could not have been granted by the Appellate Court exercising the powers under Section 151 of CPC when there is express provision provided under the Code.</p>
<b>Significant paragraph numbers</b>	Para Nos.12 and 13

**(S.A.DHARMADHIKARI)**  
**JUDGE**

**IN THE HIGH COURT OF MADHYA PRADESH**

**AT JABALPUR**

**BEFORE**

**HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI  
ON THE 29<sup>th</sup> OF AUGUST, 2022**

**MISC. PETITION No. 2448 of 2022**

**Between:-**

1. **OMPRAKASH AGRAWAL S/O LATE SHRI LALJI PRASAD AGRAWAL, AGED ABOUT 60 YEARS, OCCUPATION: BUSINESS R/O WARD NO. 6 NAGAR PARISHAD BARHI, DISTRICT KATNI (MADHYA PRADESH)**
  
2. **SUYASH @ SHANU AGRAWAL S/O SHRI OMPRAKASH AGRAWAL, AGED ABOUT 27 YEARS, OCCUPATION: BUSINESS R/O WARD NO. 1, VIJAYRAGHAVGARH ROAD, OLD BUS STAND, BARHI, DISTRICT KATNI (MADHYA PRADESH)**
  
3. **AYUSH @ SHANI AGRAWAL S/O SHRI OMPRAKASH AGRAWAL, AGED ABOUT 25 YEARS, OCCUPATION: BUSINESS R/O WARD NO. 1, VIJAYRAGHAVGARH ROAD, OLD BUS STAND, BARHI, DISTRICT KATNI (MADHYA PRADESH)**

**.....PETITIONERS**

***(BY SHRI RAJAS POHANKAR- ADVOCATE)***

**AND**

1. **SANDEEP KUMAR AGRAWAL S/O LATE SHRI LALJI PRASAD AGARWAL, AGED ABOUT 46 YEARS, R/O WARD NO. 1 BARHI, DISTRICT KATNI (MADHYA PRADESH)**
  
2. **STATE OF M.P., THROUGH COLLECTOR, KATNI DISTRICT KATNI (MADHYA PRADESH)**

**.....RESPONDENTS**

***(SHRI AMIT SETH- ADVOCATE FOR RESPONDENT NO.1)***

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

**ORDER**

Heard finally with the consent of both the parties.

In this petition under Article 227 of the Constitution of India, the petitioners have assailed the legality, validity and propriety of the order dated 20.05.2022 (Annexure P/1) passed in Miscellaneous Civil Appeal No.39/2022 by the Court of III Additional Judge to I Additional District Judge, Katni (M.P.), whereby the Appellate Court

has reversed the order of the learned trial Court dated 05.04.2022, which had rejected the application under Order 39 Rule 1 and 2 of the Civil Procedure Code (hereinafter shall be referred to as “Code”) seeking temporary injunction.

2. Brief facts leading to filing of this case are that the respondent No.1/plaintiff filed a suit for declaration and permanent injunction against the petitioners/defendants, which was registered as RCS A/07/2022 alongwith the application under Order 39 Rule 1 and 2 of the Code. It is sated in the plaint that petitioner No.1 and respondent No.1 are real brothers and petitioners No.2 and 3 are real sons of petitioner No.1. It is also stated in the plaint that respondent No.1/plaintiff is the owner of 5111 sq.ft. of land, out of which land admeasuring 15 X 25 sq.ft. has been sold by him to Mr. Rohit Gupta and Mr. Vikas Kumar Gupta. After that only 0.045 hectares is remaining with the plaintiff. It is also averred in the plaint that petitioner No.1, who is real brother of the plaintiff has purchased the adjoining area of 0.017 hectares out of the same Khasra No.186/1. The plaintiff in support of his claim has filed Najri Naksha showing his land as **ABCDEFGH** and the land admeasuring 15 X 25 sq.ft.

sold by him as **DEIJ** and the suit portion has been shown as **FGKI** admeasuring 26 X 35 sq.ft.. It is also averred that the petitioners/defendants on 11.02.2022 at around 12'o Clock in day have taken possession of the aforesaid plot and started demolishing the portion of land belonging to plaintiff shown as **FGKI**.

3. The petitioners entered their appearance and file reply to the injunction application stating that the suit land has wrongly been shown as owned and possessed by the plaintiff and the suit land has been purchased by the petitioners by way of registered sale deed. The matter was heard on the application for temporary injunction and vide order dated 05.04.2022 (Annexure P/4), the learned trial Court dismissed the application filed by the respondent No.1/plaintiff holding that Najri Naksha produced by respondent No.1/plaintiff and the one produced by the petitioners/defendants alongwith their sale deed does not make out a case for grant of injunction. Learned trial Court further held that there is no material to show that respondent No.1/plaintiff is the owner and in possession of the disputed land. Being aggrieved, the respondent No.1 challenged the aforesaid order dated 05.04.2022 in Appeal under Order 43 Rule 1 of the Code before

District Judge, Katni. Vide the impugned order dated 20.05.2022, the lower Appellate Court reversed the order dated 05.04.2022 and allowed the application under Order 39 and Rule 1 and 2 of the Code. Being aggrieved, the present petition has been filed.

4. Learned counsel for the petitioners submitted that the learned Appellate Court has travelled beyond the scope of Order 39 Rule 1 and 2 of the Code by directing appointment of Commissioner for demarcation of the suit land, which was never prayed by respondent No.1/plaintiff. The learned Appellate Court has also granted *status quo* in the matter under Section 151 of the Code, which could not have been exercised in view of the fact that there is an express provision under Order 39 Rule 1 and 2 of the Code and the said application has been kept pending. He further contended that the application under Order 39 Rule 1 and 2 of the Code has to be decided on the three sound principles i.e.:

- (i) Whether plaintiff has a *prima facie* case;
- (ii) Whether balance of convenience is in favour of the plaintiff;

(iii) Whether the plaintiff would suffer irreparable injury if temporary injunction is declined.

5. In the present case, appointment of Commissioner can be directed only after recording of evidence, whereas the Appellate Court has exceeded its jurisdiction by directing appointment of Commissioner and also exercising power for granting *status quo* under Section 151 of the Code, which could not have been done.

6. Learned counsel for the petitioners has relied on the judgment of the Apex Court in the case of **Alok Vs. Smt. Shashi Somani and others** as reported in **2018(3) MPLJ 641** to contend that the provision of Section 151 of the Code cannot be invoked where a specific provision is available under the CPC. He has also placed reliance on the judgment of Apex Court in the case of **Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal** as reported in **AIR 1962 SC 527**, in which it is held that the inherent jurisdiction of the court to make orders *ex debito justitiae* is undoubtedly affirmed by Section 151 of the Code, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals

expressly with a particular matter, the provision should normally be regarded as exhaustive.

7. So far as the appointment of Commissioner is concerned, the learned counsel for the petitioners has relied on the judgment of the Coordinate Bench of this Court at Gwalior Bench in the case of **Smt. Vimla Tyagi Vs. Ram Niwas Sharma [W.P. No.7830/2012 decided on 08.04.2022]**, in which it is held as under:

*“(13) Further, a local Commissioner can be appointed for either elucidating any matter in dispute or for ascertaining the market value of any property or the amount of any mense profits or damages or annual net profits. However, “Elucidating any matter in dispute” would not include collection of evidence. Also the Court by passing an order under Order 26 Rule 9 CPC cannot delegate its powers of adjudicating the dispute to a local Commissioner. The scope of Order 26 Rule 9 CPC*

*is very limited. It is settled law that the parties are required to prove their own case by way of evidence, therefore, it is the duty of plaintiff/defendant to first give evidence in support of their case. After the evidence of parties, if court deem it proper that any issue requires clarification then the Court may appoint a Commissioner. The report of 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 came on record.”*

8. Learned counsel for the petitioners has further placed reliance on the judgment of the Coordinate Bench of this Court at Indore Bench in the case of **Ansuiya Bai and others Vs. Rajendra Parsai and others [W.P. No.1915/2014 decided on 03.04.2018]**, in which the court has 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 plaintiff/defendant to first give evidence in support of their case. After the evidence of parties, if Court deem it proper that any issue is required to be elucidate or explained or clarified then the Court may appoint a Commissioner. The report of 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. On the other hand, Shri Amit Seth, learned counsel appearing for the respondent No.1 vehemently opposed the prayer and submitted that the order passed by the trial Court is in accordance with the law, therefore, no interference is called for. He further contended that the inherent power under Article 227 of the Constitution of India is to be exercised sparingly and not in the routine manner. Learned counsel further contended that no application is required for appointing the Commissioner. The Court on its own can appoint the Commissioner as has been done in the present case. The petition deserves to be dismissed.

10. In support of his contention, learned counsel for respondent No.1 has relied on the judgment of this Court in the case of **Jaswant Vs. Deen Dayal** as reported in **2011 (2) MPLJ 576**. He further relied on the judgment of this Court in the case of **Ravishankar Vs. VIIIth Additional District Judge** as reported in **1994 MPLJ 783**. He also

relied on the judgment of the Apex Court in the case of **Shalini Shyam Shetty and another vs. Rajendra Shankar Patil** as reported in **(2010) 8 SCC 329**, in which the Court has held as under:

*“48. The jurisdiction under Article 226 normally is exercised where a party is affected but power under Article 227 can be exercised by the High Court suo motu as a custodian of justice. In fact, the power under Article 226 is exercised in favour of persons or citizens for vindication of their fundamental rights or other statutory rights. Jurisdiction under Article 227 is exercised by the High Court for vindication of its position as the highest judicial authority in the State. In certain cases where there is infringement of fundamental right, the relief under Article 226 of the Constitution can be claimed ex-debito justitia or as a matter of right. But in cases where the High Court exercises its jurisdiction under Article 227, such exercise is entirely discretionary and no person can claim it as a matter of right. From an order of a*

*Single Judge passed under Article 226, a Letters Patent Appeal or an intra Court Appeal is maintainable. But no such appeal is maintainable from an order passed by a Single Judge of a High Court in exercise of power under Article 227. In almost all High Courts, rules have been framed for regulating the exercise of jurisdiction under Article 226. No such rule appears to have been framed for exercise of High Court's power under Article 227 possibly to keep such exercise entirely in the domain of the discretion of High Court.*

*49. 62. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:*

*(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.*

*(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.*

*(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restraint on the exercise of this power by the High Court.*

*(d) The parameters of interference by High Courts in exercise of its power*

*of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.*

*(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, 'within the bounds of their authority'.*

*(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.*

*(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.*

*(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.*

*(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution*

*Bench of this Court in the case of L. Chandra Kumar vs. Union of India & others, reported in (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.*

*(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.*

*(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.*

*(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.*

*(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.*

*(n) This reserve and exceptional power of judicial intervention is not*

*to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.*

*(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality.”*

**11.** Heard the learned counsel for the parties.

**12.** Thus, while exercising discretion for grant of interim injunction the following three principles are applied:-

(i) Whether plaintiff has a *prima facie* case;

(ii) Whether balance of convenience is in favour of the plaintiff;

(iii) Whether the plaintiff would suffer irreparable injury if temporary injunction is declined.

**13.** Admittedly, the learned Court below has erred in appointing the Commissioner, inasmuch as collection of evidence cannot be permitted while deciding the application under Order 39 Rule 1 and 2 of the Code. The application has to be decided *prima facie* on the three sound principles of law. Even, *status quo* order could not have been granted by the Appellate Court exercising the powers under Section 151 of the Code when there is express provision provided under the Code. Thus, in view of the judgments of the Hon'ble Apex Court in the case of **Alok (supra)** and **Manohar Lal Chopra (supra)**, this order cannot be allowed to stand. Accordingly, the Appellate Court's order dated 20.05.2022 (Annexure P/1) is hereby set aside. The Appellate Court is directed to decide the appeal in accordance with law deciding the application under Order 39 Rule 1 and 2 of the Code without evaluating the evidence/report of Commissioner and take a decision as expeditiously as possible.

The Writ Petition stands **allowed** to the extent indicated hereinabove.

**(S. A. DHARMADHIKARI)**  
**JUDGE**

Shanu