
(2015) 05 MP CK 0090

In the Madhya Pradesh High Court

Case No : Writ Petition No. 19604 of 2014

Manish Agrawal

APPELLANT

Vs

Basant Keshav Pataskar and Others

RESPONDENT

Date of Decision : 14-05-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, 10

Citation : (2015) 05 MP CK 0090

Hon'ble Judges : R.S. Jha, J

Bench : Single Bench

Advocate : Avinash Zargar, Learned Counsel, for the Appellant

Final Decision : Dismissed

Judgement

R.S. Jha, J—The petitioner has filed this petition being aggrieved by the order dated 19-11-2014, passed by the Third Additional Judge to the Court of First Civil Judge Class-I, Sehore in C.S. No. 40-A/2013 by which the petitioner's application under Order XXVI Rule 9 of the C.P.C. has been rejected.

2. The petitioner had filed the aforesaid application in a suit filed by the petitioner for declaration and injunction in respect of agriculture land comprising of Survey No. 252/2, area 8.60 acres, situated at village Sonkachh, Tahsil Shyampur, District Sehore. In the said suit the petitioner had filed an application under Order XXVI Rule 9 of the C.P.C. praying for appointing a commission to determine as to whether the disputed land alongwith 30-35 acres of land comprises of a farm house which is fenced with barbed wires and is restricted by a gate, whether a permanent structure stands on the said land, whether a tube well and water tank exists on the land and whether the area of 8.60 acres of land has been divided into pieces of land comprising of 1.00 acre each.

3. The Court below by the impugned order has dismissed the application by holding that in a connected suit i.e. C.S. No. 35-A/2013 a similar application filed by the petitioner has already been rejected by order dated 2-8-2013 on the

ground that the suit is being adjourned repeatedly since 3-10-2013 for the plaintiff's evidence but he has not produced his witnesses and that the grounds on which the petitioner is seeking issuance of a commission can be proved by him by adducing evidence and that he has not placed anything on record to indicate that it is impossible to do so without issuance of a commission. It has also been held that a commission cannot be issued for collecting evidence.

4. The learned counsel appearing for the petitioner submits that the issuance of commission is necessary on account of the fact that the dispute in the matter relates to demarcation and that the plaintiff would not be able to prove his case without the report of the commissioner. It is further stated that the order passed in C.S. No. 35-A/2013, dated 2-8-2013 rejecting the petitioner's application under Order XXVI Rule 9 of the C.P.C. could not have been taken note of by the Court below as that order has been passed in a different suit in which the petitioner was defendant.

5. The learned counsel for the petitioner has relied upon decisions of this Court rendered in the case of Durga Prasad Vs. Mst. Parveen and Others, AIR 1975 MP 196 : (1980) ILR (MP) 448 : (1975) JLJ 340 : (1975) 20 MPLJ 801 , Mahfooz Ahmed and Another Vs. Neelmani and Another, AIR 2010 MP 165 : (2010) ILR (MP) 1771 : (2010) 4 MPHT 44 : (2010) 2 MPLJ 603 and Rajaram Pooranchand Rai Vs. Noor Mohammed (since deceased, through L.Rs. Alvas & anr.), 2001 (2) MPLJ Note 12 in support of his submissions.

6. The learned counsel appearing for the respondent No. 1, per contra, submits that the petitioner had executed five separate sale deeds in respect of the disputed land comprising of 8.60 acres to five different persons. He has subsequently filed a suit against all the five purchasers who have purchased part of the disputed property of 8.60 acres. It is submitted that all the suits have been clubbed together and in one of the other connected cases, which has been filed by a subsequent purchaser from the respondents i.e. C.S. No. 35-A/2013, the petitioner himself had filed a similar and identical application seeking appointment of a commissioner which application was dismissed by the Court on 2-8-2013. It is submitted that in such circumstances, once the order passed on a similar application filed by the petitioner in respect of the same land in a connected suit has been dismissed and that order has become final, the petitioner could not have been permitted to file a second application only for the purposes of delaying the proceedings or collecting evidence. It is submitted that in such circumstances the petition be dismissed.

7. The learned counsel for the respondent has relied upon decisions rendered by this Court in case of Suryabhan Singh Vs. State of Madhya Pradesh, 2006 (5) MPHT 346 and Ashutosh Dubey and Another Vs. Tilak Grih Nirman Sahakari Samiti Maryadit and Another, (2004) ILR (MP) 46 : (2004) 2 MPHT 14 : (2004) 3 MPLJ 213 , to submit that a commission cannot be issued for the purposes of collecting evidence or for determining as to which party is in possession of the property as these are the questions which have to be decided by the Court after

adducing evidence by the parties.

8. Having heard the learned counsel appearing for the parties it is observed from a perusal of the order dated 2-8-2013 passed by the Court below in C.S. No. 35-A/2013 that in the said suit the petitioner had filed two applications, one under Section 10 of the C.P.C. and another under Order XXVI Rule 9 of the C.P.C. The application under Section 10 of the C.P.C. filed by the petitioner was rejected with a direction/order to the effect that the other two suits filed by the petitioner relating to Survey No. 252/2 area 8.60 acres be clubbed alongwith C.S. No. 35-A/2013. The Court thereafter proceeded to decide the application under Order XXVI Rule 9 of the C.P.C. filed by the petitioner and rejected the same. A perusal of the order indicates that in the said application also the petitioner had sought issuance of a commission for determining as to whether the petitioner had a full-fledged farm house on the disputed land, whether a bore-well, a permanent well as well as a permanent structure was standing on the farm house and whether the farm house was surrounded by the fencing.

9. The Court below, after considering the petitioner's contention, had rejected the said application by order dated 2-8-2013 upon holding that the evidence in respect of the issues raised by the petitioner could not be collected through issuance of a commission, more so, as there was no dispute between the parties regarding identity of the property or regarding encroachment. Even in the present case the petitioner has sought issuance of commission for the same purposes which is clear from a perusal of page 42 of the petition. A perusal of the four issues in respect of which the petitioner is seeking commission, makes it clear that there is no dispute regarding identity, demarcation or encroachment.

10. The judgments cited by the petitioner have no applicability to the facts of the present case as those cases related to a case where a commission was sought to be issued by the Court when there was a serious dispute regarding demarcation between the parties or there was a dispute in respect of boundaries between the parties and there was serious contest in that regard.

11. In the present case, the petitioner is only seeking commission for finding out as to whether the farm house exists on the suit land, whether there is fencing around the farm house and as to whether permanent structures are standing thereon or that the land has been broken up into pieces of 1.00 acre. These are all the issues which have to be proved and established by the petitioner by adducing evidence and the petitioner cannot be permitted to collect the evidence in support of his case by issuance of commission, more so, when an identical application has already been rejected by the Court below in the connected civil suit in respect of the same property and that order has attained finality as it has not been challenged or assailed.

12. In the circumstances, I do not find any reason to entertain the present petition, therefore, the petition filed by the petitioner being meritless is accordingly dismissed.