

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

**BEFORE
HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL**

ON THE 2nd OF NOVEMBER, 2023

MISC. APPEAL No. 1282 of 2005

BETWEEN:-

1. RAJARAM MALI

(MADHYA PRADESH)

2. SMT. SUSHAMA SHUKLA

.....APPELLANTS

(BY SHRI PRAVEEN DUBEY - ADVOCATE)

AND

1. SMT. GANGA BAI (DEAD)

2. INDRAJ SAINI

3. GAURI SHANKER

4. BRIJLAL SAINI

5. STATE OF MADHYA PRADESH THROUGH
COLLECTOR DISTRICT SAGAR M.P.
(MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI BHOOP SINGH - ADVOCATE)

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

ORDER

This misc. appeal is preferred by the appellants/defendants 1-2 challenging the judgment of remand dtd. 21.02.2005 passed by 1st Additional District Judge, Sagar in civil appeal No.7-A/2003 reversing the judgment and decree dtd. 29.09.2003 passed by 2nd Civil Judge Class-I, Sagar in civil suit No.8-A/2002, whereby learned trial court dismissed the respondents 1-2/plaintiffs' suit for declaration of title and permanent injunction filed in respect of the suit property, which in civil appeal filed by the plaintiffs has been set aside and matter has been remanded to learned trial court for

decision of civil suit afresh, after getting demarcated the suit property through Commissioner/Revenue Officer.

2. The suit in question has been filed for declaration of title and permanent injunction with the allegations that the plaintiffs are owner and in possession of the suit house and appurtenant open land bearing house No.348, situated in Gopalganj Ward. It is alleged that the plaintiff is residing in the house for last 40-50 years, which is situated on the land (new) nos. 506/7 and 509/1, old number of which was 473 area 1.27 acre, which was purchased by husband and father of plaintiffs 1-2 namely Kanhaiyalal (died in the year 1977) vide regd. sale deed dtd. 03.04.1933. It is also alleged that the defendant 1 has executed sale deed of the suit property in favour of defendant 2 on 05.06.1997 for consideration of Rs.1,60,000/- without any authority, on that basis the defendants 1-2 want to dispossess the plaintiffs. Hence, prayed for decreeing the suit.

3. The defendants 1-2 appeared and filed written statement denying the plaint allegations. It is also denied that that new numbers of khasra no. 473 are 506/7 and 509/1 and the suit property is situated in khasra no. 506/7 and 509/1. It is also contended that the residential house of the plaintiffs, defendant 1,3,4 and another son of Kanhaiyalal namely Raghuvar is constructed over khasra No.473. It is contended that kachcha house constructed over khasra No.506/7 and 509/1 is different house, which has been purchased by defendant 2 from defendant 1 vide registered sale deed dtd.

05.06.1997, on the basis of which mutation has also been done vide order dtd. 22.10.1997. It is also contended that the plaintiffs have no nexus with the land of khasra No.506/7 and 509/1 as well as the house no. 348 constructed thereon. On *inter alia* contentions the suit was prayed to be dismissed.

4. On the basis of pleadings of the parties learned trial court framed issues and recorded evidence of the parties and vide judgment and decree dtd. 29.09.2003 dismissed the suit. Against which the plaintiffs preferred civil appeal No.7-A/2003 on 02.12.2003, which vide impugned judgment dtd. 21.02.2005 has been allowed and by setting aside the judgment and decree of trial Court, matter has been remanded to learned trial court for decision of the civil suit afresh after getting the suit property demarcated through Commissioner/Revenue Officer. Against which the appellants/defendants 1-2 preferred instant misc. appeal.

5. Learned counsel for the appellants/defendants 1-2 submits that there is no dispute of title of the lands in question amongst the parties and the suit property/land of the plaintiffs is different and the property of the defendants is also different, which is clear from the pleadings and documentary evidence, as well as from the admissions made by plaintiffs in their oral testimony, therefore, there is no necessity for demarcation of the suit property/land and learned first appellate court has committed illegality in passing judgment of remand with the direction to decide the suit afresh after

getting the suit property demarcated through some Commissioner/ Revenue Officer. He also submits that with a view to ascertain the factum of possession, commission cannot be issued, which would be amounting to collection of evidence.

6. In support of his submissions, learned Counsel for the appellants placed reliance on a decision of this Court in the case of Dharam Singh and anr. vs. Deenanath and ors. **2019(4) MPLJ 32** (Paras 10-12). He also submits that in any case the first appellate court cannot remand the matter only for the purpose of demarcation of the suit property and this exercise can be done by the first appellate court itself, if demarcation/spot inspection is necessary. In support of his second/alternate submission, he placed reliance on another decision of this Court in the case of Raghunath vs. Chandrakala and ors. in **M.A. No.2882/2022 decided on 05.10.2023** (at Jabalpur). With the aforesaid submissions, learned counsel prays for allowing the misc. appeal and for setting aside the judgment of remand.

7. Learned counsel appearing for the respondents/plaintiffs supports the impugned judgment of remand passed by first appellate court and submits that there being dispute of survey numbers and location of the suit property, learned first appellate court while passing the impugned judgment of remand, has not committed any illegality in setting aside the judgment and decree of trial court,

with the direction to decide the suit afresh after getting the suit property demarcated through some Commissioner/Revenue Officer.

8. Heard learned counsel for the parties and perused the record.

9. Bare perusal of plaint and written statement shows that there is dispute of survey numbers and location of the suit property. The plaintiffs claim themselves to be in possession of the suit property bearing house No.348, alleging it to be situated on the land survey nos. 506/7 and 509/1, old number of which has been shown as 473 area 1.27 acre, purchased by husband and father of plaintiffs 1-2 namely Kanhaiyalal (died in the year 1977) vide regd. sale deed dtd. 03.04.1933.

10. As against the case in plaint, the defendants 1-2 have denied that new numbers of khasra no. 473 were formed as 506/7 and 509/1 and the suit property is situated in khasra no. 506/7 and 509/1 but they have contended that residential house of the plaintiffs, defendant 1,3,4 and another son of Kanhaiyalal namely Raghuvar is constructed over khasra No.473. It has also been contended that kachcha house constructed over khasra No.506/7 and 509/1 is different house, which has been purchased by defendant 2 from defendant 1 vide registered sale deed dtd. 05.06.1997. It is also contended that the plaintiffs have no nexus with the land of khasra No.506/7 and 509/1 as well as the house no. 348 constructed thereon.

11. Although none of the parties to the suit prayed for appointment of Commissioner before the trial court or first appellate Court, but upon perusal of pleadings of the parties and available evidence, learned first appellate court has come to conclusion that the dispute between the parties can be resolved only by appointment of Commissioner. In the case of *Jaswant vs. Deen Dayal* **2011(2) MPLJ 576** (para 10), it has been held by this Court that, if necessary, the commission can be issued even without application under order 26 rule 9 CPC. In the case of *Shreepat vs. Rajendra Prasad* **2000 (6) Supreme 389**, the Supreme Court has held that dispute of survey numbers cannot be decided without survey commission. Almost similar view has been taken by Supreme Court in the case of *Haryana Waqf Board vs. Shanti Saruj & ors.* **(2008) 8 SCC 671**.

12. In the following cases, different coordinate Benches of this Court, have held as under:

i) In case of dispute of encroachment of open land of one survey number, commissioner should be appointed to measure entire survey number to ascertain the actual encroached area. Pl. see: *Kiriti Bai (Smt.) vs. Amrit* **1996(I) MPWN 7**;

- ii) Question whether a well situates in the land of plaintiff or of defendant, should be got decided by appointing Commissioner. Pl. see: Balu Singh vs. Ranjeet **1996(I) MPWN 78**;
- iii) Dispute as to area, boundaries, location and possession, may be decided by appointing commission, when document of title is on record. Pl. see: Madanlal vs. Devilal **1997(I) MPWN 9**;
- iv) When identity of land in dispute is to be ascertained, commissioner should be appointed for that purpose. Pl. see: Kamlesh Sharma (Smt.) vs. Komal Chand Kesharwani **1998(II) MPWN 40**;
- v) When disputed property is claimed by both the parties to be their own, commissioner for taking measurement should be appointed. Pl. see: Rajaram Rai vs. Noor Mohammed **2001(II) MPWN 10**.

As such, it is clear that dispute of encroachment, location of suit property, area, identity, boundaries and survey numbers cannot be decided without appointment of commissioner.

13. In view of the aforesaid legal position and upon perusal of the entire plaint and written statement as well as other material available on record, findings in respect of necessity of getting the suit property demarcated through commissioner, recorded by first appellate court, do not appear to be perverse, therefore, no interference is called for in the said findings. In the case of Dharam

Singh (**supra**), direction for issuance of commission for ascertaining physical possession of the parties, was found to be illegal, which is not the case here, as such, the decision relied upon by learned counsel for the appellants in the case of Dharam Singh (**supra**) is not applicable to the instant case and is distinguishable on facts.

14. Now the second question is as to whether in the existing facts and circumstances, learned first appellate Court was right in setting aside the judgment and decree of trial Court and in remanding the matter to trial Court for decision of suit afresh only upon finding the necessity of demarcation of the suit property.

15. In the case of Gajraj and others vs. Ramadhar and others **AIR 1975 Allahabad 406**, a coordinate Bench of Allahabad High Court, has held as under :

“4. Having considered the matter I feel that Sri Chaudhary is right in his contention that there was no occasion for a remand of the suit under Order 41, Rule 23, Civil Procedure Code. It is well known that a remand of the entire suit under the said provision should be an exception and should be taken recourse to only as a last resort. In the normal course the court should decide the case on the basis of the record in existence. However, the Appellate Courts have been given power to entertain additional evidence, if necessary, or to remit an issue for enquiry and report to the trial court under Order 41, Rule 25, Civil Procedure Code. There is a long catena of case law which has laid down that the provision of remand is not to enable the parties to have a second innings with a view to fill up the lacuna in the pleadings or evidence. I do not propose to refer to these cases as the law is well understood in this respect. The lower appellate court in the instant case felt that without a clear demarcation of the land in dispute, it was not possible to give any finding on the question of title or ownership of the disputed land and, therefore, the suit was remanded to the trial court with a direction that the trial court should issue a fresh survey commission for the demarcation of the disputed land and for ascertaining the number of the plot in which it fell. In my view, for that limited purpose, it was not necessary to remand the entire suit under Order 41, Rule 23, Civil Procedure Code. The said purpose could be well achieved by the issuance of such a commission by the lower appellate court itself. I do not agree with Sri Chaudhary that the issuance of such a commission can only be done by way of the reception of additional evidence under Order 41, Rule 27, Civil

Procedure Code. In my view that provision will not be applicable to a case where the Court itself desires a local inspection of the spot to be made and in such a situation the court can act under Order 26, Rule 9, Civil Procedure Code. **It cannot be denied that an appellate Court has the power to issue a commission for local inspection in the same manner in which a trial court can act under Order 26, Rule 9, Civil Procedure Code.** This follows from Section 107, Civil Procedure Code and if any authority be needed then a reference can be made to Ram Dihal Lal v. Lakhpal Lal, (AIR 1932 All 270). In my view 1971 All LJ 244 (supra) does not support the contention raised by Sri Chaudhary. It was observed there as under :-

"Issue of a commission is something which is quite different from production of a document or examination of a witness. Provisions regarding issue of a commission are to be found in Order 26 of the Code. Rule 9 of Order 26 provides that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court."

16. In the case of Raghunath vs. Chandrakala & ors. (**supra**) this Court has also taken the same view and held as under :

"6. It is well settled that the dispute of boundaries, survey numbers and location of land/property cannot be decided on the basis of oral evidence and without demarcation of the land by some competent revenue officer. As such in my considered opinion, learned first appellate Court has not committed any illegality in directing demarcation of the land in question **but for that purpose only, matter is not required to be remanded for deciding the suit afresh.** Pl. see 2014 SCC OnLine MP 4685 (Satish & ors. v. Hanumant Singh and another)."

17. In view of the aforesaid decisions in the case of Gajraj and others (**supra**) and Raghunath (**supra**), the impugned judgment of remand passed only upon requirement of demarcation of the suit property, is not sustainable because the exercise of getting the suit property demarcated can be done by the first appellate court itself. It is also pertinent to mention here that in the present case no application under Order 41 Rule 27 CPC or under Order 6 Rule 17 CPC was filed by any of the parties to the case.

18. As such, the impugned judgment of remand is not sustainable and is hereby set aside with the direction to first appellate Court that it shall itself decide the appeal after issuing a commission for local inspection of the suit property including the survey numbers disclosed by the defendants/appellants with a view to ascertain exact location, number and necessary details of the suit property. The Commissioner must be directed to prepare a correct map of the spot and to submit the same along with his report. After such report along with the map is obtained and after considering the objections of the parties to the same, if any, in accordance with law, the first appellate Court will decide the appeal on the basis of the entire record including the report of Commissioner.

19. With the aforesaid, the impugned judgment of remand is set aside and misc. appeal is allowed partly and disposed off.

20. Pending application(s), if any, shall stand disposed off.

(DWARKA DHISH BANSAL)
JUDGE

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