



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

BEFORE

HON'BLE SHRI JUSTICE G. S. AHLUWALIA

ON THE 6th OF SEPTEMBER, 2024

MISC. PETITION No. 5395 of 2023

SHYAM RAO AND OTHERS

Versus

***AJIJUL NAEEM SINCE DEAD THROUGH LEGAL HEIRS FAEEM
KHAN AND OTHERS***

Appearance:

Shri Akhilesh Kumar Jain – Advocate for the petitioner.

*Shri Vijayendra Singh Choudhary – Government Advocate for
respondent No.2/State.*

None for other respondents though served.

ORDER

This petition under Article 227 of Constitution of India has been filed against order dated 04.08.2023 passed by 6th Civil Judge, Junior Division, Seoni (M.P.) in RCSA No.1200076/2014 seeking following reliefs:

- “(i) Hon’ble Court be pleased to issue appropriate writ/order/direction setting aside the impugned order dated 04.08.2023 passed in Civil Suit No.1200076/2014 of the Court of 6th Civil Judge, Junior Division, Seoni.
- (ii) Any other suitable relief deemed fit in the facts and circumstances of the case may also kindly be granted together with the cost of this petition.”

2. It is submitted by counsel for petitioners that respondent-plaintiff has filed a suit for declaration of title and permanent injunction. The petitioners have filed their written statement alongwith a counter claim



that the plaintiff has encroached upon some part of the land and accordingly, apart from declaration of title, a decree for possession was also sought. The petitioners filed an application under Order 16 Rule 1 CPC for summoning the Revenue Inspector as well as Halka Patwari of village Mohgaon on the ground that demarcation was carried out on the orders of Tahsildar and it was found that plaintiff has encroached upon some part of the land. Accordingly, in order to prove demarcation report, field book as well as to prove that the plaintiff has encroached upon the land belonging to petitioners, the aforesaid witnesses were sought to be summoned. However, the said application has been rejected on two grounds; (i) the names of these witnesses are not mentioned in the list of witnesses; (ii) the petitioners have not clarified the reasons for which they wanted to summon these witnesses.

3. Challenging the orders passed by the Court below, it is submitted by counsel for petitioners that in the application filed under Order 16 Rule 1 CPC, it was specifically mentioned that on the orders of Tahsildar, demarcation was carried out on 11.12.2022 and accordingly, demarcation report, Panchnama, field book and map was prepared and in order to prove encroachment by the plaintiff, petitioners/defendants want to examine Revenue Inspector and Halka Patwari. It is submitted that since the reason was assigned by petitioners in the application therefore, the rejection of the said application on the ground that no reasons have been assigned is erroneous. Further, by relying upon the order passed by Coordinate Bench of this Court in the case of **Mandir Shri Hanuman Murti and Another Vs. Collector Mahoday, Datia and Another** reported in **2016 (1) MPLJ 72**, it is submitted that the



application cannot be rejected merely on the ground that the names of witnesses were not mentioned in the list of witnesses.

4. Heard the learned counsel for the petitioners.

Whether any purpose for summoning the Government witnesses was disclosed by petitioners in their application or not?

5. Paragraphs 2 and 3 of the application filed by petitioners under Order 16 Rule 1 CPC reads as under:

“2- यह कि, प्रतिवादीगणों ने वादी द्वारा प्रस्तुत वाद का विरोध करते हुए वादोत्तर प्रस्तुत किये हैं, तथा उक्त विवादित भूमि प्रतिवादीगणों के स्वामित्व की भूमि है, तथा वादी उक्त भूमि के अवैध आधिपत्य में है। प्रतिवादीगणों द्वारा नियमानुसार, तहसीदार महोदय, को सीमांकन हेतु आवेदन प्रस्तुत कर, विवादित भूमि का सीमांकन कराया है, एवं दिनांक 11/12/2012 को हल्का पटवारी विनोद कोराम तथा कोटवार एवं ग्रामवासियों की उपस्थिति में सीमांकन कर, सीमांकन प्रतिवेदन एवं पंचनामा, फील्ड बुक, एवं नक्शा तैयार किया गया है।

3- यह कि, प्रतिवादी/प्रतिवादाकर्ता अपना पक्ष प्रमाणित करने एवं सीमांकन प्रतिवेदन, फील्ड बुक, एवं वादी द्वारा अवैध कब्जा किये हुए भूखंड को प्रमाणित किये जाने हेतु शासकीय कर्मचारी तत्कालिक राजस्व निरीक्ष एवं हल्का पटवारी जो कि शासकीय कर्मचारी को साक्ष्य में आहूत कराना चाहते हैं।”

6. Thus, it is clear that petitioners had specifically pointed out the reasons for summoning the Revenue Inspector and Halka Patwari.

7. Thus, the trial Court committed a material illegality by holding that reasons for summoning the witnesses have not been disclosed.

Whether the application could have been dismissed only on the ground that names of witnesses were not mentioned in the list?

8. A Coordinate Bench of this Court in the case of **Mandir Shri Hanuman Murti (supra)** has held as under:

“7. In my view, the Apex Court has drawn curtains on the question involved in this case.



In *Mange Ram* (supra) the Apex Court opined as under:—

“There is no inner contradiction between sub-rule (1) of Rule 1 and Rule 1-A of Order XVI. Sub-rule (3) of Rule 1 of Order XVI confers a wider jurisdiction on the Court to cater to a situation, where the party has failed to name the witness in the list and yet the party is unable to produce him or her on his own under Rule 1-A and in such a situation the party of necessity has to seek the assistance of the Court under sub-rule (3) to procure the presence of the witness and the Court, may if it is satisfied that the party has sufficient cause for the omission to mention the name of such witness in the list filed under sub-rule (1) of Rule 1, the Court may still extend its assistance for procuring the presence of such a witness by issuing a summons through the Court or otherwise which ordinarily the Court could not extend for procuring the attendance of a witness whose name is not shown in the list. Therefore, sub-rule (3) of Rule 1 and Rule 1-A operate in two different areas and cater to two different situations.”

8. The said view was followed by Supreme Court in *Vidhyadhar v. Manikrao*, reported in (1999) 3 SCC 573 : AIR 1999 SC 1441, the Apex Court opined as under:—

“30. These two Rules read together clearly indicate that it is open to a party to summon the witness to the Court or may, without applying for summons, bring the witnesses to give evidence or to produce documents. Sub-rule (3) of Rule 1 provides that although the name



of a witness may not find place in the list of witnesses filed by a party in the Court, it may allow the party to produce a witness though he may not have been summoned through the Court. Rule 1-A which was introduced by the Code of Civil Procedure (Amendment) Act, 1976 with effect from 1-2-1977 has placed the matter beyond doubt by providing in clear and specified terms that any party to the suit may bring any witness to give evidence or to produce documents. Since this Rule is subject to the provisions of sub-rule (3) of Rule 1, all that can be contended is that before proceeding to examine any witness who might have been brought by a party for that purpose, the leave of the Court may be necessary but this by itself will not mean that Rule 1-A was in derogation of sub-rule (3) of Rule 1. The whole position was explained by this Court in *Mange Ram v. Brij Mohan*, AIR 1983 SC 925 : (1983) 4 SCC 36 : (1983) 3 SCR 525, in which it was held that sub-rule (3) of Rule 1 and Rule 1-A operate in two different areas and cater to two different situations.”

9. The said Supreme Court's judgments were considered by Division Bench of Karnataka High Court in AIR 2004 Kar. 172, *Rehman Hussain v. Althaf Hussain*. The High Court opined as under:—

“14. In the present case, of course, the plaintiff has not filed the application under sub-rule (3) of Rule 1, Order XVI, Civil Procedure Code, but he has filed an application purported to be under Rule 60(2) of KCRP read with section 151, Civil Procedure Code. It is



well settled that if a Court has jurisdiction to entertain an application in law, simply because the mover of the application has not stated correct provision of law or has stated wrong or incorrect provisions of law, that circumstance will not divest the power of the Court to entertain the application and pass appropriate order on merit. Therefore, the application already filed by the plaintiff could be regarded as the application filed under sub-rule (3) of Rule 1, Order XVI, Civil Procedure Code. Since, we have held that even in a case where a party has not filed list of witnesses envisaged under sub-rule (1) of Rule 1, Order XVI, Civil Procedure Code, he can make an application under sub-rule (3) read with sub-rule (1) thereof, condemning, Rule 60(2) of KCRP as ultra vires Order XVI, Rule 1, Civil Procedure Code, would not arise. In other words, Rule 60(2) of KCRP proviso is ultra vires Order XVI, Rule 1(1) of Civil Procedure Code.”

10. In view of aforesaid legal position, there is no difficulty to hold that Court below has erred in examining the matter with a hyper technical point of view. As per said judgments, a witness can be brought by party even if no list is filed earlier or name of said witness does not figure in the said list. It needs to be remembered that procedural law is made to advance the cause of justice. The same is not made to strangulate the litigant on hyper technical ground. This Court considered this aspect in 2014 (3) MPLJ 612, *Dataram Singh v. Brindawan Singh* and opined as under:—

“This is settled in law that all the rules of procedure are the handmaid of



justice. The Apex Court in AIR 1955 SC 425, *Sangram Singh v. Election Tribunal, Kotah* opined that A Code of Civil Procedure must be regarded as such. It is “procedure”, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against. The Apex Court in (1975) 1 SCC 774, *Sushil Kumar Sen v. State of Bihar* opined that the mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence-processual, as much as substantive. In (1976) 1 SCC 719, *State of Punjab v. Shamlal Murari*, the Apex Court held that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. In (1984) 3 SCC 46, *Ghanshyam Dass v. Dominion of India* the Apex Court reiterated the



need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle. In (2005) 4 SCC 480, *Kailash v. Nanhku* the Apex Court held that the provisions of Civil Procedure Code or any other procedural enactment ought not to be construed in a manner which would leave the Court helpless to meet extraordinary situations in the ends of justice.”

9. Accordingly, it is held that the application cannot be dismissed by adopting a hyper-technical view merely for the reason that names of witnesses were not mentioned in the list of witnesses.
10. Under these circumstances, this Court is of considered opinion that the trial Court committed a material illegality by rejecting the application filed under Order 16 Rule 1 CPC.
11. *Ex-consequenti*, order dated 04.08.2023 passed by 6th Civil Judge Junior Division, Seoni in RCSA No.1200076/2014 is hereby **set aside**.
12. The application filed by petitioners under Order 16 Rule 1 CPC is hereby **allowed**.
13. The trial Court is directed to proceed in accordance with law.
14. The petition succeeds and is hereby **allowed**.

(G.S. AHLUWALIA)
JUDGE

SR*